

IV. Equal Treatment for Religious Organizations

Background

Under § 260.34(a)(2) of the proposed rule (§ 260.34(b)(2)), we clarified that organizations are eligible to participate in the TANF program without regard to their religious character or affiliation, and may not be excluded because they are religious. Federal, State and local governments administering TANF funds are prohibited from discriminating against organizations on the basis of religion or their religious character.

Comment: One commenter suggested that the final rule should also prohibit discrimination “in favor of” faith-based organizations. In selecting contractors, a government entity should not allow a provider’s religious character to influence its selection.

Response: Like the commenter, we believe congressional intent was to ensure neutrality and to prohibit any discrimination. Therefore, we have modified the language of the final rule to read, “Neither the Federal government nor a State or local government in its use of Federal TANF or State MOE funds shall, in the selection of service providers, discriminate for or against an organization that applies to provide, or provides TANF services or benefits on the basis of the organization’s religious character or affiliation.”

Comment: A couple of commenters, noting the importance of this provision, which prohibits Federal, State and local governments administering TANF funds from discriminating against organizations on the basis of religion or their religious character, observed that the proposed rule is consistent with the statute and strongly supported retention in the final rule.

Response: We agree with these comments and have retained similar language in the final rule.

Comment: One commenter noted that the provisions under § 260.34(a)(1) and (2) (now § 260.34(b)(1) and (2)) equate religious and non-religious providers and seek to treat them as equals, thereby failing to recognize the unique place that religion has in our society. Religion should be above the fray of government funding, regulation and auditing, not reduced to it.

Response: This rule does not present any violation of the Establishment Clause or Free Exercise Clause. Rather, this rule governs the conscious decision of a religious organization to administer regulated activities, by accepting public funds to do so. Therefore, we have retained language that enables faith-based organizations to compete on an

equal footing for funding, within the framework of constitutional church-State guidelines.

V. Restriction on Inherently Religious Activities by Organizations That Receive Direct TANF Funding

Background

Section 260.34(c) of this rule describes limitations on the use of Federal TANF and State MOE funding provided directly to an organization by a governmental entity or by an intermediate organization that has the same duties as a governmental entity, as opposed to those funds that an organization receives indirectly as the result of the genuine and independent private choice of a beneficiary. The Charitable Choice provisions allow, at State option, for direct or indirect forms of funding, or both, to provide benefits and services. Under a “direct” funding method, the government or an intermediate organization with the same duties as a governmental entity purchases the needed services straight from the provider (e.g., via a contract). Under this scenario, there are no intervening steps in which the beneficiary’s choice comes into play. The government or intermediate organization selects the provider which the beneficiary must attend. With an “indirect” funding method, by contrast, there is an intervening step in determining which social service provider receives the Federal TANF or State MOE funds. Under indirect funding, the individual in need of the service is given a voucher, coupon, certificate, or other means of free agency such that he or she has the power to select for himself or herself from among providers, whereupon the coupon (or other method of payment) may be “redeemed” and the services rendered. Hence, indirect funding means that individual private choice, rather than the government, determines which social service provider eventually receives the funds.

Section 260.34(c) states that Federal TANF and State MOE funds that are provided directly to a participating organization may not be used to support inherently religious activities, such as worship, religious instruction, or proselytization. If an organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services for which it receives direct Federal TANF or State MOE funds, and participation must be voluntary for the beneficiaries. This requirement ensures that such funds are not used to support inherently religious activities. Thus,

direct Federal TANF and State MOE funds may not be used, for example, to conduct prayer meetings, devotional studies of sacred texts, or any other activity that is inherently religious.

This restriction does not mean that an organization that receives direct Federal TANF or State MOE funds may not engage in inherently religious activities. It simply means that such an organization may not fund these activities with direct Federal TANF funds. Additionally, an organization may not fund these activities with funds that are used to meet the MOE requirements, since those funds must be spent consistent with the Charitable Choice requirements.

For example, suppose a church has a contract with the State’s TANF agency to provide job preparation classes. The classes are held in the finished basement of the church, the same place where the pastor of the church holds a Bible study group at the end of the day, when all other classes have ended. The pastor has extended an open invitation for anyone who wishes to attend the study group. The church must use private funds to pay for the Bible study activity. Thus, faith-based organizations that receive direct Federal TANF or State MOE funds must take steps to separate, in time or location, their inherently religious activities from the Federal TANF or State MOE-funded services that they offer.

In addition, any participation by a program beneficiary in such religious activities must be voluntary. An invitation to participate in an organization’s religious activities is not in itself inappropriate. However, directly funded religious organizations must be careful to inform program beneficiaries that their decision will have no bearing on the services they receive. In short, any participation by recipients of services in such religious activities must be voluntary and understood to be voluntary.

On the other hand, these restrictions on inherently religious activities do not apply where Federal TANF or State MOE funds are indirectly provided to religious organizations as a result of a genuine and independent private choice of a beneficiary. A religious organization may receive such funds as the result of a beneficiary’s genuine and independent private choice if, for example, a beneficiary redeems a voucher, coupon, certificate, or similar funding mechanism that was provided to that individual using Federal TANF or State MOE funds under a program that is designed to give that individual a choice among providers. Thus, religious organizations that receive Federal TANF