DEPARTMENT OF EDUCATION

34 CFR Parts 74, 75, 76, and 80

RIN 1890–AA11

Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants

AGENCY: Center for Faith-Based and Community Initiatives, Office of the Secretary, U.S. Department of Education.

ACTION: Final regulations.

SUMMARY: These final regulations implement Executive branch policy that, within the framework of constitutional church-state guidelines, religiously affiliated (or ''faith-based'') organizations should be able to compete on an equal footing with other organizations for funding by the U.S. Department of Education (Department). We are revising Department regulations to remove barriers to the participation of faith-based organizations in Department programs and to ensure that these programs are implemented in a manner consistent with the requirements of the U.S. Constitution, including the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment.

DATES: These regulations are effective July 6, 2004.

FOR FURTHER INFORMATION CONTACT: John J. Porter, Director, Center for Faith-Based and Community Initiatives, Office of the Secretary, U.S. Department of Education, 555 New Jersey Avenue, NW., Suite 410, Washington, DC 20208–8300. Telephone: (202) 219–1741.

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SUPPLEMENTARY INFORMATION:

Background

Faith-based organizations make an important contribution to the education of Americans and provide an important part of the social services network of the United States. Faith-based organizations acting alone or in partnership with public schools, community-based organizations, institutions of higher education, and other private organizations do much good work to advance the quality of education for all Americans. Often this good work of faith-based organizations is done despite meager resources, and, in the past, it has generally been done without the assistance of the Federal government. The Department seeks to facilitate the contribution of faith-based and community organizations to increase the effectiveness of its programs and to provide equal access to a quality education for all Americans.

President Bush has directed Federal agencies, including this Department, to take steps to ensure that Federal policies and programs are fully open to faith-based organizations in a manner that is consistent with the U.S. Constitution and statutory requirements. The Administration believes that faith-based organizations possess an under-appreciated ability to meet the educational needs of disadvantaged children and to strengthen our system of education. The Administration believes that Federal agencies should ensure that there is equal opportunity for all private organizations—faith-based and secular—to use Federal resources to meet the needs of their communities.

On September 30, 2003, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (68 FR 56417) to amend Department regulations that imposed unwarranted barriers to the participation of faith-based organizations in Department programs. The proposed regulations were part of the Department's effort to fulfill its responsibilities under two Executive Orders issued by President Bush.

Executive Order 13198, dated January 29, 2001, directs several Departments to identify and eliminate regulatory and other programmatic obstacles to the full contribution of faith-based and community organizations in order to increase the effectiveness of their programs.

Executive Order 13279, dated December 12, 2002, directs those Departments to review and evaluate existing policies that have implications for faith-based and community organizations. The stated purpose of the review and evaluation is to assess the consistency of those policies with certain fundamental principles and policymaking criteria designed to ensure a level playing field for religious and nonreligious organizations. The order directs the Departments, to the extent permitted by law, (1) to amend all such existing policies to ensure that they are consistent with the fundamental principles and policymaking criteria; (2) where appropriate, to implement new policies that are consistent with and necessary to further the fundamental principles and policymaking criteria; and (3) to implement new policies that are necessary to ensure that the Departments collect data regarding the participation of faith-based and community organizations in social service programs that receive Federal financial assistance.

The NPRM proposed the following changes to the Department's regulations:

1. *Participation by faith-based organizations in Education Department programs.* The proposed regulations specifically provided that faith-based organizations are eligible to apply for and to receive funding under Department programs on the same basis as any other private organization, with respect to programs for which such other organizations are eligible. If a faith-based organization meets the statutory and regulatory tests for eligibility, the Department considers it eligible. The proposed regulations additionally provided that the Department and the States shall not discriminate against a private organization on the basis of the organization's religious character or affiliation.

2. *Inherently religious activities.* The NPRM sought to clarify that a faith-based organization that receives a grant under a program of the Department or a subgrant from a State under a State-administered program of the Department is subject to the existing regulatory provisions that prohibit grantees and States and subgrantees from using their grants and subgrants to pay for inherently religious activities, such as religious worship, instruction, or proselytization. In addition, the NPRM sought to clarify that such an organization is subject to the existing regulatory provisions that prohibit grantees and States and subgrantees from using their grants and subgrants to pay for equipment or supplies used for religious worship, instruction, or proselytization. If an organization engages in these religious activities, then it must offer those services separately in time or location from any programs or services supported by grants from the Department or subgrants from a State under a State-administered program of the Department. Additionally, participation in any inherently religious activities by beneficiaries of the programs supported by the grants or subgrants must be voluntary.

3. *Independence of faith-based organizations.* The proposed regulations also clarified that a religious organization that participated in Department programs would retain its

independence and could continue to carry out its mission, including the definition, practice, and expression of its religious beliefs. Among other things, a faith-based organization could use space in its facilities to provide Department-funded services without removing religious art, icons, scriptures, or other religious symbols. In addition, a Department-funded religious organization could retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. *Nondiscrimination in providing assistance.* The NPRM provided that an organization that received a grant from the Department or that received a subgrant from a State under a State-administered program of the Department would not be allowed to discriminate against a beneficiary or prospective beneficiary of that program on the basis of religion or religious belief.

5. *Removal of prohibition on use of grants and subgrants to pay for an activity of a school or department of divinity.* The proposed regulations clarified that the most qualified applicants will receive funding under the Department's programs, and that the religious character or affiliation of the private organizations that apply will not be taken into account. For that reason, we proposed to remove the regulation prohibiting grantees and subgrantees from using their grants and subgrants to pay for an activity of a school or department of divinity.

6. *Technical amendment relating to the prohibition on use of grants to pay for equipment or supplies to be used for religious worship, instruction, or proselytization.* In the NPRM, we proposed a technical amendment to the Department's regulations, clarifying that grantees cannot use their grants to pay for equipment or supplies used for religious worship, instruction, or proselytization.

7. *Removal of prohibition on use of grants and subgrants to pay for construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for religious worship, instruction, or proselytization.* We proposed to remove §§ 75.532(a)(3) and 76.532(a)(3), which prohibit the use of Department funds to pay for construction, remodeling, repair, operation, or maintenance of any private educational facility (or part of a private educational facility). This regulation is not necessary because there is no statutory authority for this use of Department funds. Accordingly, the Department has no programs that fund such capital improvements.

8. *Eligibility of faith-based organizations to contract with or otherwise receive assistance from grantees and subgrantees, including States, on the same basis as other private organizations, with respect to contracts or assistance for which such organizations are eligible.* The NPRM proposed to clarify that faith-based organizations are eligible to contract with or otherwise receive assistance from grantees and subgrantees, including States, on the same basis as other private organizations, with respect to contracts or assistance for which such organizations are eligible. These faith-based organizations are subject to the same limitations to which grantees and subgrantees are subject regarding the use of funds for inherently religious activities, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

These final regulations contain several significant changes from the NPRM. We fully explain these changes in the appendix at the end of these final regulations.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 12 parties submitted a total of 14 comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix at the end of these final regulations.

We group major issues according to subject. Generally, we do not address technical and other minor changes.

Executive Order 12866—Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this final rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that the rule is a ''significant regulatory action,'' as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This final rule does not impose any Federal mandates on any State, local, or tribal governments, or the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132—Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule and in so doing certifies that the rule will not have a significant economic impact on a substantial number of small entities. The final rule will not impose any new costs, or modify existing costs, applicable to Department grantees and subgrantees. Rather, the purpose of the rule is to remove policy prohibitions that currently restrict the equal participation of religious or religiously affiliated organizations (large and small) in the Department's programs.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Intergovernmental Review

These final regulations affect direct grant programs that are subject to Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster an intergovernmental partnership and to promote federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, we intend this document to provide early notification of our specific plans and actions for these programs.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the

United States gathers or makes available.

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List of Subjects

34 CFR Part 74

Accounting, Grant programs, Reporting and recordkeeping requirements.

34 CFR Part 75

Accounting, Administrative practice and procedure, Education, Grant programs-education, Private schools, Reporting and recordkeeping requirements.

34 CFR Part 76

Administrative practice and procedure, Compliance, Eligibility, Grant administration, Reporting and recordkeeping requirements.

34 CFR Part 80

Accounting, Grant programs, Reporting and recordkeeping requirements.

Dated: May 28, 2004.

Rod Paige,

Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends parts 74, 75, 76, and 80 of title 34 of the Code of Federal Regulations as follows:

PART 74—ADMINISTRATION OF GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

■ 1. The authority citation for part 74 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474; OMB Circular A–110, unless otherwise noted.

■ 2. Section 74.44 is amended by adding new paragraph (f) to read as follows:

§ 74.44 Procurement procedures.

* * * * *

(f)(1)(i) A faith-based organization is eligible to contract with recipients on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible.

(ii) In the selection of goods and services providers, recipients shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(2) The provisions of §§ 75.532 and 76.532 applicable to grantees and subgrantees apply to a faith-based organization that contracts with a recipient, unless the faith-based organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(3) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a contract with a recipient, and participation in any such inherently religious activities by beneficiaries of the programs supported by the contract must be voluntary, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(4)(i) A faith-based organization that contracts with a recipient may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(ii) A faith-based organization may, among other things—

(A) Retain religious terms in its name;

(B) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(C) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(D) Select its board members and otherwise govern itself on a religious basis; and

(E) Include religious references in its mission statement and other chartering or governing documents.

(5) A private organization that contracts with a recipient shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(6) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization contracts with a recipient.

PART 75—DIRECT GRANT PROGRAMS

■ 3. The authority citation for part 75 continues to read as follows:

Authority: 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

■ 4. Add § 75.52 to subpart A under the undesignated center heading ''Eligibility for a Grant'' to read as follows:

§ 75.52 Eligibility of faith-based organizations for a grant.

(a)(1) A faith-based organization is eligible to apply for and to receive a grant under a program of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible.

(2) In the selection of grantees, the Department shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(b) The provisions of § 75.532 apply to a faith-based organization that receives a grant under a program of the Department.

(c) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a grant from the Department, and participation in any such inherently religious activities by beneficiaries of the programs supported by the grant must be voluntary.

(d)(1) A faith-based organization that applies for or receives a grant under a program of the Department may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(2) A faith-based organization may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and otherwise govern itself on a religious basis; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) A private organization that receives a grant under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(f) If a grantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the grantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives financial assistance from the Department.

(Authority: 20 U.S.C. 1221e–3 and 3474)

■ 5. In § 75.532, revise paragraph (a)(2), remove paragraphs (a)(3) and (4), and remove and reserve paragraph (b) to read as follows:

§ 75.532 Use of funds for religion prohibited.

(a) * * *

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(b) [Reserved.]

PART 76—STATE-ADMINISTERED PROGRAMS

■ 6. The authority citation for part 76 continues to read as follows:

Authority: 20 U.S.C. 1221e-3, 3474, 6511(a), and 8065a, unless otherwise noted.

■ 7. Add § 76.52 to subpart A under the undesignated center heading ''Eligibility for a Grant or Subgrant'' to read as follows:

§ 76.52 Eligibility of faith-based organizations for a subgrant.

(a)(1) A faith-based organization is eligible to apply for and to receive a subgrant under a program of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible.

(2) In the selection of subgrantees, States shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(b) The provisions of § 76.532 apply to a faith-based organization that receives a subgrant from a State under a State-administered program of the Department.

(c) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a subgrant from a State under a State-administered program of the Department, and participation in any such inherently religious activities by beneficiaries of the programs supported by the subgrant must be voluntary.

(d)(1) A faith-based organization that applies for or receives a subgrant from a State under a State-administered program of the Department may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(2) A faith-based organization may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and otherwise govern itself on a religious basis; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) A private organization that receives a subgrant from a State under a State-administered program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(f) If a State or subgrantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement Federally funded activities, the State or subgrantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives financial assistance from the Department.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

§ 76.532 [Amended]

■ 8. Section 76.532 is amended by removing paragraphs (a)(3) and (a)(4); and removing and reserving paragraph (b).

PART 80—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

■ 9. The authority citation for part 80 is revised to read as follows:

Authority: 20 U.S.C. 1221e–3(a)(1) and 3474, OMB Circular A–102, unless otherwise noted.

■ 10. Section 80.36 is amended by adding new paragraph (j) to read as follows:

§ 80.36 Procurement.

* * * * *

(j) *Contracting with faith-based organizations.* (1)(i) A faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible.

(ii) In the selection of goods and services providers, grantees and subgrantees, including States, shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(2) The provisions of §§ 75.532 and 76.532 applicable to grantees and subgrantees apply to a faith-based organization that contracts with a grantee or subgrantee, including a State, unless the faith-based organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(3) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a contract with a grantee or subgrantee, including a State, and participation in any such inherently religious activities by beneficiaries of

the programs supported by the contract must be voluntary, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(4)(i) A faith-based organization that contracts with a grantee or subgrantee, including a State, may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(ii) A faith-based organization may, among other things—

(A) Retain religious terms in its name;

(B) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(C) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(D) Select its board members and otherwise govern itself on a religious basis; and

(E) Include religious references in its mission statement and other chartering or governing documents.

(5) A private organization that contracts with a grantee or subgrantee, including a State, shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(6) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization contracts with a grantee or subgrantee.

Appendix—Analysis of Comments and Changes

Note: The following appendix will not appear in the Code of Federal Regulations.

Participation by Faith-Based Organizations in Education Department Programs

Comments: Several commenters expressed appreciation and support for the Department's efforts to clarify the regulations governing participation of faith-based organizations in its programs. Other commenters disagreed with the proposed regulations, asserting that they would allow Federal funds to be given to ''pervasively sectarian'' organizations in violation of the U.S. Constitution. These commenters maintained that the regulation places no limitations on the kinds of religious organizations that can receive funds, and they requested that ''pervasively sectarian'' organizations be barred from receiving Department funds. Similarly, other commenters suggested that the proposed regulation improperly allows grants of public funds to religious organizations in which religious missions overpower secular functions.

Discussion: We do not agree that the U.S. Constitution requires the Department to distinguish between different religious organizations in providing funding for Department programs. Organizations that receive direct Department funds may not use these funds for inherently religious activities. These organizations must ensure that such religious activities are separate in time or location from services funded by the Department and must also ensure that participation in such religious activities is voluntary. Furthermore, program participants that violate these requirements will be subject to applicable sanctions and penalties. The regulations thus ensure, as required by current legal precedent, that there is no government funding of inherently religious activities.

In addition, 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, joined by Justice Breyer, set forth reasoning that is inconsistent with that doctrine's underlying premises, *see id.* at 857 (O'Connor, J., concurring in judgment) (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 religious institutions will invariably advance the institutions' religious purposes, and that view is the foundation of the ''pervasively sectarian'' doctrine. The Department therefore believes that, under current legal precedent, the Department may fund all service providers, without regard to religion and free of criteria that require the provider to abandon its religious expression or character.

To clarify that the final rule bars not only discrimination against, but favoritism of, faith-based organizations, we have modified it to expressly prohibit discrimination against, and favoritism of, faith-based providers in the selection of grantees, subgrantees, and goods and services providers. However, nothing in the regulation precludes those administering Department-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause of the First Amendment to the U.S. Constitution.

Changes: Sections 74.44(f)(1)(ii), 75.52(a)(2), 76.52(a)(2), and 80.36(j)(ii) are revised to reflect that a private organization shall not be subjected to discrimination, either in its favor or to its detriment, on the basis of the organization's religious character or affiliation.

Inherently Religious Activities

Comments: Some commenters suggested that the proposed regulation does not sufficiently detail the scope of religious content that must be omitted from government-funded programs. For example, some suggested that the explanation given of ''inherently religious activities'' as ''religious worship, instruction, or proselytization'' is unclear or incomplete. Relatedly, it was suggested that the proposed regulation authorizes conduct that will impermissibly convey the message that the government endorses religious content. One commenter requested that the proposed regulation be changed to make clear that the government may not disburse public funds to organizations that convey religious messages or in any way advance religion. A few commenters also suggested that the Department could not engage in effective grant monitoring activities without violating the First Amendment to the U.S. Constitution.

Discussion: The Department disagrees with these comments. As the commenters' own submissions suggest, it would be difficult to establish an acceptable list of all ''inherently religious'' activities. Inevitably, the regulatory definition would exclude some inherently religious activities or include certain activities that are not inherently religious. Rather than attempt to establish an exhaustive regulatory definition, the Department has decided to retain the language of the proposed regulation, which provides examples of the general types of activities that are considered ''inherently religious.'' This approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities. For example, prayer and worship are inherently religious activities, but Department-funded activities 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.''

As for the suggestion that the regulation indicates that the Department endorses religious content, we again emphasize that the regulation forbids the use of government assistance for inherently religious activities and states that any such activities must be voluntary and separated, in time or location, from any programs or services supported by a grant from the Department or by a subgrant from a State under a State-administered program of the Department. The Department believes that the term ''voluntary'' sufficiently protects beneficiaries. Conditioning receipt of services funded by the Federal Government upon active participation in inherently religious activities would be one example of involuntary participation in inherently religious activities.

Finally, there is no constitutional support for the view that the government must exclude from its programs those organizations that convey religious messages or advance religion with their own funds. As noted above, the Supreme Court has held that the U.S. Constitution forbids the use of government funds for inherently religious activities, absent an element of genuine and

independent private choice, but the Court has rejected the presumption that religious organizations will inevitably divert such funds and use them for their own religious purposes. The Department rejects the view that organizations with religious commitments cannot be trusted to fulfill their written promises to adhere to grant requirements. The Department also disagrees with commenters that stated that the Department could not monitor faith-based organizations without running afoul of the First Amendment to the U.S. Constitution. The Department's monitoring of faith-based organizations for compliance with Federal requirements will be no different from its monitoring of other organizations, which does not violate the First Amendment to the U.S. Constitution. We further discuss monitoring below under ''Assurance Requirements.''

Changes: None.

Programs of Choice

Comments: Some commenters claimed that where the proposed regulation addressed the selection of a faith-based organization as a result of the genuine and independent private choice of the beneficiary of the program, it did not contain sufficient safeguards under *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). These commenters stated that secular alternatives are not available in the social services context, eliminating the possibility of real choice by program beneficiaries. They requested that the regulation clearly state that beneficiaries have the right to object to a religious provider assigned to them and to receive a secular provider, and that the beneficiaries be given notice of these rights.

Some commenters also objected to the Department's classification of the supplemental educational services program of section 1116 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, as one that involves the genuine and independent private choice of the beneficiary of the program. Additionally, they objected to this classification because payment for the services rendered may be made directly by the government to service provider organizations. The commenters also believe the application of the proposed regulations violates the supplemental educational services program statute, which requires that the instruction and content of supplemental educational services be secular, neutral, and non-ideological.

Another commenter stated that programs in which the organization is selected as a result of the genuine and independent private choice of the beneficiary should be labeled as such in the procurement contract and in any public notification regarding that program.

Discussion: The Department declines to adopt the recommendations of the commenters. Any programs of choice offered by the Department must, of course, comply with Federal law (including current legal precedent), and nothing in the proposed regulation provides otherwise. The regulation comports with Supreme Court precedent by requiring a ''genuine and independent private choice[].'' The Department thus believes that the proposed regulation adequately addresses the commenters' constitutional concerns.

With respect to the commenters' objection relating to the supplemental educational services program, we believe that this regulation must be read together with all applicable statutory requirements. For example, the supplemental educational services program requires State educational agencies, among other things, to promote maximum participation by providers to ensure, to the extent practicable, that parents have as many choices as possible and to approve providers based upon objective criteria.

Furthermore, it is not dispositive for constitutional purposes that the funds for supplemental educational services may formally pass directly from the government to the faith-based organization, provided there is genuine and independent private choice for the ultimate beneficiaries and the aid follows them to the service providers of their choice. The United States Court of Appeals for the Seventh Circuit recently addressed this issue:

> The state in effect gives eligible offenders ''vouchers'' that they can use to purchase a place in a halfway house, whether the halfway house is ''parochial'' or secular. We have put ''vouchers'' in scare quotes because the state has dispensed with the intermediate step by which the recipient of the publicly funded private service hands his voucher to the service provider. But so far as the policy of the establishment clause is concerned, there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers.
>
> Nor does it make a difference that the state, rather than accrediting halfway houses, enters into contracts with them.

Freedom from Religion Found., Inc. v. *McCallum*, 324 F.3d 880, 882 (7th Cir. 2003). The Department finds the reasoning of this decision compelling.

As for whether application of these regulations violates the terms of the supplemental educational services program statute, the Department does not believe that these regulations alter in any way those statutory requirements. The Department's non-regulatory guidance on supplemental educational services affirms that the instruction and content of these Federally funded services be secular, neutral, and non-ideological, and the proposed regulation provided that organizations, including faith-based organizations, must satisfy the requirements of the applicable programs.

We note also that the recently enacted DC School Choice Incentive Act of 2003 is another example of a program in which schools are selected as the result of the genuine and independent choices of individual beneficiaries. That Act includes a number of provisions similar to those included in these regulations, including provisions to preserve the identity and mission of participating schools.

With respect to the comment regarding procurement contracts and public notification, the Department does not believe that these regulations are the appropriate place to categorize each of its many programs.

Changes: None.

The ''Separately in Time or Location'' Requirement

Comments: Some commenters maintained that the proposed regulation should be amended to clarify the ''separately in time or location'' requirement. Specifically, one commenter requested a prohibition on conducting inherently religious activities immediately prior to or immediately after Federally funded activities. Additionally, some suggested that the requirement be strengthened to require that inherently religious activities be ''separate by both time and location.''

Discussion: The Department declines to adopt these suggestions. As an initial matter, the Department does not believe that the requirement is ambiguous or necessitates additional regulation for proper adherence. If a religious organization receives government assistance, any religious activities that the organization offers must simply be offered separately—in time or location—from the activities supported by government funds. As for the suggestion that the rule must require separation in both time and location, the Department believes that such a requirement is not legally necessary and would impose an unnecessarily harsh burden on small faith-based organizations, which may have access to only one location that is suitable for the provision of Department-funded services.

Changes: None.

State and Local Diversity Requirements and Preemption

Comments: Additional commenters expressed concern that the proposed regulations will exempt religious organizations from State and local diversity requirements. Further, the commenters suggested that the proposed regulations be modified to state that State and local laws will not be preempted by the rule.

Discussion: The requirements that govern funding under the Department programs at issue in these regulations do not address preemption of State or local laws. Federal funds, however, carry Federal requirements. No organization is required to apply for funding under these programs, but organizations that apply and are selected for funding must comply with the requirements applicable to the program. Accordingly, the rule also provides that if a grantee, State, or subgrantee contributes its own funds to supplement Federally funded activities, these regulations apply to all of the commingled funds.

Changes: None.

Religious Identity and Display of Religious Art or Symbols

Comments: Several commenters disagreed with the provisions allowing religious organizations conducting Department-funded programs in their facilities to retain the religious art, icons, scriptures, or other religious symbols found in their facilities. One commenter voiced a concern that the proposed rule was unclear in its mention in

the preamble of the rule's clarification that a faith-based organization does not have to suppress its ''religious identity'' to qualify for a grant or subgrant.

Discussion: The Department disagrees with these comments. A number of Federal statutes affirm the principle embodied in this rule. *See, e.g.*, 42 U.S.C. 290kk–1(d)(2)(B) (relating to programs of the Substance Abuse and Mental Health Services Administration). Moreover, the Department does not prescribe for any of the programs it funds the types of artwork or symbols that may be placed within the structures or rooms in which Department-funded services are provided. In addition, a prohibition on the use of religious icons would make it more difficult for many faith-based organizations than other organizations to participate in Department programs by forcing them to procure additional space. It would thus be an inappropriate and excessive restriction, typical of the types of regulatory barriers that this final regulation seeks to eliminate. Consistent with constitutional church-state guidelines, a faith-based organization that participates in Department programs will retain its independence and may continue to carry out its mission, provided that it does not use Department funds to support any inherently religious activities. Accordingly, this final regulation continues to provide that faith-based organizations may use space in their facilities to provide Department-funded services, without removing religious art, icons, scriptures, or other religious symbols.

With respect to the comment regarding the clarity of the rule's discussion of ''religious identity,'' the rule gives illustrative examples of what is meant by religious identity in §§ 74.44(f)(4), 75.52(d), 76.52(d), and 80.36(j)(4).

Changes: None.

Religious Freedom Restoration Act

Comments: Another commenter requested that the Department include language in the regulation that the Religious Freedom Restoration Act of 1993 (''RFRA''), 42 U.S.C. 2000bb *et seq.*, may also provide relief from otherwise applicable provisions prohibiting employment discrimination on the basis of religion. The commenter noted, for example, that, in the final regulations it promulgated governing its substance abuse and mental health programs, the Department of Health and Human Services recognized that RFRA may provide relief from certain employment nondiscrimination requirements.

Discussion: The Department notes that the RFRA, which applies to all Federal law and its implementation, is applicable regardless of whether it is specifically mentioned in these regulations. *See* 42 U.S.C. 4000bb–3 and 4000bb–2(1). Whether or not a party is entitled to an exemption or other relief under the RFRA depends upon whether the party satisfies the requirements of that statute. The Department, therefore, declines to adopt this recommendation at this time.

Changes: None.

Exemption Under Title VII of the Civil Rights Act of 1964

Comments: One commenter urged the Department to recognize specifically faith-based organizations' right to hire persons who support their sense of mission because the Department's proposed regulation did not directly address this issue. The commenter indicated that the hiring rights of faith-based organizations are a matter of serious concern to those organizations and that the lack of clarity on this issue may discourage qualified organizations from providing services. Other commenters urged the Department to take the position that those organizations that accept Federal funding should forfeit their Title VII exemption. Still others urged the Department to interpret section 9534 of the Elementary and Secondary Education Act of 1965 to mean that faith-based organizations must forfeit their Title VII exemption.

Discussion: The Department agrees with the commenter who supported the religious hiring autonomy of faith-based organizations, and it disagrees with the objections to the principle that a religious organization does not forfeit its Title VII exemption when administering Department-funded services. Applicable statutory nondiscrimination requirements are not altered by this regulation. Congress establishes the conditions under which religious organizations are exempt from Title VII. These requirements, including their limitations, are fully applicable to federally funded organizations unless Congress says otherwise.

Section 9534 of the Elementary and Secondary Education Act of 1965 preserves the existing state of civil rights law. If Congress intended to dramatically alter the status quo, it would have done so in unmistakable terms as it has done on other occasions. As for the suggestion that the U.S. Constitution prohibits the government from providing funding for social services to religious organizations that consider faith in hiring, that view does not accurately represent the law. The employment decisions of organizations that receive extensive public funding are not attributable to the state, *see Rendell-Baker* v. *Kohn,* 457 U.S. 830 (1982), and it has been settled for more than 100 years that the Establishment Clause of the First Amendment to the U.S. Constitution does not bar the provision of Federal grants to organizations that are controlled and operated exclusively by members of a single faith. *See Bradfield* v. *Roberts,* 175 U.S. 291 (1899); *see also Bowen* v. *Kendrick,* 487 U.S. 589, 609 (1988).

In light of these considerations, the Department believes it would be helpful to amend the proposed regulations by adding an explicit statement that religious organizations do not forfeit their Title VII exemption by receiving funding from the Department, contracting with a recipient, or contracting with a grantee or subgrantee, as the case may be.

Changes: We are revising proposed sections 74.44(f), 75.52, 76.52, and 80.36(j) to include language that a religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 20 U.S.C. 2000e–1, is not forfeited when the organization contracts with a recipient (under part 74), receives financial assistance from the Department (under parts 75 and 76), or contracts with a grantee or subgrantee (under part 80).

Assurance Requirements

Comments: Some commenters suggested that additional language be added to make clear that eligibility determinations must be based on existing statutory and regulatory requirements. Several commenters also suggested that the proposed regulation contain additional safeguards against the diversion of funds by faith-based organizations to improper religious purposes.

Discussion: The Department does not believe that it is necessary to add language to make clear that eligibility determinations must be based on existing statutory and regulatory requirements. The language of the proposed rule that faith-based organizations are eligible to apply for and to receive grants and subgrants under programs of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible, sufficiently communicates that eligibility determinations must be based on existing statutory and regulatory requirements.

With respect to additional safeguards to prevent a diversion of funds, the Department notes that it imposes no comparable requirements in any other context. It would be unfair to require religious organizations alone to comply with additional requirements. Further, the Department finds no basis for requiring greater oversight and monitoring of faith-based organizations than of other program participants simply because they are faith-based organizations. Program participants are monitored for compliance with program requirements, and no program participant may use Department funds for any ineligible activity, whether that activity is an inherently religious activity or a nonreligious activity that is outside the scope of the program at issue.

Many secular organizations participating in Department programs also receive funding from several sources (private, state, or local) to carry out activities that are ineligible for funding under Department programs. In many cases, the non-eligible activities are secular activities but not activities eligible for funding under Department programs. All program participants receiving funding from various sources and carrying out a wide range of activities must ensure through proper accounting that each set of funds is applied only to the activities for which the funding was provided. Applicable policies, guidelines, and regulations prescribe the cost accounting procedures that are to be followed in using Department funds. This system of monitoring is more than sufficient to address the commenters' concerns, and the amount of oversight of religious organizations necessary to accomplish these purposes is no different than that involved in other publicly funded programs that the Supreme Court has upheld.

Changes: None.

Removal of Construction Provisions

Comments: The Department received several comments suggesting that the Department retain the provisions prohibiting

grantees and subgrantees from using grants and subgrants to pay for construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for inherently religious activities. The commenters stated that the provisions should be retained so that the Department will not have to revisit the issue in the future if statutory authority is some day enacted.

Discussion: The Department disagrees that these provisions should be retained. As stated in the preamble to the proposed rule, there is currently no statutory authority for grantees and subgrantees to use their grants and subgrants for construction, remodeling, repair, operation, or maintenance of any private educational facility or part of a private educational facility. If and when such uses are authorized by statute, the Department will issue program-specific regulations in accordance with the statute. Furthermore, we believe that the provisions do not accurately convey the state of the law in this area, which would allow grantees and subgrantees to use their grants and subgrants to pay for construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to the extent that such facilities are used for eligible Department-funded activities (and not for inherently religious activities such as religious worship, instruction, or proselytization, or any other ineligible purpose). Rather than regulate in that manner today, however, the Department will simply remove the existing regulatory prohibition.

Changes: None.

Secular Alternative Providers

Comments: Some commenters stated that if the Department funds faith-based organizations, it must offer secular alternative providers in all situations.

Discussion: The Department does not agree with the commenters. The regulations do not permit funding of inherently religious activities (except when there is genuine and independent private choice among providers), and the civil rights of beneficiaries are protected by the prohibition on discriminating against a beneficiary or prospective beneficiary in the provision of program services on the basis of ''religion or religious belief'' and by the statement that participation in inherently religious activities must be voluntary for program beneficiaries.

Changes: None.

Establishment of Separate Legal Entities

Comments: One commenter suggested that the proposed regulations require faith-based organizations to establish separate legal entities as ''firewalls'' between their ''pervasively sectarian'' organization and the social service provider.

Discussion: The Department does not agree with this comment. The prohibition on using funds for inherently religious activity, the requirement that religious activities be offered separately—in time or location—from the activities supported by government funds, and the prohibition on religious discrimination against beneficiaries in the provision of program services provide sufficient protection to honor the constitutional boundaries.

Changes: None.

Adherence to Applicable Federal Civil Rights Laws

Comments: One commenter suggested that the proposed rule should address whether funds should flow to organizations that are racist and bigoted.

Discussion: The Department does not believe that a change to the proposed regulations is necessary. Faith-based organizations that receive Federal funding must adhere to all of the applicable Federal civil rights laws, including, where applicable, Federal civil rights laws that prohibit employment discrimination on the basis of race, color, national origin, sex, age, and disability.

Changes: None.

Applicability of Rule to ''Commingled'' Funds

Comments: Another commenter recommended additional language that would clarify operational constraints created by the provisions of the proposed rule relating to the commingling of funds.

Discussion: The Department believes that this provision of the rule is sufficiently clear. As the rule states, when grantees, States, and subgrantees have the option to commingle their funds with Federal funds or to separate their funds from Federal funds, Federal rules apply if they choose to commingle their own funds with Federal funds. Additionally, some Department programs may explicitly require that Federal rules apply to State ''matching'' funds, ''maintenance of effort'' funds, or other contributions that are commingled with Federal funds, *i.e.*, are part of the grant budget. In these circumstances, Federal rules, of course, remain applicable to both the Federal and State or local funds that implement the program.

Changes: None.

Nondiscrimination in Providing Assistance

Comments: One commenter suggested that in the proposed regulation's nondiscrimination provisions relating to beneficiaries or prospective beneficiaries, the phrase ''of that program'' should be changed to ''in the provision of program services.'' The commenter thought that the Department was inadvertently stating in the proposed regulation that faith-based organizations cannot use religion as a factor in facets of their operation that are separate from programs funded by a grant or subgrant where the same people who are beneficiaries or prospective beneficiaries of such programs may be affected by the use of religion in those other facets. Another commenter suggested that the proposed rule's prohibition against discrimination ''on the basis of religion or religious belief'' should be extended to include a prohibition against discrimination on the basis of ''refusal to participate in a religious practice.'' One commenter also suggested that the protections against religious discrimination afforded beneficiaries and prospective beneficiaries be broadened to include protections against other types of discrimination.

Discussion: We agree that the proposed regulation could have been clearer on the use of religion as a factor in facets of an organization's operation that are separate from programs funded by a grant or subgrant where the same people who are beneficiaries or prospective beneficiaries of such programs may be affected by the use of religion in those other facets. The rule was not intended to preclude a faith-based organization from using religion in facets of its operation that are separate from programs funded by a grant or subgrant of the Department, even if the same people who are beneficiaries or prospective beneficiaries of such programs may be affected by the use of religion in those other facets. We have therefore modified the language of the final regulation to address this issue.

The Department disagrees with the suggestion to include a prohibition against discrimination on the basis of ''refusal to participate in a religious practice.'' The regulation already requires private organizations that engage in inherently religious activities, such as religious worship, instruction, or proselytization, to offer those services separately in time or location, and also to make participation in such activities by beneficiaries of Department-funded programs voluntary. These requirements are sufficient to protect program beneficiaries from discrimination.

Finally, the Department disagrees that the protection against religious discrimination should be broadened to cover other categories. Grantees and subgrantees are still bound by applicable Federal civil rights laws. Moreover, the protections afforded in the proposed rule are consistent with the protections the President directed Federal agencies, including this Department, to provide beneficiaries and prospective beneficiaries in taking steps to ensure that Federal policies and programs are fully open to faith-based organizations in a manner that is consistent with the U.S. Constitution and statutory requirements.

Changes: By substituting ''in the provision of program services'' for ''of the program'' in §§ 74.44(f)(5), 75.52(e), 76.52(e), and 80.36(j)(5), the final regulation reflects that a faith-based organization may use religion in facets of its operation that are separate from programs funded by a grant or subgrant of the Department, even if the same people who are beneficiaries or prospective beneficiaries of such programs may be affected by the use of religion in those other facets.

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