

DEPARTMENT OF HEALTH AND HUMAN SERVICES
42 CFR Part 54 and Part 54a
45 CFR Part 96

RIN 0930-AA11

**CHARITABLE CHOICE REGULATIONS APPLICABLE TO
STATES RECEIVING SUBSTANCE ABUSE PREVENTION AND TREATMENT
BLOCK GRANTS, PROJECTS FOR ASSISTANCE IN TRANSITION FROM
HOMELESSNESS FORMULA GRANTS, AND TO PUBLIC AND PRIVATE
PROVIDERS RECEIVING DISCRETIONARY GRANT FUNDING FROM SAMHSA
FOR THE PROVISION OF SUBSTANCE ABUSE SERVICES
PROVIDING FOR EQUAL TREATMENT OF SAMHSA PROGRAM PARTICIPANTS**

AGENCY: Substance Abuse and Mental Health Services Administration, DHHS

ACTION: Final Rule

SUMMARY: On December 17, 2002, the Department of Health and Human Services (HHS) published a Notice of Proposed Rulemaking (NPRM) to implement the Charitable Choice statutory provisions of the Public Health Service Act, applicable to the Substance Abuse Prevention and Treatment (SAPT) Block Grant program, the Projects for Assistance in Transition from Homelessness (PATH) formula grant program, insofar as recipients provide substance abuse services, and to SAMHSA discretionary grants for substance abuse treatment or prevention services, which are all administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) of the U.S. Department of Health and Human Services. The Secretary requested comments on the NPRM and gave 60 days for individuals to submit their written comments to the Department. The Secretary has considered the comments received during the open comment period and is issuing the final regulation in light of those comments.

EFFECTIVE DATE: (30 days from the date of publication)

FOR FURTHER INFORMATION CONTACT:

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Background

Section 1955 of the Public Health Service Act, 42 U.S.C. 300x-65, as added by the Children's Health Act of 2000 (Pub. L. 106-310), as well as sections 581-584 of the Public Health Service Act, 42 U.S.C. 290kk, *et seq.*, as added by the Consolidated Appropriations Act (Pub. L. 106-554), (hereinafter referred to as "SAMHSA Charitable Choice provisions") set forth certain

provisions which are designed to give people in need of substance abuse services a greater choice of SAMHSA-supported substance abuse prevention and treatment programs. SAMHSA's Charitable Choice provisions ensure that religious organizations are able to compete on an equal footing for Federal substance abuse funding administered by SAMHSA, without impairing the religious character of such organizations and without diminishing the religious freedom of SAMHSA beneficiaries. These provisions apply to recipients of the Substance Abuse Prevention and Treatment (SAPT) Block Grant funds, the Projects for Assistance in Transition from Homelessness (PATH) formula grant funds, and to SAMHSA discretionary grant funds for substance abuse prevention and treatment services.

President Bush has made it one of his Administration's top priorities to ensure that Federal programs are fully open to faith-based and community groups in a manner that is consistent with the Constitution. It is the Administration's view that faith-based organizations are an indispensable part of the social services network of the United States. Faith-based organizations, including places of worship, nonprofit organizations, and neighborhood groups, offer myriad social services to those in need. The SAMHSA Charitable Choice provisions are consistent with the Administration's belief that there should be an equal opportunity for *all* organizations – both faith-based and nonreligious – to participate as partners in Federal programs to serve Americans in need. SAMHSA's Charitable Choice statutory provisions were enacted within the constitutional framework of government interaction with religious organizations. The goal of Charitable Choice is not to support or sponsor religion, but to ensure fair competition among providers of services whether they are public or private, secular or faith-based.

Purpose of Rule

The SAMHSA Charitable Choice provisions contain important protections both for religious organizations that receive SAMHSA funding for substance abuse services and for the individuals who receive services from such programs. The rule will work to ensure that SAMHSA substance abuse programs are open to all eligible organizations, regardless of religious character or affiliation, and to establish clearly the proper uses to which funds may be put and the conditions for receipt of funding. The regulations provide maximum flexibility to the States and local governments, and to religious organizations that are "program participants" in implementing these provisions. In that vein, the final rules provide that, as part of the application package they submit for funding, duly-designated officials from the States, local governments, and applicants for SAMHSA discretionary funding for applicable programs will assure that they will comply with these provisions.

Brief Overview of the Rule

The Department is amending the regulations to add 42 CFR Part 54 and Part 54a. Part 54 addresses implementation of these provisions with regard to SAMHSA's Substance Abuse Prevention and Treatment (SAPT) Block Grant, 42 U.S.C. 300x-21 to 300x-66, and to SAMHSA's Projects for Assistance in Transition from Homelessness (PATH) Formula Grants, 42 U.S.C. 290cc-21 to 290cc-35, in which the State has most of the responsibility for implementation. Part 54a addresses implementation of these provisions with regard to SAMHSA's discretionary grant programs, 42 U.S.C. 290aa, et seq., in which implementation

responsibility is shared among SAMHSA, and the States and local governments as recipients of those grants.

Response to Comments Received on the Proposed Rule

The Department received comments about the Charitable Choice proposed rule from 62 commenters, as follows:

- 15 comments from 13 States
- 13 comments from faith-based organizations
- 11 comments from substance abuse associations and providers
- 10 comments from individuals not representing particular groups or organizations
- 8 comments from advocacy groups and civil rights organizations
- 2 comments from public and State/local interest groups
- 2 from law firms
- 1 from a Federal agency

In general, comments from the States and providers centered on the implementation of Section 54.8 and Section 54a.8, the alternative services provisions. Comments from faith-based organizations, advocacy groups, and interest groups centered on how to keep religious activities separated from social services, and how to safeguard the rights of both the religious organization and the program beneficiary.

The following is a summary of comments by issue, and the Department's response to those comments.

Scope. (Secs. 54.1 and 54.1a)

This section of the rules clarifies that they apply, according to SAMHSA's Charitable Choice provisions, only to awards that pay for substance abuse prevention and treatment services under 42 U.S.C. 300x-21, *et seq.*, 42 U.S.C. 290cc-21 to 290cc-35, and 42 U.S.C 290aa, *et seq.* These rules do not apply to awards under any such authorities for activities that do not involve the direct provision of substance abuse services.

Comment: One commenter was concerned “about the singling out of substance abuse services from mental health services, [perpetuating] the damaging myth that substance abuse service are not truly health care services.”

Response: SAMHSA's mental health programs are not covered by the Charitable Choice statutory provisions. However, all of SAMHSA's programs are covered by Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which establishes that all eligible organizations, including faith-based and other community organizations are able to compete on an equal footing for Federal financial assistance. The Department is working to ensure that all its programs, whether substance abuse or mental health, comply with the principles set out in this Executive

Order.

Comment: Several commenters opined that the proposed rule was an unconstitutional breach of the principle of separation of church and state, because it would allow public funds to be given to "pervasively sectarian organizations," contrary to longstanding judicial precedent.

Response: We do not agree with the commenters. Religious organizations that receive direct SAMHSA funds for substance abuse treatment cannot use such funds for inherently religious activities. These organizations must ensure that religious activities are separate in time or location from the treatment services and they must also ensure that participation in such religious activities is voluntary. Furthermore, they are prohibited from discriminating against a program beneficiary 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.

The Supreme Court's "pervasively sectarian" doctrine — which held that there are certain religious institutions in which religion is so pervasive that *no* government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose — no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell v. Helms*, 530 U.S. 793, 825-829 (2000) (plurality opinion), and Justice O'Connor's opinion in that case set forth reasoning that is inconsistent with its underlying premises, see *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"). Thus, six members of the Court have rejected the view that aid provided to institutions will invariably advance the institutions' religious purposes, and that view is the foundation of the "pervasively sectarian" doctrine. We therefore believe that when current precedent is applied to a substance abuse program, or to the SAMHSA Charitable Choice provisions, government may fund all service providers, without regard to religion and free of criteria that require the provider to abandon its religious expression or character.

Definition of Religious Organization. (Secs. 54.2 and 54.2a)

In the NPRM, the Department defined "religious organization" as a "non-profit religious organization," consistent with 42 U.S.C. 290kk(c)(6). This definition covers the breadth of organizations that could potentially apply for federal funding under the Charitable Choice Regulations.

Comments: Six commenters requested a more detailed definition of "religious organizations" and some offered suggestions including using the tax code definition of "religious organization." The commenters felt it was important to know to which organizations the Charitable Choice regulations applied.

Response: Throughout the proposed rule, we used the term “religious organization” and the term “faith-based organization” interchangeably. Neither the U.S. Constitution nor the relevant Supreme Court precedents contain a comprehensive definition of religion or a religious organization that must be applied to this rule. Yet, an extensive body of judicial precedent provides the practical guidelines that States and religious organizations need to conform to the Establishment and the Free Exercise Clauses of the First Amendment to the U.S. Constitution. In addition, following investigation into the definition provided by the tax code, the Department determined that the definition did not serve to provide more clarity to the definition in the preamble. Therefore, the Department, in the final rule, has not further defined that term. Please note that the Department is planning to ask organizations to identify whether they are religious organizations as part of a survey entitled *Survey on Ensuring Equal Opportunity for Applicants*.

Comment: Several commenters asked that the final rule provide additional guidance on how to comply with the Establishment Clause and that it detail the scope of religious content that must be excluded from public funding.

Response: In enacting the Charitable Choice provisions, Congress did not include specific statutory provisions with guidance on how to meet constitutional requirements. Like Congress, we do not believe it is appropriate in this rule to provide either States or religious organizations with detailed guidance on how to comply with the Establishment or Free Exercise Clauses of the Constitution. States and faith-based organizations have years of experience and extensive practice in following case law and adhering to judicial precedent to conform to these provisions. In enacting the SAMHSA Charitable Choice provision, Congress sought to conform the law to this precedent while providing maximum flexibility to the States in carrying out statutory requirements. The requirement in the proposed rule closely mirrors the statutory provision and we have retained the identical language of the proposal in the final rule.

Restriction on Religious Activities by Organizations that Receive Funding Directly from SAMHSA. (Secs. 54.2 and 54a.2)

In the NPRM, the Department defined “inherently religious” as including “worship, proselytization, or instruction.” Faith-based organizations cannot use Federal funds to support such activities.

Comment: Many commenters addressed the issue of what constitutes “inherently religious activities.” Some groups stated that the definition provided in the NPRM, of “worship, proselytization, or instruction,” did not clarify sufficiently what activities could be funded by federal funds. They noted that questions of what constitutes religious content and the religious nature of program must be addressed. Without this clarification,

the provision opens the door to other activities -- including desirable ones such as providing food and shelter -- that may be undertaken for religiously informed reasons being ruled ineligible for SAMHSA funding support.

Response: The Charitable Choice regulation maintains that the organization's inherently religious activities must be kept separate -- i.e., in time or location -- in order to prevent the organization from using some or all of the SAMHSA funds provided to it to further its inherently religious activities. The inherently religious activities must be funded privately in their entirety.

For example, a church has a contract with SAMHSA to provide a substance abuse prevention class. The class is held in the finished basement of the church, the same place where the pastor of the church holds a Bible study group at the end of the day, when all other classes have ended. The pastor has extended an open invitation for anyone who wishes, to attend the study group. The church must use private funds to pay for this Bible study activity. Thus, faith-based organizations that receive direct SAMHSA funds must take steps to separate, in time or location, their inherently religious activities from the SAMHSA-funded services that they offer.

In addition, any participation by a program beneficiary in inherently religious activities must be voluntary. An invitation to participate in an organization's religious activities is not in itself inappropriate. However, directly funded religious organizations must be careful to reassure program beneficiaries that they will receive services or benefits even if they do not participate in these activities, and that their decision will have no bearing on the services they receive. In short, any participation by recipients of services in such religious activities must be voluntary and understood to be voluntary.

As some of the commenters noted, it would be difficult to establish an acceptable list of all inherently religious activities. Inevitably, the definition would fail to include some inherently religious activities or include certain activities that are not inherently religious. Our approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities. The Court has explained, however, that prayer and worship are inherently religious, but that social services do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of "ministry."

Comment: Other commenters were concerned because the potential for violating the requirement to separate religious and non-religious components of a program is heightened in the area of substance abuse services, which is sometimes viewed as a spiritual problem.

Response: The restrictions on inherently religious activities by organizations that receive funding directly from SAMHSA¹ remain the same as those described in the proposed

¹ In the Charitable Choice context, the term "direct" funding is used to describe funds that are provided "directly"

rule. The Department agrees that these activities include worship, religious instruction, and proselytization. (Other basic examples include prayer meetings and devotional studies of sacred texts.) The right to maintain a group’s religious character does not include the right to use government funds to pay for inherently religious activities or materials.

Comment: Questions were also raised about whether 12 step programs or, specifically, AA programs, are religious programs.

Response: With regard to the 12--step and AA meetings, we note that any inherently religious activities must be voluntary and must be offered separately in time or location from the program that receives direct SAMHSA funding.

Comment: A commenter stated that the exclusion of all "inherently religious" activities from government funding is flawed, and puts many faith-based organizations in the position of having to choose either to deny their core religious perspectives on social issues or to reject government funds for their programs that accomplish the government's objectives.

Response: This limitation on the use of the direct funds, which tracks the SAMHSA Charitable Choice statute, is not meant to put an organization in the position of having to deny its religious perspectives on social issues, or in the position of having to reject government funds for its programs that are consistent with the purposes of the SAMHSA program. We recognize that while the government regards services like feeding the hungry or helping substance abusers return to their communities as social services or secular work, some organizations may regard these same activities as acts of mercy, spiritual service, fulfillment of religious duty, good works, or the like. Therefore, providing social services that otherwise satisfy the requirements for funding under a government program – e.g., providing food for the hungry or helping substance abusers rejoin their communities -- would constitute an appropriate use of funds, as long as government funds are not used to pay for inherently religious activities such as prayer and worship.

Comment: Several commenters recommended that the phrase “separate in time or location” be changed to “separate in time and location.” According to the commenter, this would “prevent a religious provider from completing a service component, and then moving directly into a prayer service without notice or a break.”

by a governmental entity or an intermediate organization with the same duties as a governmental entity, as opposed to funds that an organization receives as the result of the genuine and independent private choice of a beneficiary. In other contexts, the term “direct” funding may be used to refer to those funds that an organization receives directly from the Federal government (also known as “discretionary” funding), as opposed to funding that it receives from a State or local government (also known as “indirect” or “block grant” funding). In these proposed regulations, the term “direct” has the former meaning.

Response: The Department has decided to leave the final regulation as it was stated in the NPRM. Changing the regulation in the suggested way would place an undue burden on the providers and is not legally necessary. For example, such a rule would impose an unnecessarily harsh burden on small religious organizations, which may have access to only one location that is suitable for the provision of SAMHSA-funded services. As to the commenter's fear that a provider may move directly from the service component into a prayer service without notice or taking a break, it should be noted that the rule makes it clear that religious activity must be separated in time or location from the SAMHSA funded services and participation by a beneficiary must be voluntary. We believe the rule adequately addresses this situation.

Equal Treatment for Religious Organizations. (Sec. 54.3 and 54a.3)

Under SAMHSA's Charitable Choice provisions, organizations are eligible to participate in SAMHSA programs without regard to their religious character or affiliation, and organizations may not be excluded from the competition for Federal funds because they are religious. Specifically, religious organizations are eligible to compete for funding on the same basis, and under the same eligibility requirements, as all other nonprofit organizations.

Comments: Eleven commenters said that faith-based providers should be held to the same program standards that are applicable to other providers. Commenters felt that without such a standard, faith-based organizations would have an unfair advantage in providing services, and that the overall effect would be lower standards of care.

Response: These regulations are established in accordance with the law to provide evenhanded treatment of SAMHSA program participants—that is, to ensure that religious organizations are not discriminated against on the basis that the religious organization has a religious character. These regulations do not establish a preference for faith-based organizations and, much like the Charitable Choice laws, in fact, provide that “nothing in these regulations shall restrict the ability of the Federal government, or a State or local government, from applying to religious organizations the same eligibility conditions in applicable programs as are applied to any other nonprofit private organization.”

Comment: One commenter felt that the NPRM failed to distinguish between “discrimination and the application of special rules required to protect the character of religious organizations.” Another commenter suggested that the final rule should also prohibit discrimination "in favor of" faith-based organizations. In selecting contractors, a government entity should not allow a provider's religious character to influence its selection.

Response: According to other comments received from faith-based organizations, most groups recognize that the regulations and the Charitable Choice laws serve to protect program recipients and are consistent with the Establishment Clause. These regulations do not establish a form of discrimination or preferential treatment, but rather deal with

the special situation involved in the funding of religious organizations. Nothing in the regulations is intended to preclude those administering the program from accommodating religious organizations in a manner consistent with the Establishment Clause.

Comment: A couple of commenters, noting the importance of the equal treatment provisions, observed that the proposed rule is consistent with the statute and strongly supported retention in the final rule.

Response: We agree with these comments and have retained similar language in the final rule.

Comment: One commenter noted that the provisions equate religious and non-religious providers and seek to treat them as equals, thereby failing to recognize the unique place that religion has in our society. This commenter believed that religion should be above the fray of government funding, regulation and auditing, not reduced to it.

Response: This rule does not present any violation of constitutional church-state principles. Rather, this rule governs the conscious decision of a religious organization to administer regulated activities, by accepting public funds to do so. Therefore, consistent with the SAMHSA Charitable Choice laws, we have retained language that enables faith-based organizations to compete on an equal footing for funding, within the framework of constitutional church-state guidelines. This does not in any way denigrate the special place of religion in the Constitution or its unique role in society. As the Supreme Court has recognized, respect for religious freedom at times permits (and at times requires) treating religion on an equal basis.

Nondiscrimination against Beneficiaries. (Sec. 54.7 and 54a.7)

This provision of the NPRM restated the statutory requirement that programs receiving federal funding may not discriminate against program recipients on the basis of their religion or religious beliefs 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 believed that the word “actively” implies that beneficiaries are not protected if they refuse to passively participate in religious practices. They also believed that faith-based organizations could compel beneficiaries to attend activities like sermons, prayers, and religious lectures, or force beneficiaries to bow their heads or remain standing during the delivery of proselytizing messages, religious instruction or worship. Further, they interpreted the word "active" to allow the delivery of such messages using facilities and equipment funded by the government. They believed 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: In enacting the SAMHSA Charitable Choice provisions, Congress provided that program participants may not discriminate against program beneficiaries “on the basis of religion, a religious belief, or a refusal to actively participate in a religious practice.” 42 U.S.C. 300x-65(f). Further, Congress stipulated that the religious freedom of beneficiaries may not be diminished and provided 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. We reiterate, however, as indicated in the rules at sections 54.4 and 54a.4, that inherently religious activities are not to be made part of a program that is directly funded by SAMHSA. Inherently religious activities, such as prayer and worship, may only be offered to beneficiaries on a voluntary basis and must be provided separately, in time or location.

Comment: The commenters suggested that we strengthen the provision in this subsection so clients may not be coerced, explicitly or tacitly, to participate in religious activities, or feel pressured to participate in such activities. Individuals in need are not always in a condition to make a thoughtful and well-considered decision whether or not to participate in worship or similar activities offered by a religious social service provider, particularly when the individual is in great need of the service.

Response: We believe that the provision suffices as written. However, we will use this opportunity to reaffirm that a person's participation in any religious activities must be entirely voluntary. Beneficiaries of directly funded SAMHSA services have the right not to take part in any religious practices to which they object. Therefore, they may, at any time, refuse to participate in inherently religious activities. We recommend that States and organizations help to ensure that clients and prospective clients have a clear understanding of the services offered by an organization by having literature available to give to the client which fully explains the services offered, including any inherently religious activities, as well as the individual's rights.

Comment: One commenter wrote that the rules should clarify that individuals who refuse to participate in the inherently religious activities will not be excluded from the program and will not suffer any discrimination in the administration of the program. Congress specified that Federal funds may not be used for religious purposes, but the rules provide no enforcement mechanism, so beneficiaries have no administrative relief if violations occur.

Response: The SAMHSA Charitable Choice provision explicitly prohibits a religious organization from discriminating against a participant on the basis of religion, religious belief, or refusal to actively participate in a religious practice. For example, if the service

provider is a faith-based organization, that organization may not discriminate against the individual on account of religion or a religious belief. In addition, the faith-based organization may not turn away a beneficiary from the organization's program solely because the beneficiary refuses to participate in an inherently religious practice. Hence, this provision ensures the beneficiary's right not to take part in any inherently religious practices to which he or she objects. The individual's participation in an inherently religious activity must be entirely voluntary. Likewise, it is well established that government may not compel an individual, through material penalty or loss of public benefit or advantage, to profess a religious belief or to observe an inherently religious practice.

Comment: One commenter wrote that the proposed rule does not require a secular alternative. Therefore, it lacks constitutionally required safeguards for beneficiaries. Another commenter suggested that beneficiaries should be referred to programs to which they have no religious objection.

Response: The proposed rule provided that if the applicant or recipient objects to the religious character of a SAMHSA 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 SAMHSA Charitable Choice provisions, which require that the beneficiary be provided assistance from “an alternative provider.” The Charitable Choice statute does not specify that the alternative provider needs to be a secular organization; it need only be a provider to which the beneficiary has no objection (unless, of course, the beneficiary objects to the religious character of *all* faith-based providers, in which case he is entitled to a secular alternative). We have chosen not to adopt this suggestion for three reasons. First, some beneficiaries may prefer an alternative religious organization, rather than a secular organization, and we prefer to provide beneficiaries with as many choices as possible. Second, the Charitable Choice statute prohibits direct funding of inherently religious activities (which must also be voluntary), and many faith-based organizations in any case deliver their services in a secular manner. As a result, most beneficiaries do 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 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 develop a regulation banning religious, sexual orientation and/or gender identity discrimination with Federal or other public funds.

Response: Religious and secular organizations alike must follow Federal civil rights laws prohibiting discrimination on the bases of race, color, national origin, gender, age, and disability. However, the Federal civil rights laws are silent on discrimination on the

basis of sexual orientation, and we decline to impose such restrictions by regulation.

Comment: Several commenters noted that if religious organizations are providing program services and facilities, then they must be in compliance with the Americans with Disabilities Act (ADA).

Response: It is beyond the scope of these regulations to address how various civil rights laws might apply in all situations. As noted previously, organizations providing programs services and facilities must comply with Federal civil rights laws to the extent those laws are applicable. We note that section 307 of the Americans with Disabilities Act of 1990 excludes religious organizations or entities controlled by religious organization, including places of worship, from coverage under the provision that deal with public accommodations. On the other hand, there exist a number of other Federal prohibitions against discrimination on the basis of disability. For example, section 504 of the Rehabilitation Act of 1973, and its implementing regulations at 45 CFR Part 84, prohibit discrimination on the basis of disability in programs or activities receiving Federal financial assistance.

Religious Character and Independence. (Sec. 54.5 and 54a.5)

Sections 54.5 and 54a.5 of the final rule clarify that a religious organization that participates in the SAMHSA program retains its independence from Federal, State, and local governments, provided that it does not use direct SAMHSA 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 SAMHSA-funded services, without removing religious art, icons, scriptures, or other symbols. In addition, a religious organization that receives SAMHSA 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 SAMHSA 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 SAMHSA-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: The SAMHSA Charitable Choice provisions impose on the government a duty not to intrude into the institutional autonomy of religious organizations. Specifically, each participating faith-based organization in receipt of SAMHSA funds "shall" retain its independence from Federal, State and local governments. This

independence includes control over the definition, development, practice, and expression of its religious beliefs. In addition, the statutes expressly prohibit State, Federal, and local governments from requiring a religious organization to alter its form of internal governance or remove religious art, icons, scripture, or other symbols in order to be eligible to receive directly funded SAMHSA funds to provide services to beneficiaries. And, it should be noted that, if the beneficiary objects to the religious character of the organization, then he or she is entitled to receive the service from an alternate provider to which the beneficiary has no religious objection.

Finally, 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., concurring in judgment, joined by Breyer, J.) (requiring proof of "actual diversion of public support to religious uses"). Accordingly, the Department (like Congress) does not believe that the Constitution requires exclusion of organizations that are governed by religious organizations or whose facilities contain religious symbols.

Employment Practices. (Sec. 54.6 and 54a.6)

The NPRM restated the SAMHSA's Charitable Choice provisions, which provide that a religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 regarding employment practices shall not be affected by its participation in, or receipt of funds from, a designated program. To the extent that 42 U.S.C. 300x-57(a)(2) or 42 U.S.C. 290cc-33(a)(2) imposes religious nondiscrimination requirements on the employment practices of program participants, the NPRM clarifies that such requirements do not apply to program participants that demonstrate that these requirements would substantially burden their exercise of religion.

Comments: Numerous comments were received dealing with the employment practices provisions in the proposed rule. Nineteen out of 23 comments made about this provision supported the removal of the provision from the final rule. Many commenters felt that the Religious Freedom Restoration Act (RFRA) was an inappropriate basis for the regulation and did not provide the statutory authority to overrule the broad anti-discrimination provision in SAMHSA's authorizing legislation for the Substance Abuse Prevention and Treatment (SAPT) block grant in the Public Health Service Act. They argued that religious groups would not be substantially burdened by having to comply with these requirements, and that, in any event, the government had a compelling interest in imposing the requirements.

Response: The Department does not agree with the comments. We believe that, in addition to being a reasonable construction of the SAMHSA Charitable Choice provision, the inapplicability of the discrimination provisions of the SAPT block grant program and the PATH program, 42 U.S.C. 300x-57(a)(2) and 42 U.S.C. 290cc-33(a) (2), to religious organizations that demonstrate a substantial burden on their exercise of religion follows from RFRA. Under RFRA, the government may not impose legal requirements that

substantially burden a grantee's exercise of religion unless doing so is the least restrictive means of furthering a compelling government interest. 42 U.S.C. 2000bb-1(b). Accordingly, where a religious entity establishes that its exercise of religion would be substantially burdened by the religious nondiscrimination provisions cited above, RFRA supercedes those statutory requirements, thus exempting the religious entity therefrom, unless the Department has a compelling interest in enforcing them.

The Department's rationale in this regard is set out in the NPRM. See 67 Fed. Reg. 77350, 77351-77352 (Dec. 17, 2002). Several points, however, merit elaboration. First, the Department recognizes that not all religious organizations that might receive funding under the SAPT block grant and PATH programs would be substantially burdened by the application of the religious nondiscrimination requirements of 42 U.S.C. 300x-57(a)(2) and 42 U.S.C. 290cc-33(a)(2). For example, some religious organizations are concerned only with their employees' commitment to providing social services, not with any profession of faith, and thus do not consider religion in hiring people to perform such services. Such groups would not likely be burdened by having to comply with a religious nondiscrimination requirement. Many other religious organizations, however, consider religious faith critical to all of their employees' activities, including those that involve providing government-funded social services to the public. For these groups, imposition of a religious nondiscrimination requirement can impose a particularly harsh burden. As Justice Brennan explained: "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). For groups that deem religious faith an important part of their self-definition, having to make employment decisions without regard to their faith would substantially alter the charter of their organization.

In recognition that the religious nondiscrimination requirements of 42 U.S.C. 300x-57(a)(2) and 42 U.S.C. 290cc-33(a)(2) would substantially burden some but not other grantees, the RFRA exemption is limited to those organizations that are able to certify that: (1) they sincerely believe that employing individuals of a particular religion is important to the definition and maintenance of their religious identity, autonomy, and/or communal religious exercise; (2) they make employment decisions on a religious basis in analogous programs; (3) the grant in question would materially affect their ability to provide the type of services in question; and (4) providing the services in question is expressive of their values or mission. We disagree, however, with some commenters' assertion that no religious organization would be substantially burdened by having to make hiring decisions without regard to their faith while participating in the SAMHSA program.

Second, the fact that SAMHSA is a funding program does not mean that the federal government necessarily possesses a “compelling interest” in imposing religious nondiscrimination provisions upon the employment practices of participating religious organizations. To begin with, religious organizations’ exemption from the religious nondiscrimination requirements of Title VII (the availability of that exemption is expressly clarified by the SAMHSA Charitable Choice law, 42 U.S.C. 290kk-1(e), 300x-65(d)(2)) reflects Congress’s judgment that employment decisions are an important component of religious organizations’ autonomy, and that the government has a much stronger interest in applying a religious nondiscrimination requirement to secular organizations than to religious organizations—many of whose existence depends upon their ability to define themselves on a religious basis. Moreover, many federal funding programs—including the discretionary grant programs administered by the Secretary under Title V of the Public Health Service Act—do not impose a religious nondiscrimination requirement upon the employment practices of grantees. Rather, Congress’s application of religious nondiscrimination requirements in the employment context is quite selective, which makes it difficult to regard the government as having a compelling interest in imposing such a requirement in this particular context. Finally, secular entities that administer federally funded social programs generally are not barred from considering their ideologies in making employment decisions. In this respect, allowing faith-based grantees to consider religious motivation in hiring simply levels the playing field, allowing them to consider ideology on the same basis as other organizations.

Comment: Several commenters agreed that the proposed rule regarding the Title VII exemption reflects a proper understanding of civil rights law. When a faith-based organization receives government funding and hires staff on a religious basis, the Federal civil rights law is not violated.

Response: We agree with these commenters and have retained the identical language in the final rule. This statutory and regulatory provision of Charitable Choice does not change the status quo; it simply clarifies applicability of the Title VII exemption under the SAMHSA Charitable Choice law.

Comment: Several commenters believed that the proposed rule allows employment discrimination in violation of constitutional prohibitions and court decisions that have struck down government-funded discrimination. One commenter explicitly stated that this provision runs afoul of the “no-religious-tests clause” of the Constitution under which “no religious test shall ever be required as a qualification to any office or public trust under the United States.” Other commenters stated that the exemption from Title VII of the Civil Rights Act was never intended to permit a religious organization to favor co-religionists in hiring when using Federal funds to pay the salaries and wages of employees who are carrying out government-funded social service programs.

Response: We do not agree that these comments accurately portray the law. In 1972, Congress broadened section 702(a) of the Civil Rights Act to exempt religious organizations from the religious nondiscrimination provisions of Title VII, regardless of the nature of the job at issue. The broader, amended provision was unanimously upheld by the Supreme Court in 1987 and, absent a specific statutory repeal, remains applicable even when religious organizations are delivering federally funded social services. Thus, although section 702(a) of the Civil Rights Act of 1964 is permissive—it does not require religious staffing—religious organizations may consider their faith in making employment decisions without running afoul of Title VII. The effect of the explicit preservation of the Title VII exemption is no different from the rule that applies in other programs that are simply silent on the question of the applicability of Title VII in the funding context, and, as noted above, there are many such programs. Concerning the commenters’ suggestion that allowing a federally funded organization to consider faith in making employment decisions would violate the “no religious test” clause of the Constitution, we would simply note that it is well settled that the receipt of government funds does not convert the employment decisions of private institutions into “state action” that is subject to constitutional restrictions such as the “no religious test” clause.

Comment: Several commenters noted that the clause – “nothing in this section shall be construed to modify or affect any State law or regulation that relates to discrimination in employment” -- did not address local laws and asked us to clarify in the final rule that the Charitable Choice provisions do not preempt any State or local law that relates to discrimination in employment.

Response: This provision of the SAMHSA Charitable Choice law preserves a “Federal or State law or regulation that relates to discrimination in employment.” 42 U.S.C. 290kk-1(e). In contrast, 42 U.S.C. 290kk-1(d)(1) provides that a religious organization participating in the program “shall retain its independence from Federal, State, and local government” Congress thus was cognizant of the distinction between State and local law in drafting the SAMHSA Charitable Choice statute, and we believe that the existing language faithfully implements the statute.

Comment: One commenter wanted the Department to clarify under section 54.6(b) that the certification that is required to show that its religious exercise would be substantially burdened by the nondiscrimination requirements under the SAPT block grant and PATH programs should be submitted to SAMHSA.

Response: The Department does not believe that it is necessary for the subgrantees to provide such documentation to SAMHSA unless SAMHSA requests it, as indicated previously in the proposed rule which is now finalized.

Comment: One commenter pointed out that oversight of the employment practices would generate an administrative burden on the States.

Response: The Department recognizes this possibility of generating an administrative burden on the States and has included extensive flexibility for the implementation of the provision by the States.

Notice, Referral, and Provision of Alternative Services. (Sec. 54.8 and 54a.8)

If an otherwise eligible program beneficiary or prospective beneficiary objects to the religious character of a program participant, within a reasonable period of time after the date of such objection, such program beneficiary must be referred to an alternative provider that has the capacity to provide the services, is accessible, and is of at least equal value as the provider to which the beneficiary objected. Under SAMHSA's Charitable Choice provisions, the responsibility for providing the alternative services rests with the "the appropriate Federal, State, or local government" that administers the program or is a program participant. The NPRM proposed that States provide and fund alternative services for SAPT block grant-funded beneficiaries and PATH program beneficiaries who have objected to the religious character of a program participant. States may use SAPT block grant and PATH grant funding to provide and fund such services from a provider to which the program beneficiaries do not have a religious objection, in a manner consistent with State law and policy.

With respect to SAMHSA discretionary grant funding, when SAMHSA provides funding directly to another unit of government, such as a State or local government, that unit of government is responsible for providing the alternative services. When SAMHSA provides discretionary grant funding directly to nongovernmental organizations, SAMHSA is the responsible unit of government.

Comments: All thirteen States and eleven providers that commented on the NPRM urged more flexibility for the States and providers in implementing these provisions. Fourteen of these commenters had concerns about the administrative and fiscal burden occasioned by this provision. Several were concerned that an "essentially duplicate system of care" would have to be developed, "with the faith-based community in charge of deciding, by default, what services must be duplicated in order to assure that the beneficiary has freedom of choice." 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. Finally, one State commenter recommended that "[I]f SAMHSA is interested in minimizing administrative costs, I recommend that these requirements be eliminated in lieu of existing State requirements."

At the same time, other commenters believed that the proposed rule left too much discretion to States to define the terms "reasonably accessible," "a reasonable period of time," "comparable," "capacity," and "value that is not less than." These commenters asked that we either provide Federal definitions for these terms, or establish baseline parameters or guidelines.

Response: After carefully considering these concerns, the Department agrees that it is important to provide flexibility to the States in determining how to establish procedures for notice, referral, and provision of alternative services. As noted in the NPRM, the Department recognizes that a range of methods that fulfill these responsibilities is possible. Therefore, the Department does not seek to prescribe a single, inflexible referral and alternative provider system that States must adopt when States are the responsible units of government. The Department believes it is vital to any effective implementation of these provisions that SAMHSA, State and local agencies, and religious organizations work cooperatively to develop systems to comply with these provisions, monitor compliance, identify compliance problems and take necessary corrective actions.

SAMHSA's Charitable Choice provisions apply to three different granting situations. The first is when the State itself is the recipient of SAPT block grant and PATH formula funds or when the States receive a discretionary grant from SAMHSA. Because of the broad range of State circumstances, coupled with the States' proven success in establishing systems to address such circumstances, States may develop referral and alternative service systems that are compatible with the treatment and prevention systems they administer, including reasonably defining and applying the terms "reasonably accessible," "a reasonable period of time," "comparable," "capacity," and "value that is not less than." SAMHSA will work with the States as they develop their implementation plans, providing technical assistance and opportunities for the States to discuss implementation approaches with one another. Allowing the States such discretion will not require the development of duplicate systems and will reduce regulatory and paperwork burden.

The second situation is when SAMHSA awards discretionary funds directly to local governments. The third is when SAMHSA awards discretionary funds directly to faith-based nonprofit organizations. The unit of government responsible for providing and funding alternative services in these situations is defined at section 54a.8 as follows:

“With respect to SAMHSA discretionary programs, for purposes of determining what is the appropriate Federal, State, or local government, the following principle shall apply: When SAMHSA provides funding directly to another unit of government, such as a State or local government, that unit of government is responsible for providing the alternative services. When SAMHSA provides discretionary grant funding directly to a nongovernmental organization, SAMHSA is the responsible unit of government.”

Therefore, in the second circumstance, when SAMHSA awards discretionary funds to local governments, local governments are responsible for providing alternative services for program beneficiaries who may object to a faith-based program they are funding with

SAMHSA funds. SAMHSA expects that local governments will work with the States and comply with the implementation approach adopted by their respective States.

In the third circumstance – when SAMHSA provides discretionary funds directly to faith-based organizations -- SAMHSA will work with those organizations and consult with the States to ensure that program beneficiaries are provided alternative services in accordance with the statutory and regulatory requirements. As provided in the rule in section 54a.8(e), if there are no publicly funded alternatives available for the beneficiary, these grantees must contract with an alternative provider for the provision of such services, and the grantee may use the SAMHSA grant funds to finance the services. Should a grantee incur unanticipated additional costs as a result of providing alternative services beyond the discretionary grants awarded, the grantee may request reimbursement of those funds from SAMHSA, as the responsible unit of government, in the form of a request for supplemental funds to cover unanticipated costs. Based on the past experience of other HHS agencies in implementing similar provisions, objections to the religious character of program participants have been rare, which is perhaps unsurprising in light of the fact that beneficiaries may not be required to participate in any inherently religious activities as a condition of receiving services. Thus, SAMHSA expects that such an occurrence will be infrequent and only occur when the referral is to a private provider. While the specific circumstances will vary from jurisdiction to jurisdiction, we anticipate that in many cases, referrals will be made to programs that are funded, at least in part, from public funds, and therefore the burden of this requirement will not be substantial.

Comment: SAMHSA posed certain questions to commenters in the Federal Register Notice about what commenters thought constituted ‘reasonable period of time’, ‘reasonably accessible services’, and what the best understanding of “services that... have a value that is not less than the value of [services that would otherwise be provided].”

Commenters provided the following input in response:

- With regard to “reasonable period of time,” commenters suggested this would be anywhere from 24 hours after a request for alternative services to 4-6 weeks after such request. Most commenters reiterated that the States should determine what “a reasonable period of time” is.
- With regard to what “reasonably accessible services” are, commenters urged a focus on comparable level of care and reasonable accommodation. They noted that in large cities it may be easy to effect a referral to an alternative provider, but in smaller communities and rural areas, there may be only one existing licensed provider in the county.
- With regard to what constitutes equivalent services, commenters recommended that this phrase be interpreted to mean the value of the services themselves, without regard to the administrative costs involved.

Response: Although commenters made many good suggestions for defining these terms, the wide variety of responses to the questions SAMHSA raised underscores the need for

State flexibility and the need for Departmental restraint in defining terms or regulating procedures for referral and provision of alternative services.

Comment: Commenters asked for clarification of “how these recipients would fund and deliver services from alternative providers.” Another commenter offered the opinion that States would need to establish formal set-asides within discretionary grants to cover alternative placements.

Response: As indicated above, the regulation (consistent with the statute) requires the “responsible unit of government” to provide and fund alternative services. With regard to the suggestion for set-asides, Federal cost policies do not permit grantees to have set-aside/contingency dollars.

Comment: Several commenters were concerned about the “excessive burden on the treatment program to monitor the action of an individual who has not been admitted to its program and for whom the program is not receiving funding.” In particular, several commenters noted “faith-based organizations should not bear the burden of securing and financing alternative services.”

Response: SAMHSA considered these comments carefully in finalizing this rule, and has concluded that, when SAMHSA is the responsible unit of government (that awards discretionary funds directly to a religious organization), it will follow the rule that applies to the other granting circumstances – that is, the grantee (which may be the State, the local government, or in this instance, the religious organization) will use grant funds, if necessary, to cover the cost of securing and providing alternative services. As indicated earlier, SAMHSA anticipates that in many cases, referrals will be made to programs that are funded, at least in part, from public funds, and therefore the burden of this requirement will not be substantial.

Comment: With regard to the program participant’s responsibility to refer objecting program beneficiaries to alternative services, one commenter recommended that a “gateway” referral system that takes place before a beneficiary arrives at any provider be established and administered by the government. In the same vein, another commenter suggested that referral take place through “coordination that result[s] in referrals not requiring opt-outs.”

Response: State and local governments have the flexibility to implement the requirement as they see fit so long as they meet all of the statutory and regulatory requirements. The Department is not mandating any one method.

Comment: Several commenters noted that the requirement to provide alternative services places additional burdens on State agencies, when the States are the responsible units of government, especially in rural areas. A faith-based organization may be selected as the service provider for a particular geographic area. Ensuring that an

alternative service provider is available could require the State to make dual sets of services available, and thus increase costs. As a result, many of these commenters suggested that the requirement to provide alternative services is unreasonable. Some suggested that exceptions be permitted or that the requirement should be eliminated. Others noted that with this requirement, some States may choose not to contract out or provide community-based services, especially in rural areas.

Response: SAMHSA's Charitable Choice provisions impose the requirement to provide accessible and comparable assistance or services within a reasonable period of time to an individual who has an objection to the religious character of an organization. In the proposed rule, with the exception of requiring notice and referral, we did not expand or enhance the rights of beneficiaries to assistance from an alternative provider, but simply clarified this statutory right. We also left substantial discretion to the States to define terms and carry out the statutory objectives. We are not free, however, to eliminate the statutory requirement to provide alternative services.

We also believe that commenters may have potentially overestimated the impact and potential burden of this requirement. Through the Department's Administration on Children and Families' TANF program, many faith-based organizations have a long history of contracting with State and local governments to address the secular purpose of providing assistance and services to needy families. In this situation, few beneficiaries have objected to the religious nature of these providers, which is perhaps unsurprising in light of the fact that, under TANF's Charitable Choice provisions, any inherently religious activities must be offered separately and on a voluntary basis. We also do not believe that States will decide not to contract out or provide community-based services in order to avoid this requirement. Since the statutory Charitable Choice requirements have applied since 2000, we believe that State and local governments are providing alternative services, in compliance with the law, and discovering and enhancing procedures that efficiently and effectively address this requirement.

Comment: Several provider commenters were concerned that faith-based programs receiving SAMHSA funding "should conform to principles of religious tolerance and inclusiveness."

Response: All recipients of SAMHSA funding are required to comply with Sections 54.7 and 54a.7, dealing with nondiscrimination toward program beneficiaries.

Comment. One State commenter was concerned about having to provide notice and alternative services to beneficiaries in SAMHSA-funded substance abuse prevention programs.

Response: SAMHSA appreciates this concern and recommends that grantees contact their State's substance abuse agency to secure information about alternative prevention services in the State. Many States' governors have used SAMHSA State Incentive

Grants (SIGs) to coordinate their prevention systems, and, as a result, will have comprehensive information on prevention services available in particular areas.

Comment: One State offered implementation suggestions, including that “the provision of alternative services could be addressed in contract language through a requirement that providers identify services available for referral.” Several States noted that they already provide beneficiaries a choice of providers.

Response: The Department hopes that States will work with each other to identify effective implementation approaches, such as those noted above. We decline, however, to impose this particular requirement across the board.

Notice.

The SAMHSA Charitable Choice provisions require SAMHSA-funded religious organizations providing substance abuse services, public agencies that refer individuals to such SAMHSA-funded programs, and the appropriate Federal, State, or local governments that administer these SAMHSA-funded programs to ensure that notice is provided to beneficiaries and prospective beneficiaries regarding alternative services. It further requires the program participant to notify the responsible unit of government of all such referrals.

Comments: Several commenters recommended that notice of availability of alternative providers be given to all beneficiaries at the outset.

Response: Below is a model notice that grantees may wish to use:

**MODEL NOTICE TO INDIVIDUALS RECEIVING
SUBSTANCE ABUSE SERVICES**

No provider of substance abuse services receiving Federal funds from the U.S. Substance Abuse and Mental Health Services Administration, including this organization, may discriminate against you 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.

If you object to the religious character of this organization, Federal law gives you the right to a referral to another provider of substance abuse services to which you have no religious objection. The referral, and your receipt of alternative services, must occur within a reasonable period of time after you request them. The alternative provider must be accessible to you and have the capacity to provide substance abuse services. The services provided to you by the alternative provider must be of a value not less than the value of the services you would have received from this organization.

In addition, section 54.8(b) and 54a.8(b) of the regulation has been changed to add the word, “all” before “program beneficiaries” as follows:

Program participants, public agencies that refer individuals to designated programs, and the appropriate Federal, State, or local governments that administer designated programs or are program participants shall ensure that notice is provided to all program beneficiaries or prospective program beneficiaries of their rights under this section. (Emphasis added.)

SAMHSA assumes that providers will be able to provide such notice when program beneficiaries can understand their rights – which may be at the outset of services.

Comment: Other commenters recommended States should be given latitude to comply with the Notice requirements.

Response: The Department agrees. SAMHSA is providing a “model notice” to the States and other grantees, but is not requiring them to use this notice.

Comment: Another State commenter recommended that program participant notify the State “or responsible unit of government” of such referral.

Response: The Department will insert the suggested language, “or responsible unit of government” in 54.8(c)(4).

Referral to Alternative Provider.

If an individual objects to the religious character of the substance abuse treatment or prevention program from which they are receiving services, the religious organization (program participant) must refer the individual, within a reasonable period of time, to another provider of substance abuse services. The requirements regarding referral are set out in sections 54.8(c) and 54a.8(c).

Comments: Several commenters felt that the government should require that a non-religious alternative be available. On this point, several asked whether a program beneficiary had to be referred to a religious provider if that is the only alternative.

Response: The proposed rule at sections 54.8 and 54a.8 provided that if the applicant or recipient objects to the religious character of a SAMHSA 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 SAMHSA Charitable Choice provisions at sections 582(f) and 1955-(e) of the Public Health Service Act, 42 U.S.C. 290kk-1(f) and 300xx-65(e), which require States to provide the individual with assistance from “an alternative provider.” Hence, the alternative provider could, but does not have to be, a secular alternative (unless, of course, the beneficiary objects to the religious character of all faith-based providers). We have retained the wording of this provision.

Comment: One commenter wrote that the proposed rule does not require a secular alternative. Therefore, it lacks constitutionally required safeguards for beneficiaries.

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: Others wanted a more general requirement that the government ensure the existence of at least one alternative service provider to protect the rights of beneficiaries; on this point, several States and providers noted the problem of the availability of alternative services in a rural setting. In contrast, one State stressed that the regulations “must not require the establishment of alternative providers where none currently exist.”

Response: The Department expects States, local governments and other grantees to abide by the statutory and regulatory requirements with respect to providing alternative services. We will work together to ensure compliance. In addition, we note that the statute prohibits grantees from using direct funding for inherently religious activities, and that any such activities must be voluntary. These requirements are sufficient to protect the religious freedom of beneficiaries.

Comment: Several commenters felt that the referral responsibility should be the government’s, rather than the religious organization’s (as a program participant).

Response: The Department is relying on the close cooperation among SAMHSA, States, providers and religious organizations to develop referral systems that are based primarily on shared responsibility. Religious organizations can look to the responsible unit of government for assistance, including access to SAMHSA’s treatment facility locator at <http://findtreatment.samhsa.gov> to identify providers in the surrounding area. See the regulations for further detail.

Comment: Several commenters, mainly providers, underscored the importance of ensuring that the confidentiality protections, including those provided in 42 CFR Part 2 and HIPAA, are complied with; others were concerned, however, that confidentiality rules would block information sharing between religious organizations and secular providers.

Response: The SAMHSA Charitable Choice laws do not override the confidentiality laws of 42 CFR Part 2 and HIPAA. Therefore, the final regulations will contain the same provision from the NPRM in section 54.8(c)(3), as follows:

All referrals shall be made in a manner consistent with all applicable confidentiality laws, including, but not limited to, 42 C.F.R. Part 2 (“Confidentiality of Alcohol and Drug Abuse Patient Records”).

Comment: Two State commenters were concerned that SAMHSA’s Charitable Choice provisions confer a “special entitlement” to certain beneficiaries to services, similar to that of the “priority” set-aside populations currently listed in SAPT block grant law.

Response: With regard to a “special entitlement” being created, SAMHSA agrees with a State commenter who stated that “[T]he States can assure that steps can and will be taken to assure protection of these rights without granting religious objectors more extensive rights than those of the general population of beneficiaries.... [Existing protections are sufficient.]”

Fiscal Accountability. (Sec. 54.10 and 54a.10)

The fiscal accountability section of the regulation provided that religious organizations receiving SAMHSA funding would be held to the same fiscal accountability requirements as other organizations, including generally accepted auditing and accounting principles. Faith-based organizations would also be required to keep any federal funds in a separate account from non-federal funds. Only the segregated Federal funds are subject to audit by the government under the SAMHSA program.

Comment: The Department received 13 comments on the issue of fiscal accountability. All of the comments received on this section supported segregation of funds and strict adherence to Federal audit and cost principles and requirements. There was some concern about the ability of faith-based organizations to maintain separate accounts.

Response: The final rule provides that religious organizations receiving SAMHSA discretionary funds will be subject to audit, just like any other non-governmental organization receiving such funds. The faith-based organization is to use the funds in accordance with the grant and all applicable laws and regulations. For discretionary grants, as provided in 45 CFR 74.26 and 92.26, SAMHSA grantees are responsible for obtaining audits by an independent auditor following generally accepted government auditing standards, in accordance with applicable OMB circulars. When the State is the grantee, the State is responsible for the appropriate use of its SAMHSA funds, so the organization (as the subgrantee) needs to be able to show to the State and the auditor that it used the funds for the purpose intended by the State. This must also be in accordance with the Single Audit Act and OMB Circular A-133.

Moreover, HHS is authorized to conduct any additional audits or reviews that are warranted, irrespective of the amount of Federal funds expended by the grantee annually, in order to ensure compliance with program requirements including the restriction against funding of inherently religious activities. HHS may determine that such audits or reviews are warranted based upon any information received by the agency that raises an issue concerning the propriety of expenditures.

Comment: Several commenters were concerned about religious organizations operating as intermediary organizations. One commenter notes that the "proposed rule creates the risk that comparable religious intermediaries will not act in a religiously neutral manner." Another commenter believed using such intermediaries has the effect of advancing religion and noted that the delegation of governmental authority to a religious organization violates the Establishment Clause. Another commenter believed it would raise questions about the accountability of tax dollars and that it promotes religion.

Response: We do not agree that the use of a religious organization as an intermediate organization is unconstitutional. Our review did not disclose any precedents, legal or otherwise, that would prevent a governmental unit from selecting a religious organization as an intermediate organization. The purpose of the regulations at sections 54.12 and 54a.12 is not to delegate authority to organizations to carry out tasks that are traditionally reserved for a governmental agency. It simply recognizes what has occurred in States already - that is, States have used block grant funds to contract with intermediaries to manage programs and make sub-awards to other organizations as part of their substance abuse service systems. Although such intermediary organizations may be utilized, we emphasize that the governmental unit that procures such services is accountable for Federal funds and must assure that the intermediary abides by all statutory and regulatory requirements, including these regulations, and must assure that the intermediary acts in a religiously neutral manner and that direct funds are not expended for inherently religious activities.

Educational Requirements for Personnel in Drug Treatment Programs (Sec. 54.13 and 54a.13)

This provision, restated directly from SAMHSA's Charitable Choice laws, seeks to redress "unduly rigid or uniform educational qualification for counselors and other personnel in drug treatment programs." States establish such licensure and certification requirements.

Comment: Of the eighteen comments received on this section, sixteen stressed that faith-based organizations should have to meet the same licensing and certification requirements as other providers. One commenter noted that language should be clarified that the goal of this section is to ensure non-discrimination against training programs offered by religious organizations, rather than to loosen State requirements designed to ensure quality of care to clients.

Response: The final rule restates the statutory requirement of 42 U.S.C. 290kk-3, which provides that, in determining whether personnel of a program participant that has a record of successful drug treatment for the preceding three years have satisfied State or local requirements for education and training, a State or local government shall not discriminate against education and training provided to such personnel by a religious organization, so long as such education and training is comparable to the coursework or training provided by nonreligious organizations or is substantially equivalent to education and training that the State or local government would otherwise credit for purposes of determining whether the relevant requirements have been satisfied (emphasis added).

In keeping with its approach to provide States with wide flexibility in implementing the alternative service provisions, the Department is enabling the States to determine whether the education and training provided by a religious organization is “substantially equivalent” to that provided by nonreligious organizations, and is in accordance with applicable State certification and licensure requirements. States are encouraged to provide simplified information about their State’s certification and licensure requirements to religious organizations, highlighting, if appropriate, different requirements for different stages of treatment (e.g., outreach versus medically-indicated treatment).

Comment: Two commenters felt that faith-based organizations should be provided more flexibility, with one commenting that “[S]tates should reconsider their existing certification requirements to ensure that their existing certification requirements do not unnecessarily discourage alternative treatment strategies and thus the involvement of new providers.” The commenter also suggested that “SAMHSA provide guidance on the range of drug treatments that are effective and on the range of educational paths that prepare people to offer those different treatment modalities.”

Response: The Department urges the States to work with their faith-based providers to ensure that these providers have clear information on licensure and certification requirements, and to ensure that new providers are encouraged and supported. With regard to guidance from the Department on types of drug treatment, we refer interested parties to the full range of SAMHSA’s Treatment Improvement Protocols (TIPS), available at www.samhsa.gov.

Comment: Several commenters noted that substance abuse treatment is a medical treatment, not a social service, and that “prevailing models treat addiction as a biopsychosocial disorder,” not a social problem.

Response: The Department agrees that certain aspects of substance abuse treatment are medical in nature. State licensure and certification systems recognize this characterization as well. SAMHSA encourages States to work with their provider community to clarify different treatment alternatives.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

Comment: Numerous States, providers, faith-based organizations and public interest groups stated that the proposed rule constitutes an unfunded mandate by SAMHSA and asked that an unfunded mandate analysis be completed. In the words of one commenter, “there is a broad delegation of responsibility to States for providing secular alternatives without providing corresponding resources to carry it out. SAMHSA should provide ‘much more specific regulation’ and resources necessary to carry this out.”

Response: The Department has determined that this rule would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year. As provided in sections 54.8 and 54a.8, States and other grantees can use grant funds to implement these provisions, and these regulations impact only existing Federal-funding streams, unless the State or local governments commingle other funds with Federal funds.

Assurances and State Oversight of the Charitable Choice Requirements

The NPRM proposed that States, as a standard part of their applications for funding under each program, certify that they will comply with all of the requirements of the SAMHSA Charitable Choice provisions and submit to the Secretary a summary each year of the steps it has taken to implement this regulation.

Comments: Eight commenters felt that the stated assurance for tracking implementation and accountability was not strong enough. One commenter recommended spot-checks and reporting requirements to make sure faith-based providers and governments were complying with the final rule.

Response: The Department believes that signed assurances, plus existing compliance and auditing standards, provide the needed oversight and guarantee that the States, localities and religious organizations are implementing the regulation properly and that all beneficiaries’ rights are being upheld as required.

Complaint System

Comment: One commenter pointed out that no complaint, investigation and resolution process was discussed in the NPRM.

Response: For the PATH formula grant and SAPT block grant, and for discretionary programs, program participants and beneficiaries can contact the Administrator, SAMHSA. Complaints and comments will be addressed on a case-by-case basis as needed.

Indirect and Direct Funding

In the Charitable Choice context, the term “direct” funding is used to describe funds that are provided “directly” to a participating organization – i.e., based on the government’s own decision and without any intervening steps -- by a governmental entity or an intermediate organization with the same duties under this part as a governmental entity, as opposed to funds that such an organization receives as the result of the genuine and independent private choice of a beneficiary through a voucher, certificate, coupon or other similar mechanism.

Comment: One commenter wrote that the indirect funding definition opens the door to government-funded worship and proselytization. This commenter asked us to require that all government-funded services be free of religious content. In addition, the commenter thinks that “free and independent choice” is a myth which incorrectly assumes that people in need will be able to shop for services. Social services are not available on a scale that makes “choice” real. This commenter believes people use the most geographically accessible providers.

Response. With respect to indirect funding, we find no basis to require that all government-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, secular 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.

Comment: Several other commenters were concerned that indirect funding mechanisms would not be subject to the requirements of this rule, giving way to government funding of religious activities. One commenter asked for clarification whether a faith-based organization receiving indirect funding from the government could require active participation by a beneficiary in religious activities. Some commenters seemed to be confused as to whether the rules applied to indirect funding.

Response: It is the Department’s position that these regulations apply only to direct

funding and not to indirect funding pursuant to vouchers, certificates or similar funding mechanisms. To the extent that religious organizations receive federal funding indirectly through vouchers, certificates or similar funding mechanisms, the Charitable Choice regulations do not apply.

Comment: One faith-based commenter recommended that beneficiaries be given the opportunity to choose to use indirect funding for the religious services provided to them.

Response: Making this a requirement is beyond the authority of the Charitable Choice statutes.

Vouchers

President Bush announced his “Access to Recovery” program in his State of the Union Address in January 2003. This initiative will provide increased access to services for the Nation’s substance abusers while also expanding the range of treatment providers available. In short, the voucher program will enhance consumer choice and allow recovery to be pursued in an individualized manner.

Comment: We received approximately 15 comments about the voucher program being developed by the Department. Some commenters recommended that requirements from the Zelman case be included in the Charitable Choice regulations. Other commenters discussed their opposition to the government use of vouchers while others felt that vouchers would violate the Establishment Clause. Also, commenters questioned whether the voucher program allowed for a true “genuine and independent choice.”

Response: Neither the NPRM, nor the final rule, create a voucher program. Since these regulations in and of themselves do not create a voucher program, we do not believe these comments are relevant to the regulations at issue. As to the specifics of the voucher program, such details are beyond the scope of this regulation. Furthermore, the Department disagrees with the comments and believes that voucher programs are a viable mechanism for funding services and are constitutionally permissible.

We do not agree with the contentions that vouchers for religiously based services would violate the Establishment Clause, force individuals to attend “pervasively sectarian” institutions, or lack secular purpose, for the following reason: the Supreme Court has upheld the constitutionality of mechanisms of indirect aid, such as vouchers. Therefore, we think that it is reasonable to conclude that neutral, indirect aid to a religious organization does not violate the Establishment Clause.

Applicability of Charitable Choice to the PATH Program

SAMHSA’s program, Projects in Transition from Homelessness (PATH), funds outreach and

some substance abuse services for homeless persons with mental illness. The Department has determined that the Charitable Choice provisions apply to the programs under PATH that provide substance abuse services.

Comment: Several commenters were concerned that the State PATH offices have “no administrative capacity to monitor such reporting of client specific information.” They also commented that, because the reporting burden “doesn’t seem to quite fit with the PATH program, implementing the Charitable Choice regulation for PATH will require development of an entirely new planning and accounting system.”

Response: The Department appreciates these concerns, but is confident that, with sufficient flexibility, States will be able to develop client referral and monitoring systems that will enable PATH grant officials to comply with the regulation.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when rulemaking is necessary, to select regulatory approaches that provide the greatest net benefits (including potential economic, environmental, public health, safety distributive and equity effects). We have determined that the rule is a “significant regulatory action” under Section 3(f) of the Executive Order, and the Office of Management and Budget has therefore reviewed it under that Order.

Paperwork Reduction Act of 1995

This final rule contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA)(44 U.S.C. 3507(d)). The title, description and respondent description of the information collections are shown in the following paragraphs with an estimate of the annual reporting and record keeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Regulations to Implement SAMHSA’s Charitable Choice Statutory Provisions - 42 CFR Parts 54 and 54a

Description: Section 1955 of the Public Health Service Act (42 USC 300x-65), as amended by the Children’s Health Act of 2000 (Pub. L. 106-310), and Sections 581-584 of the Public Health Service Act (42 USC 290kk, et seq.), as added by the Consolidated Appropriations Act (Pub. L. 106-554), set forth various provisions which aim to ensure that religious organizations are able to compete on an equal footing for Federal funds to provide substance abuse services. These provisions allow religious organizations to offer substance abuse services to individuals without impairing the religious character of the organizations or the religious freedom of the individuals who receive the services. The provisions apply to the SAPT Block

Grant, PATH formula grant program, and to certain SAMHSA discretionary grant programs (programs that pay for substance abuse treatment and prevention services, not for certain infrastructure and technical assistance activities). Every effort has been made to assure that the reporting, record keeping and disclosure requirements of the regulations allow maximum flexibility in implementation and impose minimum burden.

Description of Respondents: Not-for-profit institutions; State, Local or Tribal Government

Response burden estimate: This rule includes requirements for disclosure by program participants to program beneficiaries of their rights to receipt of services from an alternative service provider, for notification by program participants to the applicable level of government of referrals made to alternative service providers, and requirements for reporting of activities to comply with these regulations. The rule also requires that a program participant under the SAPT Block Grant and the PATH programs that believes it would be substantially burdened by application of the requirements of 42 U.S.C. 300x-57(a)(2) or 42 U.S.C. 290cc-33(a)(2) must sign a certification to that effect and must maintain documentation to support the certification.

Comment: SAMHSA received three comments related to response burden estimates. One comment noted that States would need to enhance their current data systems to track an individual's choice of providers or referral between providers.

Response: The regulations do not require that States track individuals. They require only that a religious organization that is a program participant refer a beneficiary who objects to the religious character of the organization to an alternative provider and that the program participant notify the State of the referral. Each State or local government may determine its own reporting procedures.

Comment: One State commented that it believes the annual burden estimates are not supported with reliable data.

Response: At the present time, there is no known source of information to quantify precisely the numbers or proportions of program beneficiaries who will request referral to alternative providers. The Department believes that less than one percent, the proportion suggested by the commenter, of program beneficiaries will make such requests.

Comment: A third State commented that the burden of implementation will depend on the number of objections from beneficiaries.

Response: The Department agrees with the State that this is true. However, the Department believes that there will be a minimal number of program beneficiaries who request referral to alternative providers and that the flexibility provided with regard to implementation will minimize information collection burden. Experience in the first several years of implementing the rule will provide an empirical basis for any adjustments of burden estimates associated with the information collection requirements.

Annual Burden Estimates

42 CFR Citation and Purpose	No. of Respondents	Responses per Respondent	Hours per Response	Total Hours
Part 54 - States Receiving SAPT Block Grants and/or Projects for Assistance in Transition from Homelessness Grants				
Reporting				
54.8(c)(4) Program participant notification to responsible unit of government regarding referrals to alternative service providers	40	4	0.33	53
54.8 (e) Annual report by PATH grantees on activities undertaken to comply with 42 CFR Part 54	56	1	2.00	112
Disclosure				
54.8(b) Program participant notice to program beneficiaries of rights to referral to an alternative service provider				
SAPT BG	1,000	275	.05	13,750
PATH	100	170	.05	850
Record keeping				
54.6(b) Documentation must be maintained to demonstrate significant burden for program participants under 42 USC 300x-57 or 42 USC 290cc-33(a)(2)	50	1	1.00	50
PART 54 – SUBTOTAL	1,156	--	--	14,815
Part 54a – States, local governments and religious organizations receiving funding under Title V of the PHS Act for substance abuse prevention and treatment services				
Reporting				
54a.8(c)(1)(iv) Program participant notification to State or local government of a referral to an alternative provider	25	4	.083	8

42 CFR Citation and Purpose	No. of Respondents	Responses per Respondent	Hours per Response	Total Hours
54a(8)(d) Program participant notification to SAMHSA of referrals	20	2	.25	10
Disclosure				
54a.8(b) Program participant notice to program beneficiaries of rights to referral to an alternative service provider	100	275	.05	1,375
PART 54a – SUBTOTAL	100	--	--	1,393
TOTAL	1,256	--	--	16,208

In addition, the regulations for the SAPT Block Grant (45 CFR Part 96) will be amended to include at 45 CFR 92.122(f)(5) a requirement to include as part of the annual report a description of the activities the State has undertaken to comply with 42 CFR Part 54. This reporting burden is estimated as follows:

45 CFR Citation and Purpose	No. of Respondents	Responses per Respondent	Hours per Response	Total Hours
96.122(f)(5) Annual report of activities the State undertook to comply with 42 CFR Part 54	60	1	2	120

The information collection provisions in this final rule have been approved under OMB control number 0930-0242. This approval expires 09/30/2006. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses and other small entities. Small entities are defined in the Act to include small businesses, small non-profit organizations, and small governmental entities. This rule will affect primarily the 50 States, the District of Columbia, and certain Territories. It also does have an impact on potential grantees, some of which are small entities. However, the number of small entities affected and the size of the impact does not require a regulatory flexibility analysis under the requirements of the Act. Therefore, we certify that this rule will not have a significant impact on small entities.

Comment: One commenter noted that the “proposed rules will impact a large number of nonprofit organizations, both faith-based and secular, that wish to partner with government in providing SAMHSA services” and called for SAMHSA to conduct a regulatory flexibility analysis.

Response: While the commenter is accurate in his assertion that nonprofit organizations, some of which would be considered small entities under the Regulatory Flexibility Act definition, will be affected by this rule, the economic impact of this particular rule on small entities will not be significant. The rule simply allows faith-based organizations to compete for a wider range of government funding on an equal footing as other qualified applicants. The economic impact stems from the individual funding opportunities, which are not included in this rule. We have certified that this rule will not have a significant impact on small entities, and therefore a regulatory flexibility analysis is not required.

Executive Order 13132

Executive Order 13132, Federalism, requires that Federal agencies consult with State and local government officials in the development of regulatory policies with Federalism implications. In the NPRM, we specifically solicited comments from State and local government officials.

Comment: Two commenters specifically mentioned that we should have consulted with State and local officials before the issuance of a final rule.

Response: We believe that our solicitation of comments from the public in the NPRM satisfied the consultation requirement of Executive Order 13132. SAMHSA provided a comment period, during which time the agency heard from many State agencies and local providers, and the rules have been drafted in a manner that provides States flexibility.

Dated:

Approved:

Tommy G. Thompson

Secretary of Health and Human Services

For the reasons set forth in the preamble, 42 CFR Chapter I and 45 CFR Subtitle A are amended as follows:

42 CFR Chapter I

1. Part 54 is added to read as follows:

PART 54 CHARITABLE CHOICE REGULATIONS APPLICABLE TO STATES
RECEIVING SUBSTANCE ABUSE PREVENTION AND TREATMENT BLOCK
GRANTS AND/OR PROJECTS FOR ASSISTANCE IN TRANSITION FROM
HOMELESSNESS GRANTS

Sec.

54.1 Scope.

54.2 Definitions.

54.3 Nondiscrimination against religious organizations.

54.4 Religious activities.

54.5 Religious character and independence.

54.6 Employment practices.

54.7 Nondiscrimination requirement.

54.8 Right to services from an alternative provider.

54.9 Assurances and State oversight of SAMHSA Charitable Choice requirements.

54.10 Fiscal accountability.

54.11 Effect on State and local funds.

54.12 Treatment of intermediate organizations.

54.13 Educational requirements for personnel in drug treatment programs.

AUTHORITY: 42 U.S.C. 300x-65, et seq., 42 U.S.C. 290kk, et seq., 42 U.S.C. 300x-21, et seq., 42 U.S.C. 290cc-21, et seq., and 42 U.S.C. 2000bb, et seq.

§54.1 Scope.

These provisions apply only to funds provided directly to pay for substance abuse prevention and treatment services under 42 U.S.C. 300x-21 et seq., and 42 U.S.C. 290cc-21 to 290cc-35. This part does not apply to direct funding under any such authorities for activities that do not involve the provision of substance abuse services, such as for infrastructure activities authorized under Section 1971 of the PHS Act, 42 U.S.C. 300y, and for technical assistance activities. This part implements the SAMHSA Charitable Choice provisions, 42 U.S.C. 300x-65 and 42 U.S.C. 290kk, et seq.

§54.2 Definitions.

Applicable program means the programs authorized under:

- (1) The Substance Abuse Prevention and Treatment (SAPT) Block Grant, 42 U.S.C. 300x to 300x-66, and
- (2) The Projects for Assistance in Transition from Homelessness (PATH) Formula Grants, 42 U.S.C. 290cc-21 to 290cc-35 insofar as they fund substance abuse prevention and/or treatment services.

Religious organization means a nonprofit religious organization.

Program beneficiary means an individual who receives substance abuse services under a program funded in whole or in part by applicable programs.

Program participant means a public or private entity that has received financial assistance, under an applicable program.

SAMHSA means the U.S. Substance Abuse and Mental Health Services Administration.

SAMHSA Charitable Choice provisions means the provisions of 42 U.S.C. 300x-65 and 42 U.S.C. 290kk, et seq..

Direct funding or Funds provided directly means funding that is provided to an organization directly by a governmental entity or intermediate organization that has the same duties under this part as a governmental entity, as opposed to funding that an organization receives as the result of the genuine and independent private choice of a beneficiary through a voucher, certificate, coupon, or other similar mechanism.

§54.3 Nondiscrimination against religious organizations.

(a) Religious organizations are eligible, on the same basis as any other organization, to participate in applicable programs, as long as their services are provided consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution. Except as provided herein or in the SAMHSA Charitable Choice provisions, nothing in these regulations shall restrict the ability of the Federal government, or a State or local government, from applying to religious organizations the same eligibility conditions in applicable programs as are applied to any other nonprofit private organization.

(b) Neither the Federal government nor a State or local government receiving funds under these programs shall discriminate against an organization that is, or applies to be, a program

participant on the basis of religion or the organization's religious character or affiliation.

§54.4 Religious Activities.

No funds provided directly from SAMHSA or the relevant State or local government to organizations participating in applicable programs may be expended for inherently religious activities, such as worship, religious instruction, or proselytization. If an organization conducts such activities, it must offer them separately, in time or location, from the programs or services for which it receives funds directly from SAMHSA or the relevant State or local government under any applicable program, and participation must be voluntary for the program beneficiaries.

§54.5 Religious Character and Independence.

A religious organization that participates in an applicable program will retain its independence from Federal, State, and local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs. The organization may not expend funds that it receives directly from SAMHSA or the relevant State or local government to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide services supported by applicable programs, without removing religious art, icons, scriptures, or other symbols. In addition, a SAMHSA-funded religious organization retains the authority over its internal governance, and it 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.

§54.6 Employment Practices.

(a) The participation of a religious organization in, or its receipt of funds from, an applicable program does not affect that organization's exemption provided under 42 U.S.C. 2000e-1 regarding employment practices.

(b) To the extent that 42 U.S.C. 300x-57(a)(2) or 42 U.S.C. 290cc-33(a)(2) precludes a program participant from employing individuals of a particular religion to perform work connected with the carrying on of its activities, those provisions do not apply if such program participant is a religious corporation, association, educational institution, or society and can demonstrate that its religious exercise would be substantially burdened by application of these religious nondiscrimination requirements to its employment practices in the program or activity at issue. In order to make this demonstration, the program participant must certify: that it sincerely believes that employing individuals of a particular religion is important to the definition and maintenance of its religious identity, autonomy, and/or communal religious exercise; that it makes employment decisions on a religious basis in analogous programs; that the grant would materially affect its ability to provide the type of services in question; and that providing the services in question is expressive of its values or mission. The organization must maintain documentation to support these determinations and must make such documentation available to SAMHSA upon request.

(c) Nothing in this section shall be construed to modify or affect any State law or regulation

that relates to discrimination in employment.

(d) The phrases “with respect to the employment,” “individuals of a particular religion,” and “religious corporation, association, educational institution, or society” shall have the same meaning as those terms have under Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a).

§54.7 Nondiscrimination requirement.

A religious organization that is a program participant shall not, in providing program services or engaging in outreach activities under applicable programs, discriminate against a program beneficiary or prospective program beneficiary 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.

§54.8 Right to services from an alternative provider.

(a) **General requirements.** If an otherwise eligible program beneficiary or prospective program beneficiary objects to the religious character of a program participant, within a reasonable period of time after the date of such objection, such program beneficiary shall have rights to notice, referral, and alternative services, as outlined in subsections 54.8(b)-(d) below.

(b) **Notice.** Program participants that refer an individual to alternative service providers, and the State government that administers the applicable programs, shall ensure that notice of the individual’s right to services from an alternative provider is provided to all program beneficiaries or prospective beneficiaries. The notice must clearly articulate the program beneficiary’s right to

a referral and to services that reasonably meet the requirements of timeliness, capacity, accessibility, and equivalency as discussed in this section. A model notice is set out in Appendix A to Part 54a.

(c) Referral to an Alternative Provider. If a program beneficiary or prospective program beneficiary objects to the religious character of a program participant that is a religious organization, that participating religious organization shall, within a reasonable time after the date of such objection, refer such individual to an alternative provider. The State shall have a system in place to ensure that referrals are made to an alternative provider. That system shall ensure that the following occurs:

(1) the religious organization that is a program participant shall, within a reasonable time after the date of such objection, refer the beneficiary to an alternative provider;

(2) in making such referral, the program participant shall consider any list that the State or local government makes available to entities in the geographic area that provide program services, which may include utilizing any treatment locator system developed by SAMHSA;

(3) all referrals shall be made in a manner consistent with all applicable confidentiality laws, including, but not limited to, 42 CFR Part 2 (“Confidentiality of Alcohol and Drug Abuse Patient Records”);

(4) upon referring a program beneficiary to an alternative provider, the program participant shall notify the State or responsible unit of government of such referral; and

(5) the program participant shall ensure that the program beneficiary makes contact with the alternative provider to which he or she is referred.

(d) Provision and Funding of Alternative Services. If an otherwise eligible applicant or

recipient objects to the religious character of a SAMHSA-funded service provider, the recipient is entitled to receive services from an alternative provider. In such cases, the State or local agency must provide the individual with alternative services within a reasonable period of time, as defined by the State agency. That alternative provider must be reasonably accessible and have the capacity to provide comparable services to the individual. Such services shall have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection, as defined by the State agency. The alternative provider need not be a secular organization. It must simply be a provider to which the recipient has no religious objection. States may define and apply the terms "reasonably accessible," "a reasonable period of time," "comparable," "capacity," and "value that is not less than." The appropriate State or local governments that administer SAMHSA-funded programs shall ensure that notice of their right to alternative services is provided to applicants or recipients. The notice must clearly articulate the recipient's right to a referral and to services that reasonably meet the timeliness, capacity, accessibility, and equivalency requirements discussed above.

(e) **PATH Annual Report.** As part of the annual report to SAMHSA, PATH grantees shall include a description of the activities the grantee has taken to comply with 42 C.F.R. Part 54.

§54.9 Assurances and State Oversight of the Charitable Choice Requirements.

In order to ensure that States receiving grant funding under the SAPT block grant and PATH formula grant programs comply with the SAMHSA Charitable Choice provisions and provide oversight of religious organizations that provide substance abuse services under such programs, States are required as part of their applications for funding to certify that they will comply with

all of the requirements of such provisions and the implementing regulations under this part, and that they will provide such oversight of religious organizations.

§54.10 Fiscal Accountability.

(a) Religious organizations that receive applicable program funds for substance abuse services are subject to the same regulations as other nongovernmental organizations to account, in accordance with generally accepted auditing and accounting principles, for the use of such funds.

(b) Religious organizations shall segregate Federal funds they receive under an applicable program into a separate account from non-Federal funds. Only the Federal funds shall be subject to audit by government under the SAMHSA program.

§54.11 Effects on State and Local Funds.

If a State or local government contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the provisions of this part shall apply to all of the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds.

§54.12 Treatment of Intermediate Organizations.

If a nongovernmental 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 nongovernmental organizations to provide services under any applicable program, the intermediate organization shall have the same duties under this part as the government. The intermediate organization retains all other rights of a nongovernmental organization under this part and the SAMHSA Charitable Choice provisions.

§54.13 Educational Requirements for Personnel in Drug Treatment Programs.

In determining whether personnel of a program participant that has a record of successful drug treatment for the preceding three years have satisfied State or local requirements for education and training, a State or local government shall not discriminate against education and training provided to such personnel by a religious organization, so long as such education and training is comparable to that provided by nonreligious organizations, or is comparable to education and training that the State or local government would otherwise credit for purposes of determining whether the relevant requirements have been satisfied.

2. Add a new Part 54a to read as follows:

PART 54a CHARITABLE CHOICE REGULATIONS APPLICABLE TO STATES,
LOCAL GOVERNMENTS AND RELIGIOUS ORGANIZATIONS RECEIVING
DISCRETIONARY FUNDING UNDER TITLE V OF THE PUBLIC HEALTH SERVICE
ACT, 42 U.S.C. 290aa, ET SEQ., FOR SUBSTANCE ABUSE PREVENTION AND
TREATMENT SERVICES

Sec.

54a.1 Scope.

54a.2 Definitions.

54a.3 Nondiscrimination against religious organizations.

54a.4 Religious activities.

54a.5 Religious character and independence.

54a.6 Employment practices.

54a.7 Nondiscrimination requirement.

54a.8 Right to services from alternative provider.

54a.9 Oversight of Charitable Choice requirements.

54a.10 Fiscal accountability.

54a.11 Effect on State and local funds.

54a.12 Treatment of intermediate organizations.

54a.13 Educational requirements for personnel in drug treatment programs.

54a.14 Determination of nonprofit status.

Appendix to Part 54a – Model notice to individuals receiving substance abuse services.

AUTHORITY: 42 U.S.C. 300x-65, and 42 U.S.C. 290kk, et seq., 42 U.S.C. 290aa, et seq.

§54a.1 Scope.

These provisions apply only to funds provided directly to pay for substance abuse prevention and treatment services under Title V of the Public Health Service Act, 42 U.S.C. 290aa, et seq., which are administered by the Substance Abuse and Mental Health Services Administration. This part does not apply to direct funding under any such authorities for only mental health services or for certain infrastructure and technical assistance activities, such as cooperative agreements for technical assistance centers, that do not provide substance abuse services to clients. This part implements the provisions of 42 U.S.C. 300x-65 and 42 U.S.C. 290kk, et seq.

§54a.2 Definitions.

Applicable program means the programs authorized under Title V of the PHS Act, 42 U.S.C. 290aa, et seq., for the provision of substance abuse prevention and or treatment services.

Religious organization means a nonprofit religious organization.

Program beneficiary means an individual who receives substance abuse services under a program funded in whole or in part by applicable programs.

Program participant means a public or private entity that has received financial assistance under an applicable program.

SAMHSA means the Substance Abuse and Mental Health Services Administration.

SAMHSA Charitable Choice provisions means the provisions of 42 U.S.C. 300x-65 and 42 U.S.C. 290kk, et seq.

Direct funding or Funds provided directly means funding that is provided to an organization

directly by a governmental entity or intermediate organization that has the same duties under this part as a governmental entity, as opposed to funding that an organization receives as the result of the genuine and independent private choice of a beneficiary through a voucher, certificate, coupon, or other similar mechanism.

§54a.3 Nondiscrimination against religious organizations.

(a) Religious organizations are eligible, on the same basis as any other organization, to participate in applicable programs as long as their services are provided consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution. Except as provided herein or in the SAMHSA Charitable Choice provisions, nothing in these regulations shall restrict the ability of the Federal government, or a State or local government, from applying to religious organizations the same eligibility conditions in applicable programs as are applied to any other nonprofit private organization.

(b) Neither the Federal government nor a State or local government receiving funds under these programs shall discriminate against an organization that is, or applies to be, a program participant on the basis of the organization's religious character or affiliation.

§54a.4 Religious Activities.

No funds provided directly from SAMHSA or the relevant State or local government to organizations participating in applicable programs may be expended for inherently religious activities, such as worship, religious instruction, or proselytization. If an organization conducts such activities, it must offer them separately, in time or location, from the programs or services

for which it receives funds directly from SAMHSA or the relevant State or local government under any applicable program, and participation must be voluntary for the program beneficiaries.

§54a.5 Religious Character and Independence.

A religious organization that participates in an applicable program will retain its independence from Federal, State, and local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs. The organization may not expend funds that it receives directly from SAMHSA or the relevant State or local government to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide services supported by applicable programs, without removing religious art, icons, scriptures, or other symbols. In addition, a SAMHSA-funded religious organization retains the authority over its internal governance, and it 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.

§54a.6 Employment Practices

(a) The participation of a religious organization in or its receipt of funds from an applicable program does not affect that organization's exemption provided under 42 U.S.C. 2000e-1 regarding employment practices.

(b) Nothing in this section shall be construed to modify or affect any State law or regulation that relates to discrimination in employment.

§54a.7 Nondiscrimination requirement

A religious organization that is a program participant shall not, in providing program services or engaging in outreach activities under applicable programs, discriminate against a program beneficiary or prospective program 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.

§54a.8 Right to services from an alternative provider.

(a) General requirements. If an otherwise eligible program beneficiary or prospective program beneficiary objects to the religious character of a program participant, within a reasonable period of time after the date of such objection, such program beneficiary shall have rights to notice, referral, and alternative services, as outlined in subsections 54.8a(b)-(d) below.

With respect to SAMHSA discretionary programs, for purposes of determining what is the appropriate Federal, State, or local government, the following principle shall apply: When SAMHSA provides funding directly to another unit of government, such as a State or local government, that unit of government is responsible for providing the alternative services. When SAMHSA provides discretionary grant funding directly to a nongovernmental organization, SAMHSA is the responsible unit of government.

(b) Notice. Program participants that refer an individual to alternative providers, and the appropriate Federal, State, or local governments that administer the applicable programs,

shall ensure that notice of the individual's rights to services from an alternative provider is provided to all program beneficiaries or prospective beneficiaries. The notice must clearly articulate the program beneficiary's right to a referral and to services that reasonably meet the requirements of timeliness, capacity, accessibility, and equivalency as discussed in this section. A model notice is set out in Appendix A to this part.

(c) **Referral to Services from an Alternative Provider.** If a program beneficiary or a prospective program beneficiary objects to the religious character of a program participant that is a religious organization, that participating religious organization shall, within a reasonable time after the date of such objection, refer such individual to an alternative provider.

(1) When the State or local government is the responsible unit of government, the State shall have a system in place to ensure that such referrals are made. That system shall ensure that the following occurs:

(i) The religious organization that is a program participant shall, within a reasonable time after the date of such objection, refer the beneficiary to an alternative provider;

(ii) in making such referral, the religious organization shall consider any list that the State or local government makes available to entities in the geographic area that provide program services, which may include utilizing any treatment locator system developed by SAMHSA;

(iii) all referrals are to be made in a manner consistent with all applicable confidentiality laws, including, but not limited to, 42 C.F.R. Part 2 ("Confidentiality of Alcohol and Drug Abuse Patient Records");

(iv) upon referring a program beneficiary to an alternative provider, the religious organization shall notify the responsible unit of government of such referral; and

(v) the religious organization shall ensure that the program beneficiary makes contact with the alternative provider to which he or she is referred.

(2) When SAMHSA is the responsible unit of government, the referral process is as follows:

(i) When a program beneficiary requests alternative services, the religious organization will seek to make such a referral.

(ii) If the religious organization cannot locate an appropriate provider of alternative services, the religious organization will contact SAMHSA. They will work together to identify additional alternative providers, utilizing the SAMHSA Treatment Locator system, if appropriate.

(iii) The religious organization will contact these alternative providers and seek to make the referral, in a manner consistent with all applicable confidentiality laws, including, but not limited to, 42 C.F.R. Part 2 (“Confidentiality of Alcohol and Drug Abuse Patient Records”).

(iv) In the event the religious organization is still unable to locate an alternative provider, it may again contact SAMHSA for assistance.

(d) Referral Reporting Procedures. The program participant shall notify the appropriate Federal, State or local government agency that administers the program of such referral. If a State or local government is the responsible unit of government, it may determine its own reporting procedures. When SAMHSA is the responsible unit of government, this notification

will occur during the course of the regular reports that may be required under the terms of the funding award.

(e) Provision and Funding of Alternative Services. The responsible unit of government, as defined in paragraph (a), of this section, shall provide to an otherwise eligible program beneficiary or prospective program beneficiary who objects to the religious character of a program participant, services and fund services from an alternative provider that is reasonably accessible to, and has the capacity to provide such services to the individual. Such services shall have a value that is not less than the value of the services that the individual would have received from the program participant to which the individual had such objection. The appropriate State or local governments that administer SAMHSA-funded programs shall ensure that notice of their right to alternative services is provided to applicants or recipients. The alternative provider need not be a secular organization. It must simply be a provider to which the program beneficiary has no religious objection.

(1) When the State receives a discretionary grant from SAMHSA, it shall utilize its own implementation procedures for these provisions and shall use funds from the SAMHSA discretionary grant to finance such alternative services, as needed;

(2) When the local government receives a discretionary grant from SAMHSA, it shall utilize State implementation procedures for these provisions and shall use funds from the SAMHSA discretionary grant to finance such alternative services, as needed;

(3) When a religious organization receives a discretionary grant from SAMHSA, if a publicly funded alternative provider is available that is reasonably accessible and can provide equivalent services, the religious organization shall refer the beneficiary to that provider.

However, if such a provider is not available, the religious organization shall contract with an alternative provider to provide such services and may finance such services with funds from the SAMHSA discretionary grant.

§54a.9 Oversight of the Charitable Choice Requirements.

In order to ensure that program funds are used in compliance with the SAMHSA Charitable Choice provisions, applicants for funds under applicable programs are required, as part of their applications for funding, to certify that they will comply with all of the requirements of the SAMHSA Charitable Choice provisions and the implementing regulations under this part.

§54a.10 Fiscal Accountability.

(a) Religious organizations that receive applicable program funds for substance abuse services are subject to the same regulations as other nongovernmental organizations to account, in accordance with generally accepted auditing and accounting principles, for the use of such funds.

(b) Religious organizations shall segregate Federal funds they receive under applicable programs into a separate account from non-Federal funds. Only the Federal funds shall be subject to audit by the government under the SAMHSA program.

§54a.11 Effect on State and Local Funds.

If a State or local government contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the

Federal funds or commingle them. If the funds are commingled, the provisions of this part shall apply to all of the commingled funds, in the same manner, and to the same extent, as the provisions apply to the Federal funds.

§54a.12 Treatment of Intermediate Organizations.

If a nongovernmental 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 nongovernmental organizations to provide services under any applicable program, the intermediate organization shall have the same duties under this part as the government. The intermediate organization retains all other rights of a nongovernmental organization under this part and the SAMHSA Charitable Choice provisions.

§54a.13 Educational Requirements for Personnel in Drug Treatment Programs.

In determining whether personnel of a program participant that has a record of successful drug treatment for the preceding three years have satisfied State or local requirements for education and training, a State or local government shall not discriminate against education and training provided to such personnel by a religious organization, so long as such education and training is comparable to that provided by nonreligious organizations, or is comparable to education and training that the State or local government would otherwise credit for purposes of determining whether the relevant requirements have been satisfied.

§54a.14 Determination of Nonprofit Status.

The nonprofit status of any SAMHSA applicant can be determined by any of the following:

- (a) Reference to the organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in section 501(c)(3) of the IRS code.
- (b) A copy of a currently valid IRS Tax exemption certificate.
- (c) A statement from a State taxing body, State Attorney General, or other appropriate State official certifying that the applicant organization has a nonprofit status and that none of its net earnings accrue to any private shareholder or individuals.
- (d) A certified copy of the organization's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the organization.
- (e) Any of the above proof for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local nonprofit affiliate.

Appendix – to Part 54a -Model Notice of Individuals Receiving Substance Abuse Services

**MODEL NOTICE TO INDIVIDUALS RECEIVING
SUBSTANCE ABUSE SERVICES**

No provider of substance abuse services receiving Federal funds from the U.S. Substance Abuse and Mental Health Services Administration, including this organization, may discriminate against you 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.

If you object to the religious character of this organization, Federal law gives you the right to a referral to another provider of substance abuse services. The referral, and your receipt of alternative services, must occur within a reasonable period of time after you request them. The alternative provider must be accessible to you and have the capacity to provide substance abuse services. The services provided to you by the alternative provider must be of a value not less than the value of the services you would have received from this organization.

45 CFR Subtitle A

Part 96 [Amended]

1. The authority for Part 96 continues to read as follows:

Authority: 31 U.S.C. 1243 note, 7501-7507; 42 U.S.C. 300w et seq., 300x et seq., 300y et seq., 701 et seq., 8621 et seq., 9901 et seq., 1397 et seq.

2. Amend §96.122(f)(5) by adding paragraph (f)(5)(v) to read as follows:

§96.122 Application content and procedures.

(f) ***

(5) ***

(v) A description of the activities the State has undertaken to comply with 42 CFR Part 54.

3. Amend §96.123(a) by adding paragraph (a)(18) to read as follows:

§96.123 Assurances.

(a) ***

(18) The State will comply with the requirements of 42 CFR 54.