

information received by the agency that raises an issue concerning the propriety of expenditures.

As we noted in an earlier response, we do not think it is appropriate to require a separate corporate or other structure because this would be stricter than the TANF Charitable Choice statute stipulates. In contrast to the TANF Charitable Choice provisions, the Charitable Choice provisions applicable to SAMHSA at 42 U.S.C. 290kk-1(g)(2) and the Community Services Block Grant program at 42 U.S.C. 9920(d)(2) specifically require that the religious organization program participant segregate the Federal funds it receives into a separate account.

Comment: One commenter noted that there is no requirement against using government funds to supplant church funds. Therefore, the final rule should make clear that “pervasively sectarian” organizations should not receive direct funding.

Response: We disagree with this recommendation. To begin with, it contradicts the very purpose of the TANF Charitable Choice provisions. The TANF Charitable Choice provisions provide a level playing field in the government’s procurement of benefits and services that it has chosen to provide to TANF-eligible families and individuals. To this end, the Charitable Choice provisions give qualified religious organizations the right to participate in the provision of these services. Hence, as we have indicated in Sections III and IV of these comments, a religious organization may not be excluded from the procurement process on the basis that it is religious, too religious, or “pervasively sectarian.” In addition, 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., concurring in judgment, joined by Breyer, J. (requiring proof of “actual diversion of public support to religious uses”).

None of the Federal TANF or State MOE funds provided directly to the organization may be used for inherently religious activities. The government has purchased a service from the religious organization to deliver a specific social service benefit(s) to TANF applicants or recipients.

Comment: One commenter recommended that we define “non-profit” organization consistent with the definition provided in the SAMHSA proposed rule at 67 FR 77350 regarding the Charitable Choice Clause.

Response: We decline to add a definition of “non-profit” organization. As we explained, we have deleted the definition of “religious organization” that was in the NPRM, which contained a reference to “non-profit.”

XI. Effect on State and Local Funds

Background

Section 104(a) of PRWORA as amended (42 U.S.C. 604a(a)) applies to “a State program funded under part A of title IV of the Social Security Act” (TANF) and also to “any other program established or modified under title I or title II of this Act that permits contracts with organizations; or permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries as a means of providing assistance.” Title I includes all TANF provisions, including the maintenance-of-effort (MOE) requirement that States continue to expend a specified level of State or local funds. Claimed expenditures must be spent on eligible families for activities that achieve a TANF purpose. (Title II is the Supplemental Security Income program.)

The proposed rule followed the statute in specifying that the Charitable Choice requirements apply both when a State or local government uses Federal TANF funds to procure services and benefits from non-governmental organizations, or to redeem certificates, vouchers, or other forms of disbursement or when the State claims those expenditures to meet the MOE requirement. We said that the Charitable Choice provisions apply whether the State or local funds are commingled with Federal funds, segregated, or expended in separate State programs.

The proposed rule also clarified that, pursuant to section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)), nothing in the Charitable Choice requirements shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

Comment: A number of commenters opposed the application of Charitable Choice to the State and local funds claimed to meet the MOE requirement. Some believed that Charitable Choice should only apply to the use of Federal TANF dollars. Others believed that the rule covers commingled funds, but asked that we modify the rule with respect to both segregated funds and funds expended in separate State programs. Still others believed the rule should apply to funds expended in the TANF program (Federal funds,

commingled and segregated MOE expenditures) but that it ought not apply to expenditures in separate State programs, like other TANF rules.

Response: Because ACF did not regulate on Charitable Choice or provide guidance earlier, we recognize that many may not have understood that the statutory provision applies to State and local funds claimed to meet the State’s MOE requirement, just as it applies to Federal TANF funds. Given the nearly total flexibility provided to States with respect to separate State programs, we also acknowledge that the application of the Charitable Choice requirements to these funds is unusual, because only a few of the TANF rules apply to the expenditure of State funds in separate State programs.

But, while we recognize the frustration of some of the commenters with the interpretation in the NPRM and the preference of others to modify the rule, for the reasons explained in the “Background” above, we believe the better reading of the statute is that Charitable Choice applies to all State funds claimed to meet the maintenance-of-effort requirements.

Comment: Several commenters noted that the preemption clause did not address local laws and asked us to clarify in the final rule that the Charitable Choice provisions do not preempt any provision of a State constitution, State statute or local ordinances that prohibits or restricts the expenditure of State funds in or by religious organizations.

Response: Section 104(k) (42 U.S.C. 604a(k)) preserves “a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations”; it contains no reference to “local laws” or “ordinances.” In addition, the TANF Charitable Choice statute, read as a whole, demonstrates that Congress was cognizant of the distinction between State and local law. For example, section 104(d)(1) (42 U.S.C. 604a(d)(1)) provides that a religious organization participating in a TANF program “shall retain its independence from Federal, State, and local governments * * *.” We therefore believe that the existing language faithfully implements the statute.

Comment: Several commenters noted that the proposed rule was confusing. If Charitable Choice applies to the use of Federal funds and all State and local expenditures claimed to meet MOE, what does the preemption provision mean?

Response: We understand the confusion. But, Congress recognized that some States have enacted laws to