

ensure a more rigorous “separation of church and state.” These States either prohibit or restrict contracts with religious organizations or more broadly proscribe providing any State funding to them. In enacting Charitable Choice, Congress explicitly allowed these State prohibitions or restrictions, as they apply to State funds only, to take precedence over this Federal provision.

The provision at section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)) which preserves “a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations,” only applies to the State’s own funds, but not to Federal TANF funds. The “preemption” provision also does not apply to State funds that have been commingled with Federal TANF funds. (Federal requirements only affect the use of Federal TANF funds, unless the State commingles its money with Federal TANF funds. If a State commingles its funds, the Federal and State funds become subject to the same rules.) A number of States may have general or specific provisions that prohibit or restrict providing direct or indirect State funds to religious organizations. Such States should use segregated Federal TANF funds to pay for any benefits and services provided by religious organizations, to avoid the risk of running afoul of a provision in their laws that prohibits or restricts the expenditure of State funds in or by religious organizations.

So, another way of expressing the requirements is that if a State’s constitution or law prohibits or restricts State funds from going to religious organizations, or proscribes contracts with religious organizations, the Charitable Choice requirements do not apply to those State funds. We defer to the State to interpret the scope of its constitution or law. But, if a State does not have such prohibitions or restrictions, then Charitable Choice applies to both Federal TANF funds and State and local expenditures claimed for MOE purposes. This is faithful to Congress’ expressed intention to preserve State constitutional or statutory restrictions on State funds, while ensuring that Federal rules apply to both Federal and State MOE funds in the absence of such State law provisions.

Comment: Several commenters asked that the final rule clarify that the provision at section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)) which preserves “a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by

religious organizations,” also includes State and local nondiscrimination hiring provisions.

Response: We do not agree that the provision at section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)) addresses employment nondiscrimination provisions. Rather, this provision explicitly covers provisions of a State constitution or State statute that prohibits or restricts the expenditure of State funds “in or by religious organizations.” Employment nondiscrimination provisions do not fall within this category.

XII. Treatment of Intermediate Organizations

Background

Section 260.34(k) of this rule provides that, if a non-governmental organization (referred to here as an “intermediate organization”), acting under a contract or other agreement with the Federal government or a State or local government, is given the authority under the contract or agreement to select other non-governmental organizations to provide services under the program, the intermediate organization must ensure that there is compliance with the Charitable Choice provisions. The intermediate organization retains all other rights of a non-governmental organization under the Charitable Choice provisions.

Comment: One commenter asked for clarification on whether these rules apply to Tribal governments that participate or contract with the State as part of a State’s TANF program. Related to this question is the issue of whether these rules apply to a Tribal government or organization that has the authority under the contract or agreement with the State to select other organizations to provide services under the program.

Response: Tribes that operate their own TANF program under section 412 of the Social Security Act are not required to follow the Charitable Choice rules because the statutory provisions on Charitable Choice refer only to State and local governments. However, Tribes must adhere to these rules if they are under a contract or agreement with the State to operate some aspect of the State’s TANF program and the Tribe has the authority to select other organizations and disburse funds to provide benefits and services. Under such an arrangement, a Tribe is functioning like any other intermediate organization and, is, therefore bound to ensure compliance with the statutory provisions of Charitable Choice and these implementing regulations.

Comment: Six commenters raised a number of different issues with respect to our regulatory provision on intermediate organizations. The first issue is whether or not a State’s use of intermediate organizations to select TANF service providers is unconstitutional. The second issue is whether or not we should specifically regulate the requirements that intermediate organizations be held to the same standards of service, care, nondiscrimination, financial management and accounting rules as the agency receiving the direct grant. The third issue is whether or not we should regulate a requirement that intermediate organizations identify and describe basic information on each subgrantee. The fourth issue is whether or not religious organizations should be permitted to function as intermediate organizations.

Response: We do not agree that the use of an FBO as an intermediate organization is unconstitutional. Our review did not disclose any precedents, legal or otherwise, that would prevent a State from selecting an FBO as an intermediate organization. The purpose of the provision in § 260.34(k) is not to delegate authority to organizations to carry out tasks that are traditionally reserved for a governmental agency. States already have the authority to procure needed social services through the non-governmental sector. Nor is it uncommon for States to authorize non-governmental intermediaries to select TANF service providers by contracting with them to do so. Since the responsibility to select service providers is often vested in non-governmental organizations, it is not a duty that traditionally has been an exclusive function of the government, and intermediate organizations (whether religious or secular) are in any event obligated to act as the government itself must act when carrying out their intermediary functions under this program. We also wish to emphasize that a State’s use of intermediate organizations does not relieve the State of its traditional responsibility to effectively monitor the actions of such organizations. The regulations at 45 CFR 92.40 hold a State accountable for managing the day-to-day operations of grant and subgrant supported activities to assure compliance with applicable Federal requirements and performance goals. Moreover, no provision of this rule relieves a State of its responsibility to ensure that providers are selected in a manner consistent with the Establishment Clause.

Regarding the issues related to standards of service, financial