

604a(e)) does not differentiate between direct and indirect funding of services. Therefore, we conclude that the alternative provider requirement applies whether Federal TANF or State MOE funds are provided directly or indirectly to the institution or organization. The beneficiary has a right to an alternative provider, regardless of funding method.

We recommend that States and organizations help to ensure that clients and prospective clients have a clear understanding of the services offered by an organization by having literature available to give to clients which fully explains the services offered, including any inherently religious activities, as well as expectations and requirements.

*Comment:* One commenter asked us to clarify the definition of indirect funding and its application to service providers and to provide examples.

*Response:* Essentially, indirect funding places the choice of service provider in the hands of the beneficiary. Then, the State pays for the cost of that service through a voucher, certificate, or other means of free agency. In this way, the government is providing assistance to beneficiaries by dealing "indirectly" with independent providers and directly with beneficiaries. For example, the TANF agency, operating under a neutral program of aid, could present the beneficiary with a list of all qualified providers at which the beneficiary could obtain services using a government-provided certificate. Or, the State could choose to allow the beneficiary to secure the needed service on his/her own. Either way, the State empowers the beneficiary to choose for himself or herself to receive the needed services through a religious organization or through some other provider. The State could pay for the individual's choice of provider by giving the individual a voucher or other business form that tells the provider that the TANF agency will pay for the service. Or, the State could choose to pay the provider directly after asking the beneficiary to indicate his/her choice. We have added the above definition in § 260.34(a) of the final regulation.

*Comment:* Several commenters wrote that the voucher program authorized by the proposed rule lacks adequate constitutional safeguards, including legitimate secular options and secular purpose. Another commenter wrote that the proposed rule did not mention the provision of secular alternatives in cases where the voucher provider is religious. Without reasonable secular alternatives, beneficiaries may be forced to use religious providers. Yet another commenter expressed concern that the ability of individuals to use

government-sponsored vouchers for religiously based services erodes the traditional American value of separation of church and State. The commenter thinks that State and local governments will be subject to numerous lawsuits challenging the legality of the use of government funds for religiously-based programs.

*Response:* The TANF Charitable Choice provision at section 104(a)(1)(B) (42 U.S.C. 604a(a)(1)(B)) authorizes the use of "certificates, vouchers, or other forms of disbursement," as a State option. But, neither the statute, the NPRM, nor the final rule, "require" a voucher program. Although States must have a policy of inclusion as discussed below, they also have the flexibility to decide the best methods of delivering the services to or on behalf of their clientele. States are obligated to ensure that they provide options in a manner consistent with the Establishment Clause of the First Amendment and may review any relevant precedents concerning vouchers to do so.

We do not agree with the contentions that vouchers for religiously based services erode the value of separation of church and State, force individuals to attend "pervasively sectarian" institutions, or lack secular purpose for the following reasons. First, the Supreme Court has consistently upheld the constitutionality of mechanisms of indirect aid, such as vouchers, distributed without regard to religion. Therefore, we think that it is reasonable to conclude that neutral, indirect aid to a religious organization does not violate the Establishment Clause.

Second, the goal is secular, namely, to fund social services that help TANF-eligible individuals and families attain and maintain self-sufficiency. The Charitable Choice provisions level the playing field for qualified providers of these services who are faith-based, by giving them the right to participate in the provision of those services. The TANF Charitable Choice provisions simply stipulate that a religious service provider may not be excluded from eligibility for contracts, subcontracts, vouchers, or the like, on the grounds that the provider is religious, too religious, or "pervasively sectarian." This does not mean that the object of Charitable Choice is to support or sponsor religion or participating religious providers.

Furthermore, the TANF Charitable Choice provisions do not guarantee that Federal TANF or State MOE funds must automatically flow to religious providers. Whether funding is direct or indirect, the Charitable Choice provisions simply guarantee that

religious providers will not be discriminated against in the procurement process, by requiring government to stop "picking and choosing" among groups on the basis of religion.

Finally, § 260.34 (g) states that if the applicant or recipient objects to the religious character of a TANF service provider, he or she is entitled to an alternative provider to which the individual has no religious objection. This is in keeping with the TANF Charitable Choice provision at section 104(e)(1) (42 U.S.C. 604a(e)(1)), which requires that the State provide the individual with assistance from "an alternative provider." Hence, the alternative provider could, but does not have to be secular.

*Comment:* One commenter contends that there are numerous unresolved issues concerning the funding for the vouchers. For example, how would local governments measure "comparable services" between secular and religious-based programs if the individual used the TANF voucher in a "pervasively sectarian" program? Or, if the beneficiary redeems a voucher and dissents from the program because of its religious tone, is that voucher transferable? This commenter also asked whether a local government may object to the individual's "genuine and independent private choice" with regard to the program. Would such an act by the local government subject it to the loss of Federal funding?

*Response:* States may establish their own policies and procedures for establishing eligibility or continued eligibility for a particular social service benefit, as well as the method of delivery, management, and disposition of the benefit. In keeping with the flexibility afforded to States, States may determine for themselves how best to define which services are comparable to those that the TANF agency has determined an individual is eligible to receive.

We are confident that States are well-versed in collaborating with local jurisdictions, other State agencies, and appropriate social service providers, and therefore we do not anticipate problems with the quality of a person's free and independent choice under an indirect aid scenario.

*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 are free of religious content. In addition, the commenter thinks that "free and independent choice" is a myth which incorrectly