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HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS

BILL #: HB 727

RELATING TO: State Contracts with Religious Organizations

SPONSOR(S): Representative Byrd

COMPANION BILL(S): SB 1358(i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) GOVERNMENTAL OPERATIONS YEAS 3 NAYS 2
(2) JUDICIARY
(3) TRANSPORTATION & ECONOMIC DEVELOPMENT APPROPRIATIONS
(4)
(5)

I. SUMMARY:

This bill, consistent with constitutional provisions regarding freedom of religion, authorizes certain state agencies to contract with religious organizations under certain direct assistance programs to accept certificates, vouchers, or other forms of disbursement in the same manner as any other nongovernmental provider. It provides certain protections for religious organizations from governmental discrimination and interference with its religious practices.

This bill provides alternatives for applicants for or beneficiaries of certain federally-funded programs who would select a non-religious provider or who object to the religious character of the organization.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Personal Responsibility and Work Opportunity Reconciliation Act of 1996

In 1996 Congress enacted Public Law 104-193, commonly known as the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996." Section 103 of that 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.

The Wall of Separation between Church and State

Section 3, Article I of the Florida 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.

The application of art. I, sec. 3, by Florida courts has largely paralleled federal case law regarding the application of the First Amendment of the U.S. Constitution which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Through the doctrine of selective incorporation, the prohibition in this clause is applicable to the states as well.

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*, 508 U.S. 520 (1993), the 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 will violate this clause unless it is narrowly tailored to promote a compelling state interest. See *Board of Education of Kiryas Joel Village v. Grumet*, 114 S.Ct. 2481 (1994) (violation to establish a school district within a religious enclave as a favor to that sect).

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, the "Lemon test" is used to determine any violation of the Establishment Clause. Under the three part test, the law must have a secular (non-religious) purpose; the primary effect of the law must neither advance nor inhibit religion; and the law must not produce any excessive governmental entanglement with religion. Because the Lemon test has not produced clear guidelines, many justices have criticized its application, favoring instead an analysis based on 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 *Nohrr v. Brevard County Educational Facilities Authority*, 247 So.2d 304 (Fla. 1971), 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*, 515 U.S. 819 (1995), the 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*, 426 U.S. 736, 746 (1976), the court accepted the inevitable fact 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. *** [However] a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. *** The Court has also taken the view that the State's efforts to perform a secular task, and at the same time avoid aiding in the performance of a religious one, may not lead it into such an intimate relationship with religious authority.

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 institution that is "pervasively sectarian" in order to avoid supporting its religious activities. As explained in *Hunt v. McNair*, 413 U.S. 734, 743 (1973), "Aid may normally be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . ."

Religious Organizations Providing Publicly-funded Services

Nothing in the Establishment Clause of the First Amendment prohibits a state from contracting with a religious organization to provide social service benefits. The supreme court has noted the successful 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, in *Bowen v. Kendrick*, 487 U.S. 589, 607 (1988), the court wrote:

> 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 can have some influence on family life . . . . *** To the extent that this congressional recognition has any effect of advancing religion, the effect is at most "incidental and remote."

Florida has similarly recognized this useful relationship in several programs, for example, sec. 430.705 (3), F.S. (1998 Supp.), community diversion pilot project for long term care; chs. 984 and 985, F.S., juvenile delinquency prevention programs; sec. 381.0045, F.S. (1998 Supp.), targeted outreach for high-risk pregnant women; sec. 741.0305, F.S. (1998 Supp.), marriage preparation course; and ch. 240, F.S. (1998 Supp.), post-secondary education tuition assistance and scholarship programs.

B. EFFECT OF PROPOSED CHANGES:

This bill, consistent with constitutional provisions regarding freedom of religion, would authorize any agency of the state to contract with religious organizations to accept certificates, vouchers, or other forms of disbursement under any program on the same basis as any other non-governmental

organization without impairing the religious character of such organizations or diminishing the religious freedom of the beneficiaries.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) and Social Security Act requires certain programs identified to permit beneficiaries to choose a non-religious provider, if available. If beneficiaries of such identified programs object to the religious character of the religious provider, the state shall provide an alternative benefit provider, unless the religious provider is not imposing a burden on the religious liberties of the beneficiary. The value of such disbursements received by a religious provider may not exceed the value of the benefit received by the beneficiary or the actual direct and indirect cost incurred by the religious provider organization.

No agency of the state shall discriminate against a religious provider organization on the basis that the organization has a religious character. Such religious provider organizations shall retain their religious independence from state agencies with whom they contract. An agency of the state shall not require the religious provider to alter its internal governance or remove religious symbols in order to qualify as a provider.

Each state agency which administers any direct support benefit program shall prepare and submit an implementation plan to the Governor, Speaker and Senate President by September 1, 1999.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. This bill would require agencies to provide an alternative provider of services when a beneficiary objects to the religious character of a religious provider.

(3) any entitlement to a government service or benefit?

No. However this bill would increase the number of eligible provider organizations, which allows greater choice by beneficiaries.

b. If an agency or program is eliminated or reduced:

The bill does not eliminate or reduce an agency or program.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

   a. Does the bill increase anyone's taxes?

      No.

   b. Does the bill require or authorize an increase in any fees?

      No.

   c. Does the bill reduce total taxes, both rates and revenues?

      No.

   d. Does the bill reduce total fees, both rates and revenues?

      No.

   e. Does the bill authorize any fee or tax increase by any local government?

      No.

3. Personal Responsibility:

   a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

      No. However this bill would increase the number of eligible provider organizations, which allows greater choice by beneficiaries.

   b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

      N/A

4. Individual Freedom:

   a. Does the bill increase the allowable options of individuals or private organizations/ associations to conduct their own affairs?

      Yes. The bill allows beneficiaries of public assistance to choose to utilize the resources of religious organizations which are eligible to administer certain TANF and direct benefit programs.

   b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

      No. The bill prohibits a state agency from interfering with the religious practices of a religious organization eligible to administer certain TANF and direct benefit programs.

5. Family Empowerment:

   a. If the bill purports to provide services to families or children:

      The bill does not purport to provide services to families or children, however the bill would increase the number of eligible provider organizations.

      (1) Who evaluates the family's needs?

          N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

The bill does not create or change a program providing services to families or children, however the bill would increase the number of eligible provider organizations.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

None.

E. SECTION-BY-SECTION ANALYSIS:

None.

III. <u>FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT</u>:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. <u>Non-recurring Effects</u>:

N/A

2. Recurring Effects:

   N/A

3. Long Run Effects Other Than Normal Growth:

   N/A

4. Total Revenues and Expenditures:

   N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   N/A

2. Recurring Effects:

   N/A

3. Long Run Effects Other Than Normal Growth:

   N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   N/A

2. Direct Private Sector Benefits:

   N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

   By increasing the number of eligible provider organizations for TANF and direct benefit services, beneficiaries will be more likely to find a program which better addresses their barriers to economic self-sufficiency, which will increase the quantity and quality of the labor force. The increased competition among nongovernmental providers will improve the efficiency and effectiveness of their programs.

D. FISCAL COMMENTS:

   N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

   This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

   This bill does not reduce the authority of counties or municipalities to raise revenue.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Much of the language in the bill is permissive, due to the fact that in general the state may already contract with religious organizations to provide services to beneficiaries under federal or state programs. A prohibition on such contracts would violate the Free Exercise clause of the First Amendment by denying religious organizations eligibility simply because of their religious character. The bill provides a statutory framework for implementing the freedoms and protections of the First Amendment religion clauses. Much of the language reiterates the constitutional principles of neutrality towards religion and avoidance of excessive entanglement with religion. State agencies and religious organizations may find the statutory framework more readily accessible and understandable than the many court opinions dealing with the separation of church and state.

The bill limits the value of the disbursement to a religious provider to the greater of the "value of assistance to the beneficiary" (contract rate) or the "actual direct and indirect costs incurred" by a religious provider (reimbursement). This language would prevent the appearance of direct aid to a religious organization. Such a general limitation, however, would not disturb the application of the Lemon test or other constitutional principles to prevent a pervasively sectarian institution from receiving public support.

The bill also 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.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

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