

assumes that people in need will be able to shop for services. Social services are not available on a scale that makes "choice" real. People use the most geographically accessible providers.

*Response:* We find no basis to require that indirectly 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, nonreligious 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. We believe that this thinking played a part in Congress limiting the prohibition in section 104(j) of PRWORA as amended (42 U.S.C. 604a(j)), on the use of Federal TANF or State MOE funds for worship, religious instruction, or proselytization, to the direct funding of benefits and services.

One of the aims of Charitable Choice is that faith-based and community-based organizations will be able to expand their capacity to provide for the social service needs of under-served areas. Also, in soliciting competition for possible Federal TANF or State MOE funds, a State could, for example, include among the factors that it will weigh toward choosing a provider, the ability of a potential provider to provide beneficiaries with transportation to and from the point of service.

Additionally, even when a State operates within the required level playing field, there may still be occasions where no faith-based organizations successfully compete to provide the needed service, regardless of whether the State has chosen to pay for the service directly or indirectly. We expect and understand this. As we previously mentioned, Charitable Choice is not a guarantee that Federal TANF or State MOE funds must automatically flow to faith-based organizations. The TANF Charitable Choice provisions do not require that States favor religious organizations. The provisions simply require a level

playing field in the procurement of benefits and services.

Also, the TANF Charitable Choice provisions leave it up to States to decide whether to involve the non-governmental social service sector or to provide all services through government agencies. In some areas, the latter may be the State's only choice, until non-governmental providers expand their service capabilities. But, if a State does choose to involve any non-governmental providers, 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.

In addition, indirectly funded organizations must of course satisfy secular requirements of the program and provide otherwise eligible services through their programs.

## VI. Religious Character and Independence of Religious Organizations

### Background

Section 260.34(d) of the final rule clarifies that a religious organization that participates in the TANF program retains its independence from Federal, State, and local governments, provided that it does not use direct Federal TANF or MOE funds to support inherently religious activities. It may continue to carry out its mission, including the definition, practice and expression of its religious beliefs. Among other things, religious organizations may use their facilities to provide TANF-funded services, without removing religious art, icons, scriptures, or other symbols. In addition, a religious organization that receives Federal TANF or State MOE funds may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

*Comment:* A number of commenters expressed concern that a religious organization in receipt of Federal TANF or State MOE funds does not have to remove the religious art, icons, scriptures, or other symbols. The commenters think that this provision is too broad. It could result in the organization providing services in a setting that may well constitute a "pervasively sectarian" atmosphere in which members of a different religion may not feel comfortable or welcome to receive their TANF-funded benefits. For example, the organization could conduct the government-funded program in a chapel, leading to a

reasonable misperception of government endorsement of or support for religion.

*Response:* Section 104(d) of PRWORA as amended (42 U.S.C. 604a(d)) imposes on the government a duty not to intrude into the institutional autonomy of religious organizations. Each participating faith-based organization in receipt of Federal TANF or State MOE funds, whether directly or indirectly, shall retain its independence from Federal, State and local governments. This independence includes their control over the definition, development, practice, and expression of its religious beliefs. In addition, the statute expressly prohibits State, Federal, and local governments from requiring a religious organization to alter its form of internal governance or to remove religious art, icons, scripture, or other symbols in order to be eligible to receive directly or indirectly funded Federal TANF or State MOE funds to provide help to beneficiaries. If the beneficiary objects to the religious character, then he or she is entitled to receive the social service benefit at an alternate provider to which the beneficiary has no religious objection. In addition, as noted above, the Supreme Court's "pervasively sectarian" doctrine no longer enjoys the support of a majority of the Court. *See Mitchell v. Helms*, 530 U.S. 793, 825–829 (2000) (plurality opinion), *id.* At 857.858 (O'Connor, J.,) (requiring proof of "actual diversion of public support to religious uses").

*Comment:* Several commenters noted that the protections afforded in this subsection are consistent with the statute and should be maintained. One of the commenters requested that we add a statement essentially stating that "contrary State and local procurement laws that would otherwise prohibit faith-based organizations (FBOs) from continuing to staff on a religious basis" are preempted. Another commenter asked that we add language essentially stating that nothing in this section shall be construed to affect any State or local law or regulation that relates to discrimination in employment, including the provision of employee benefits.

*Response:* The protections in § 260.34(d) have been retained. We believe that the content of this subsection suffices as written.

As discussed under "Employment Practices," the FBOs enjoy an exemption "with respect to the employment of individuals of a particular religion," under Title VII of the Federal Civil Rights Act of 1964. Therefore, in keeping with the guarantees of institutional autonomy, a