

baseline parameters or guidelines. Others appreciated the discretion we had provided to States, but were concerned that the expectation of alternative services may expose States to litigation based on availability and how they define comparable services.

*Response:* Since the enactment of the welfare reform legislation in PRWORA, we have learned two clear lessons:

- Operational details and procedures need to be developed taking into consideration community and local needs and constraints. Because State and local governments have the knowledge of these realities, they are better prepared to define and set realistic and effective parameters to meet these mandatory, statutory goals. Given the diverse and wide range of TANF services, benefits and programs offered by States, it would be nearly impossible for us to define these terms in ways that would accommodate the needs of different States and communities; and,
- When given the flexibility, opportunity and authority through devolution, States and communities have demonstrated tremendous creativity leading to beneficial results. When TANF was enacted, many people expressed concern that the flexibility granted States, without Federal regulation would lead to “a race to the bottom.” Experience has proven these fears to be completely unfounded; and, if anything, the converse is true. Through experimentation and innovation, States and communities have developed programs and services to enhance the ability of families to achieve independence—a true race to the top and to excellence.

We believe that States, faced with the challenge of how to offer clients this option, while at the same time guaranteeing other alternative providers, will again rise to the occasion and develop reasonable and effective definitions and operational procedures. We are convinced that families will be better served by providing this discretion to States.

Nevertheless, we do believe that States must conscientiously apply guidance to assure fair treatment and comparable provision of services to all eligible applicants and recipients requiring an alternative provider. We have revised § 260.34(g) of the final rule to help ensure that States adopt reasonable definitions of the terms in this section and to reflect our expectation that this section is implemented fairly.

*Comment:* One commenter, noting a potential tension between the protections provided to religious

organizations and the alternative provider requirements on States, suggested regulatory language that explicitly prohibits governmental entities from considering the impact of the alternative service provider requirements when considering faith-based providers.

*Response:* Once a State or local government elects the option to provide services through non-governmental entities, then the Charitable Choice provisions ensure that “\* \* \* religious organizations are eligible, on the same basis as any other private organization \* \* \*” Implicitly, in that requirement, State or local governments are prohibited from considerations other than those leading to the selection of providers that can best achieve the secular purposes of the service or benefit. ACF believes State and local governments clearly understand this and that an explicit addition to the rules is not needed.

*Comment:* To protect beneficiaries, one commenter offered three suggestions: (1) That clients be held harmless from work requirements while the State seeks alternative services; (2) that there be no penalty for requesting alternative providers; and (3) that a State and Federal administrative complaint mechanism be created.

*Response:* The work participation requirements are set forth in section 407 of the Social Security Act, with implementing regulations at 45 CFR part 261. Under section 407, there are limited circumstances under which an individual may be exempted from work requirements. The commenter’s suggestion is not among them. Nevertheless, States have the flexibility to develop additional exemption criteria, with the understanding that the State must still meet its required work participation rate target. Each State may also establish its own criteria for determining when not to impose a penalty on an individual—namely, when an individual has “good cause” for not engaging in required work activities.

Secondly, under the TANF Charitable Choice provisions, government may not compel an individual, through loss of public benefit or advantage, to profess a religious belief or to observe an inherently religious practice. Therefore, the State may not penalize an individual for requesting to receive a service from an alternative provider because he or she objects to the religious character of the organization or institution from which he or she receives or would receive the service.

Finally, while the Charitable Choice provisions do not include any statutory

basis for us to create a Federal appeal process, we are confident that States conscientiously provide protections to beneficiaries. For example, States are required to outline in a State plan how they will require a parent or caretaker to engage in work activities, the objective criteria for the delivery of benefits, and an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in an administrative or appeal process. ACF has heard of few abuses or complaints about the adequacy of existing procedures.

*Comment:* One commenter suggested that the final rules clarify that an individual may not object to services provided by a secular, non-profit community-based organization and request alternative faith-based services.

*Response:* We agree that this individual right is not provided by the Charitable Choice statute or regulation. The right of a beneficiary to an alternative provider derives only when the individual has an objection to the “religious character of the organization or institution from which the individual receives, or would receive assistance \* \* \*” Since secular organizations, by definition, do not have a “religious character”, no right to an alternative is created. Nonetheless, we encourage states to respect the religious or nonreligious choices of all beneficiaries.

*Comment:* Several commenters suggested that the final rule specify that beneficiaries who object to the religious character of an organization have the right to a secular provider.

*Response:* The Charitable Choice statute does not specify that the alternative provider needs to be a secular organization. We have chosen not to adopt this suggestion for three reasons. First, the purpose of the statute is to respect beneficiary choice, and some beneficiaries may prefer an alternative religious provider to an alternative secular provider. Second, many faith-based organizations deliver services in a secular manner. As a result, most beneficiaries will not object to the religious character of these organizations, and we do not want to exclude them as potential providers of service. Third, under the permissive statutory language that we have retained, State and local governments may offer a secular alternative. We believe States will implement this requirement in a manner consistent with their obligation to ensure compliance with the Establishment Clause of the First Amendment.

*Comment:* One commenter noted that the proposed rule was unclear on whether the alternative provider