

implications of Charitable Choice on State and local laws, see the analysis provided under the heading "Effect on State and Local Funds".)

### VIII. Nondiscrimination Against Beneficiaries

#### Background

This provision applies to individuals who receive Federal TANF or State MOE-funded services. In § 260.34(f) of the final rule, we state that religious organizations are prohibited from discriminating against beneficiaries or potential beneficiaries on the basis of religion, a religious belief, refusal to hold a religious belief, or a refusal to actively participate in a religious practice. Accordingly, religious organizations, in providing services funded in whole or in part by Federal TANF or State MOE funds, may not discriminate against current or prospective program beneficiaries 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.

*Comment:* Many of the commenters expressed concern over the use of the word "active" in setting forth the prohibition from discriminating against beneficiaries or potential beneficiaries 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. They interpreted the word "active" to allow the delivery of religious messages using facilities and equipment funded by the government, and they believed that this word opens the door wherein vulnerable clients may be exposed to inappropriate "passive" religious practices. The commenters recommended removing the word "actively" from the final regulations.

*Response:* We disagree. In section 104(g) of PRWORA as amended (42 U.S.C. 604a(g)), Congress prohibited religious grantees from discriminating against program beneficiaries on three related grounds: "religion, a religious belief, or refusal to actively participate in a religious practice." In addition, section 104(b) of PRWORA as amended (42 U.S.C. 604a(b)) stipulates that the religious freedom of beneficiaries may not be diminished, and section 104(e)(1) of PRWORA as amended (42 U.S.C. 604a(e)(1)) provides that beneficiaries who object to the religious character of a service provider have a right to an alternative provider. These provisions are straightforward and are sufficient to protect the religious freedom of program beneficiaries. Accordingly, we have retained the language of the proposed

rule, which is based on Congress's own language.

*Comment:* One commenter stated that it is unclear whether the discrimination prohibition applies to funds provided both directly and indirectly to the religious organization. The commenter also asked us to prohibit providers from inquiring about the religious affiliation of applicants, and to require a notice advising that any religious services offered to the beneficiary are voluntary.

*Response:* The prohibition in section 104(g) of PRWORA as amended (42 U.S.C. 604a(g)) makes no distinction in funding source or funding method. Therefore, religious organizations, in providing services funded directly or indirectly, in whole or in part, with Federal TANF or State MOE funds, may not discriminate against current or prospective beneficiaries 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. As we mentioned in the discussion regarding "Restrictions on Religious Activities By Organizations that Receive Direct TANF Funding," when Federal TANF or State MOE funds are disbursed indirectly to the organization providing the service, then the organization may invite (not require) the beneficiary's participation in inherently religious activities. But, if the individual objects to the religious character of the organization or institution, then he or she has a right to receive the services from an alternative provider. This allows the beneficiary to avoid unwanted religious practices and prevents the individual's religious freedom from being diminished.

We decline to add a statement prohibiting providers from inquiring about the religious affiliation of applicants. We believe that the provision as written, is adequate.

We also decline to require that religious organizations provide a notice to a beneficiary or potential beneficiary assuring that participation in religious activities would be entirely on a voluntary basis. We recommend that States and participating organizations work together to ensure that clients and potential clients have a clear understanding of the services offered by the organization, including any religious activities, as well as the organization's expectations and requirements. The requirement that participation be voluntary, however, is sufficient to address concerns about the religious freedom of program beneficiaries.

*Comment:* One commenter wrote that the proposed rule does not require a secular alternative. Therefore, it lacks

constitutionally-required safeguards for beneficiaries.

*Response:* The proposed rule at § 260.34(f) (now § 260.34(g)(2)) provided 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, a secular alternative; it need only be a provider to which the beneficiary has no religious objection. We have retained the wording of this provision.

*Comment:* One commenter asked us to clarify that a beneficiary has the right to choose indirect government funding to enroll in a program that has a religious component. The commenter also asked us to add that "nothing in this section shall be construed to prohibit a program beneficiary from using indirect government assistance to receive services from a participant whose program has a required religious component or to prohibit such participant from offering the required religious component."

*Response:* We decline to add the suggested sentence to the final rule. The welfare reform law of 1996 (PRWORA) gave States unprecedented flexibility to design and conduct their own TANF programs. In addition, the TANF Charitable Choice provision at section 104(a)(1) (42 U.S.C. 604a(a)(1)) gave States the option to administer and provide services directly and/or indirectly. Further, each State is responsible for its own decisions regarding how to use its Federal TANF and State MOE funds, including the range of services it elects to provide and the method of paying for those services. But, this does not preclude a beneficiary from personally choosing to participate in any inherently religious activities that an organization offers, even if the social service benefit provided to him or her is directly funded by the TANF agency. It just means that, for directly funded social services, the inherently religious activities must take place separately, in time or location, from the provision of the Federal or State MOE funded social service benefit.

*Comment:* One commenter would like us to recognize that religious organizations and secular organizations sometimes discriminate on the basis of sexual orientation or gender identity. The commenter suggested that we