SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1358

SPONSOR: Senator Webster

SUBJECT: State Contracts with Religious Organizations

DATE: March 11, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable
2.			CF	
3.				
4.				
5.				

I. Summary:

The bill provides specific authorization for state agencies and political subdivisions to contract with religious organizations or to allow relgious organizations to accept certificates, vouchers, or other forms of disbursement in the same manner as any other nongovernmental provider under any state program funded under specified federal programs. The specified federal programs authorize states to contract with charitable, religious and private organizations. The bill also contains provisions intended to protect religious organizations from governmental discrimination and interference with their religious practices. Alternatives are provided for persons who object to the religious character of contracting organizations.

This bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

In 1996, Congress enacted Public Law 104-193, commonly known as the “Personal Responsibility and Work Opportunity Reconciliation Act of 1996.” Section 103 of the act ended the Aid to Families with Dependent Children (AFDC) and the Job Opportunities and Basic Skills Training (JOBS) programs under parts A and F of Title IV of the Social Security Act. The law replaced these programs with a single combined program of block grants to eligible states with federally-approved programs for temporary assistance to needy families (TANF). The law required state TANF programs to include certain activities relating to work and education for the purpose of ending dependency on public assistance, promoting self-sufficiency, reducing out-of-wedlock and teen pregnancy, and encouraging the formation of two-parent families.

Section 104 of the act authorized the states to contract with charitable, religious and private organizations to provide services and administer programs established or modified under titles I and II of the act. Section 104 also prohibited the expenditure of funds under such programs for sectarian worship, instruction or proselytization.

Article I, s. 3 of the State Constitution, states:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

In applying and interpreting Art. I, s. 3 of the State Constitution, opinions of the Florida Supreme Court have paralleled the Federal law regarding the application of the First Amendment to the United States Constitution, which provides that the Congress shall make no law respecting an establishment of religion (called the "Establishment Clause") or prohibiting the free exercise thereof (called the "Free Exercise Clause").

The Free Exercise clause prohibits restraints on religious activity, if such restraints are imposed to prevent the religious activity. States can regulate general conduct, however, even when such regulations inadvertently impact religious practices. The Free Exercise clause prohibits states from exhibiting hostility toward religion, but permits neutrality and accommodation toward religion. In *Church of the Lukumi Babalu Aye v. Hialeah*[1] the United States Supreme Court struck down a city ordinance forbidding ritualistic animal sacrifice because the purpose was to disfavor the Santeria religion.

The Establishment Clause is said to erect a "wall of separation" between church and state, which limits but does not prevent certain interaction between the state and religious institutions. State action which exhibits a preference for any religious belief or any religious institution violates this clause unless it is narrowly tailored to promote a compelling state interest.[2] Where the state does not expressly exhibit a preference or hostility, but a religious belief or a religious institution derives a benefit or suffers a burden from the neutral law, a three-part test has been used to determine if there has been a violation of the Establishment Clause. The United States Supreme Court established this three-part test in the case *Lemon v. Kurtzman.*[3] In order for an activity to be permitted under the Establishment Clause:

> (1) the challenged activity must have a secular purpose;
> (2) the activity's main effect must neither advance nor inhibit religion; and
> (3) the challenged activity must not excessively entangle the state with religion.[4]

The Lemon test has come under some criticism by some courts and legal scholars for its failure to produce clear guidelines. It has been noted by legal scholars that in many of the Establishment Clause cases brought before the United States Supreme Court in recent years, the *Lemon* test has

[1]508 U.S. 520 (1993).

[2]*Board of Education of Kiryas Joel Village v. Grumet*, 114 S.Ct. 2481 (1994).

[3]403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[4]*Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111.

not been applied.[5] Justice Scalia's dissent (joined by Chief Justice Rehnquist, and Justices White and Thomas) in *Lee v. Weisman* states:

> The Court today demonstrates the irrelevance of Lemon by essentially ignoring it . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.[6]

The *Lemon* test, however, has not been specifically overruled. Nevertheless, it has been noted that First Amendment jurisprudence is in a state of flux.[7] It has been described as " . . . complex, confusing, and sometimes seemingly inconsistent. . . ."[8] Some cases, however, appear to be looking more toward principles of neutrality. States may provide valuable services on a neutral basis to religious institutions as any other similar institution in society, such as grants and tax exemptions, without violating the Establishment Clause. In the case *Nohrr v. Brevard County Educational Facilities Authority*,[9] the Florida Supreme Court upheld the constitutionality of a law which authorized the issuance of revenue bonds for financing construction of facilities for private higher educational institutions, including religiously-affiliated institutions, where the Legislature found a public purpose in addressing the urgent need for private institutions to obtain construction financing.

In *Rosenberger v. University of Virginia*,[10] the United States Supreme Court upheld the right of a religious student newspaper to receive activity fee support from a state university for printing its newspaper on the same basis as any other student publication. In *Roemer v. Maryland Public Works Board*,[11] the court accepted the proposition that religious institutions may receive an incidental benefit from neutral state action, stating:

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. . . . Neutrality is what is required. . . .

The excessive entanglement part of the Lemon test prevents the state from too closely monitoring or regulating the internal affairs of a religious institution in order to separate the permissible public support for secular activities from the impermissible public support for religious activities. A related concept prohibits the state from applying even a neutral law which supports any religious

---

[5]See, however, the law review article by Michael Stokes Paulsen entitled *Lemon is Dead*, 43 Case W. Res.L.Rev. 795 (Spring 1993). This article asserts that the U.S. Supreme Court in the case *Lee v. Weisman* 112 S.Ct 2649 (1992) effectively replaced the Lemon Test with a coercion test.

[6]Lee v. Weisman, 112 S.Ct. 2649, 2685 (1992).

[7]Michael Stokes Paulsen, Lemon is Dead, 43 Case W. Res. L.Rev. 795 (1993).

[8]State of Alabama v. ACLU of Alabama, 711 So.2d 952, 969 (1998), quoting from concurrence of Justice Maddox.

[9]247 So2d 304 (Fla. 1971).

[10]515 U.S. 819 (1995).

[11]426 U.S. 736, 746 (1976).

institution that is "pervasively sectarian" in order to avoid supporting its religious activities. As explained in *Hunt v. McNair*,[12]

> Aid may normally be thought to have a primary effect of advancing religion when it flows to an institution in which religioun is so pervasive that a substantial portion of its functions are subsumed in the religious mission.

Nevertheless, the United States Supreme Court has noted there may be a partnership between public programs and religious providers. In upholding the constitutionality of the Adolescent Family Life Act, which allowed religious organizations to provide teen pregnancy counseling, the court stated:

> Nothing in our previous cases prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems. . . .[I]t seems quite sensible for Congress to recognize that religious organizations can influence values and have some influence on family life. . . .To the extent that this congressional recognition has any effect of advancing religion, the effects is at most incidental and remote.

III. Effect of Proposed Changes:

The bill provides specific authorization for any agency of the state or political subdivision of the state to contract with any religious organization or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program, on the same basis as any other nongovernmental provider. The term "religious organization" is undefined. A "program" is defined to mean:

> (a) Any state program funded under part A of Title IV of the Social Security Act, as amended by section 103(a) of Title I of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193.
>
> (b) Any other program established or modified under Title I or Title II of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 that permits contracts with organizations or permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries as a means of providing assistance.
>
> (c) Any other state program or policy initiative that provides direct assistance to individuals or families.

The bill requires program operators to permit beneficiaries to select an organization which is not a religious organization as an alternative provider of equivalent government benefit. If no alternate providers are available, the governmental benefit must be provided in a manner which does not impose a burden upon the religious liberties of the beneficiary. If an individual eligible for or receiving benefits has an objection to the religious character of the organization providing

[12]413 U.S. 734, 743 (1973).

benefits, the agency administering the program must provide the individual with an equivalent level of assistance from an alternative provider that is accessible to the individual. This requirement is limited by the provision "unless the assistance is provided in a manner which does not impose a burden upon the religious liberties of the individual."

The bill prohibits any agency of the state or any political subdivision of the state receiving funds under any program from discriminating against any organization which is a contractor or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

The value of disbursement received by any religious organization under contracts governed by the section is not permitted to exceed the greater value of assistance received by the beneficiary or the actual direct and indirect costs incurred by such organization in the delivery of the assistance provided by the program.

The bill specifies that a religious organization which enters into a contract with any agency of the state or any political subdivision of the state under a program, or which accepts certificates, vouchers, or other forms of disbursement, retains its independence from state and local governments, including the organization's control over the definition, development, practice, and expression of its religious beliefs. Agencies and political subdivisions are prohibited from requiring a religious organization to alter its form of internal governance or to remove religious art, icons, scripture, or other symbols in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement.

The bill requires agencies that administer any program described by the section to prepare a plan to implement the section and to submit the plan to the Governor, the President of the Senate, and the Speaker of the House of Representatives no later than September 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill provides that upon the objection of a beneficiary to the religious character of a religious provider, the state shall provide an alternate provider, unless the religious provider does not burden the religious liberties of the beneficiary. While federal law requires the state

to provide an alternate provider, it does not allow an exception for when the religious provider does not burden the religious liberties of the beneficiary. Under the Establishment Clause, religious providers are not allowed to burden the religious liberties of beneficiaries regardless of objection to their religious character.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Religious organizations may benefit from contracts with state agencies or political subdivisions related to specific programs.

C. Government Sector Impact:

Provides specific authority to state agencies and political subdivisions to contract with religious organizations to provide specific programs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not contain a definition of the term "religious organization" or a reference to another section of Florida law which provides such a definition. Without a definition or a reference to a definition in another section of law, there is no standard provided regarding what entity is or is not a religious organization. Chapter 496, F.S., the Solicitation of Contributions Act, provides a definition of the term "religious institution." Section 496.404(20), F.S., defines the term to mean:

> any church, ecclesiastical or denominational organization, or established physical place for worship in this state at which non-profit religious services and activities are regularly conducted and carried on, and includes those bona fide religious groups which do not maintain specific places of worship. "Religious institution" also includes any separate group or corporation which forms an integral part of a religious institution which is exempt from federal income tax under the provisions of s. 501(c)(3) of the Internal Revenue Code, and which is not primarily supported by funds solicited outside its own membership or congregation.

The lack of a definition of "religious organization" in the bill, however, is consistent with section (4)(a) of the bill, which provides that a religious organization

> shall retain its independence from state and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

Section 403.705(3), F.S. (1998 Supp.), which provides for long-term care community diversion pilot projects, requires the Department of Elderly Affairs to provide to prospective participants a choice of participating in a community diversion pilot project or any other appropriate placement available. To the extent possible, individuals must be allowed to choose their care providers, including long-term care service providers affiliated with an individual's religious faith or denomination.

Section 381.0045, F.S. (1998 Supp.), the Targeted Outreach for Pregnant Women Act of 1998, was established to assist high-risk pregnant women who may not seek proper prenatal care, who suffer from substance abuse problems, or who are infected with human immunodeficiency virus, and to provide these women with links to much needed services and information. The act required the Department of Health to establish a 2-year pilot program to provide outreach services to high-risk pregnant women. The department must conduct outreach programs through contract with, grants to, or other working relationships with persons or entities where the target population is likely to be found. The types of entities the department is encouraged to contract with, provide grants to, or enter into other working relationships with may include, but are not limited to, faith-based organizations, academic institutions, religious organizations, nonprofit community centers, and other social-services-related entities.

Section 751.0305, F.S. (1998 Supp.), provides that a man and a woman who intend to apply for a marriage license may complete a premarital preparation course of not less than 4 hours. All individuals who complete such a course will have their marriage license fee reduced by $32.50. Individuals electing to participate in a premarital preparation course must choose from a statutory list of qualified instructors, including from official representatives of a religious institution which is recognized under s. 496.404(20), F.S., if the representative has relevant training.

VIII. Amendments:

None.