

private sector, of \$100 million or more in any one year.

Comment: Numerous States, providers, faith-based organizations and public interest groups stated that the proposed rule constitutes an unfunded mandate by SAMHSA and asked that an unfunded mandate analysis be completed. In the words of one commenter, "there is a broad delegation of responsibility to States for providing secular alternatives without providing corresponding resources to carry it out. SAMHSA should provide 'much more specific regulation' and resources necessary to carry this out."

Response: The Department has determined that this rule would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year. As provided in sections 54.8 and 54a.8, States and other grantees can use grant funds to implement these provisions, and these regulations impact only existing Federal-funding streams, unless the State or local governments commingle other funds with Federal funds.

Assurances and State Oversight of the Charitable Choice Requirements

The NPRM proposed that States, as a standard part of their applications for funding under each program, certify that they will comply with all of the requirements of the SAMHSA Charitable Choice provisions and submit to the Secretary a summary each year of the steps it has taken to implement this regulation.

Comments: Eight commenters felt that the stated assurance for tracking implementation and accountability was not strong enough. One commenter recommended spot-checks and reporting requirements to make sure faith-based providers and governments were complying with the final rule.

Response: The Department believes that signed assurances, plus existing compliance and auditing standards, provide the needed oversight and guarantee that the States, localities and religious organizations are implementing the regulation properly and that all beneficiaries' rights are being upheld as required.

Complaint System

Comment: One commenter pointed out that no complaint, investigation and resolution process was discussed in the NPRM.

Response: For the PATH formula grant and SAPT block grant, and for discretionary programs, program participants and beneficiaries can

contact the Administrator, SAMHSA. Complaints and comments will be addressed on a case-by-case basis as needed.

Indirect and Direct Funding

In the Charitable Choice context, the term "direct" funding is used to describe funds that are provided "directly" to a participating organization "i.e., based on the government's own decision and without any intervening steps—by a governmental entity or an intermediate organization with the same duties under this part as a governmental entity, as opposed to funds that such an organization receives as the result of the genuine and independent private choice of a beneficiary through a voucher, certificate, coupon or other similar mechanism.

Comment: One commenter wrote that the indirect funding definition opens the door to government-funded worship and proselytization. This commenter asked us to require that all government-funded services be free of religious content. In addition, the commenter thinks that "free and independent choice" is a myth which incorrectly assumes that people in need will be able to shop for services. Social services are not available on a scale that makes "choice" real. This commenter believes people use the most geographically accessible providers.

Response: With respect to indirect funding, we find no basis to require that all government-funded services be free of religious content. Furthermore, we disagree that funding services indirectly opens the door to government-funded worship and proselytization. The Supreme Court has consistently held that governments may fund programs that place the benefit in the hands of individuals, who in turn have the freedom to choose the provider to which they take their benefit and "spend" it, whether that institution is public or private, secular or religious. Therefore, any consequential aid to religion having its origin in such a program is the result of the beneficiary's own choice. In other words, indirect funding means that individual private choice, rather than the government, determines which social service provider eventually receives the funds. As a general matter, this removes involvement on the part of the government in worship and proselytization.

Comment: Several other commenters were concerned that indirect funding mechanisms would not be subject to the requirements of this rule, giving way to government funding of religious activities. One commenter asked for

clarification whether a faith-based organization receiving indirect funding from the government could require active participation by a beneficiary in religious activities. Some commenters seemed to be confused as to whether the rules applied to indirect funding.

Response: It is the Department's position that these regulations apply only to direct funding and not to indirect funding pursuant to vouchers, certificates or similar funding mechanisms. To the extent that religious organizations receive Federal funding indirectly through vouchers, certificates or similar funding mechanisms, the Charitable Choice regulations do not apply.

Comment: One faith-based commenter recommended that beneficiaries be given the opportunity to choose to use indirect funding for the religious services provided to them.

Response: Making this a requirement is beyond the authority of the Charitable Choice statutes.

Vouchers

President Bush announced his "Access to Recovery" program in his State of the Union Address in January 2003. This initiative will provide increased access to services for the Nation's substance abusers while also expanding the range of treatment providers available. In short, the voucher program will enhance consumer choice and allow recovery to be pursued in an individualized manner.

Comment: We received approximately 15 comments about the voucher program being developed by the Department. Some commenters recommended that requirements from the *Zelman* case be included in the Charitable Choice regulations. Other commenters discussed their opposition to the government use of vouchers while others felt that vouchers would violate the Establishment Clause. Also, commenters questioned whether the voucher program allowed for a true "genuine and independent choice."

Response: Neither the NPRM, nor the final rule, create a voucher program. Since these regulations in and of themselves do not create a voucher program, we do not believe these comments are relevant to the regulations at issue. As to the specifics of the voucher program, such details are beyond the scope of this regulation. Furthermore, the Department disagrees with the comments and believes that voucher programs are a viable mechanism for funding services and are constitutionally permissible.