

authority granted to him in 42 U.S.C. chapter 7, section 1302, to publish this regulation, necessary to the efficient administration of the functions for which he is responsible under chapter 7. The Charitable Choice provisions have been codified under chapter 7 of the United States Code at 42 U.S.C. 604a.

*Comment:* One commenter pointed out that section 104 of PRWORA, as amended, begins as a State option. Therefore, it is not mandatory, as the NPRM implies.

*Response:* We recognize that section 104(a) of PRWORA as amended (42 U.S.C. 604a(a)(1)) does provide that a "State may (A) administer and provide services \* \* \* through contracts with charitable, religious, or private organizations; and (B) provide beneficiaries of assistance \* \* \* with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations."

Essentially, this subsection permits a State to choose to conduct its TANF program by providing funding to help beneficiaries directly (e.g., through contracts with social service providers) or indirectly (e.g., with certificates, vouchers, or other forms of disbursement which are redeemable with charitable, religious, or private organizations). In other words, the State is not limited to providing all of the needed services itself, nor must it retain the administration of any or all of its TANF activities.

If a State does choose to involve any non-governmental providers, however, then the Charitable Choice provision at section 104(c) of PRWORA as amended (42 U.S.C. 604a(c)) requires involving religious organizations on the same basis as any other non-governmental providers. Therefore, when a State chooses to involve the non-governmental sector in the provision of benefits and services for or on behalf of TANF-eligible beneficiaries, then the TANF Charitable Choice provisions stipulate that a religious service provider may not be excluded from eligibility for contracts, subcontracts, vouchers, or the like.

### III. Constitutional Issues— Establishment and Free Exercise Clauses

#### Background

The TANF Charitable Choice statutory provisions were enacted within the constitutional framework of government interaction with religious organizations. The goal of Charitable Choice is not to support or sponsor religion, but to ensure fair competition among providers of services for low-income

families, whether they are public or private, secular or faith-based. The statute, the proposed rule, and this rule each requires that contracts with or vouchers redeemable with religious organizations must comport with the constitutional framework. Patterned after the statutory language, the proposed rule at § 260.34(a)(1) (now § 260.34(b)(1)) explicitly provided that: "Religious organizations are eligible, on the same basis as any other organization, to participate in TANF programs as long as their TANF or MOE-funded services are provided consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution."

*Comment:* Several commenters opined that the proposed rule was an unconstitutional breach of the principle of separation of church and State, because it would allow public funds to be given to "pervasively sectarian" organizations, contrary to longstanding judicial precedent.

*Response:* We do not agree with the commenters. Religious organizations that receive direct TANF funds for social services cannot use such funds for inherently religious activities. These organizations must ensure that religious activities are separate in time or location from the treatment services and they must also ensure that participation in such religious activities is voluntary. Furthermore, they are prohibited from discriminating against a program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.

The Supreme Court's "pervasively sectarian" doctrine—which held that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose—no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell v. Helms*, 530 U.S. 793, 825–829 (2000) (plurality opinion), and Justice O'Connor's opinion in that case set forth reasoning that is inconsistent with its underlying premises, see *id.* at 857–858 (O'Connor, J., concurring in judgment, joined by Breyer, J.) (requiring proof of "actual diversion of public support to religious uses"). Thus, six members of the Court have rejected the view that aid provided to religious institutions will invariably advance the institutions' religious purposes, and that view is the foundation of the "pervasively sectarian" doctrine. We therefore believe that when current

precedent is applied to a social service program, or to the TANF Charitable Choice provisions, government may fund all service providers, without regard to religion and free of criteria that require the provider to abandon its religious expression or character.

*Comment:* Several commenters asked that the final rule include a more comprehensive definition and examples of a "religious organization" and a "faith-based organization."

*Response:* Throughout the proposed rule, we used the term "religious organization" and the term "faith-based organization" interchangeably. Neither the U.S. Constitution nor the relevant Supreme Court precedents contain a comprehensive definition of religion or a religious organization that must be applied to this rule. Yet, an extensive body of judicial precedent provides the practical guidelines that States and religious organizations need to conform to the Establishment and the Free Exercise Clauses of the First Amendment to the U.S. Constitution. Under the TANF Charitable Choice provisions, and as explained in the section that discusses fiscal accountability, a religious organization is not restricted to those that are "non-profit." We have deleted the definition of "religious organization" from the final rule.

*Comment:* Several commenters asked that the final rule provide additional guidance on how to comply with the Establishment Clause and that it detail the scope of religious content that must be excluded from public funding.

*Response:* In enacting the Charitable Choice provisions, Congress did not include specific statutory provisions with guidance on how to meet constitutional requirements. Like Congress, we do not believe it is appropriate in this rule to provide either States or religious organizations with detailed guidance on how to comply with the Establishment or Free Exercise Clauses of the Constitution. States and faith-based organizations have years of experience and extensive practice in following case law and adhering to judicial precedent to conform to these provisions. In enacting PRWORA, Congress sought to conform the law to this precedent while providing maximum flexibility to States in carrying out statutory requirements. The requirement in the proposed rule closely mirrors the statutory provision and we have retained the identical language of the proposal in the final rule.