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 1504

SPONSOR: Senator Diaz-Balart

SUBJECT: State Contracts With Faith-Based Organizations

DATE: March 9, 2000 REVISED: 03/21/00

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Fav/2 amendments
2.			CA	
3.				
4.				
5.				

I. Summary:

The bill authorizes any faith-based organization to contract with the state or any of its political subdivisions to provide assistance under the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and specified state programs, as well as under any state program or policy initiative that provides direct assistance to individuals or families. It requires the preparation of implementation plans and the submission of plans to the Governor and the Legislature. It also creates the Task Force on Florida partnerships and provides for its membership and provides for its membership and duties. It requires the task force to report to the Legislature by February 1, 2001.

This bill creates an undesignated section of the Florida Statutes.

II. 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" (PRWORA). 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.[1]

[1]Florida’s TANF program is known as the Work and Gain Economic Self-Sufficiency (WAGES) program and is established in ch. 414, F.S.

Section 104 of the federal act authorizes 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 42 U.S.C. 604a., provides in pertinent part:

The paragraph describes the following programs:

- A state program funded under this part (as amended by section 103(a) of this Act).
- Any other program established or modified under title I or II of this Act, 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.

The purpose of this section is to allow states to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described herein on the same basis as any other nongovernmental provider without impairing the religious character of such organizations and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

In the event a state exercises its authority under this section, religious organizations are eligible contractors, on the same basis as any other private organization, to provide assistance or to accept certificates, vouchers, or other forms of disbursement, under any program described above so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in the preemption subsection (k) of this section, neither the Federal Government nor a state receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, on the basis that the organization has a religious character.

A religious organization with a contract or which accepts certificates, vouchers, or other forms of disbursement shall retain its independence from federal, state, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs. Neither the Federal Government nor a state shall require a religious organization to alter its form of internal governance or remove religious art, icons, scripture, or other symbols in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in this section.

If a beneficiary of assistance has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in this section, the state shall provide such individual (if otherwise eligible for such assistance) with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from another organization.

Except as otherwise provided in law, a religious organization shall not discriminate against an individual in rendering assistance funded under any program described in this section on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

Except as otherwise provided, any religious organization contracting to provide assistance funded under any program under this section shall be subject to the same regulations as other contractors to account in accord with generally accepted auditing principles for the use of funds provided under such programs. A limited audit provision is included to read: "If such organization segregates Federal funds provided under such programs into separate accounts, then only the financial assistance provided with such funds shall be subject to audit."

Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate state court against the entity or agency that allegedly commits such violation.

No funds provided directly to institutions or organizations to provide services and administer programs under this section shall be expended for sectarian worship, instruction, or proselytization.

Constitutional Law - Free Exercise of Religion and the Establishment Clause

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*[2] 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.[3] Where the state does

[2]508 U.S. 520 (1993).

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

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.*[4] 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.[5]

The *Lemon* test has come under some criticism by some courts and legal scholars for its failure to produce clear guidelines.[6] 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 not been applied.[7] 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.[8]

The *Lemon* test, however, has not been specifically overruled. Nevertheless, it has been noted that First Amendment jurisprudence is in a state of flux.[9] It has been described as " . . . complex, confusing, and sometimes seemingly inconsistent. . . ."[10] 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*,[11] 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.

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[4]403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

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

[6]See, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993)(Scalia, J., concurring).

[7]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.

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

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

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

[11]247 So.2d 304 (Fla. 1971).

In *Rosenberger v. University of Virginia*,[12] 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*,[13] 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 institution that is "pervasively sectarian" in order to avoid supporting its religious activities. As explained in *Hunt v. McNair*,[14]

> 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.

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 in the case *Bowen v. Kendrick*[15], which allowed religious organizations to provide teen pregnancy counseling, the court stated:

> [T]hese provisions of the statute reflect at most Congress' considered judgment that religious organizations can help solve the problems of [teen pregnancy]. 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 effect is at most incidental and remote.

The Florida Legislature has allowed religious organizations to participate in resolving certain secular problems, as evidenced by: s. 430.705(3), F.S., (community diversion pilot project for long term care); chs. 984 and 985, F.S., (juvenile delinquency prevention programs; s. 381.0045, F.S., (targeted outreach for high-risk pregnant women); s. 741.0305, F.S., (marriage preparation course); and ch. 240, F.S., (post-secondary education tuition assistance and scholarship programs).

[12]515 U.S. 819 (1995).

[13]426 U.S. 736, 746 (1976).

[14]413 U.S. 734, 743 (1973).

[15]487 U.S. 589 (1988).

The Department of Children and Family Services (DCFS) is not currently prohibited from contracting with religious organizations for provision of services under Florida's WAGES program. Currently, s. 414.065(10)(e), F.S., authorizes the DCFS or local WAGES coalitions to contract with commercial, charitable, or religious organizations. These contracts must comply with federal requirements with respect to nondiscrimination and other requirements that safeguard the rights of participants. Services may be provided under contract, certificate, voucher, or other form of disbursement.

Section 20.03(8), F.S., defines the term "task force" to mean:

> an advisory body created without specific statutory enactment for a time not to exceed I year or created by specific statutory enactment for a time not to exceed 3 years and appointed to study a specific problem and recommend a solution or policy alternative with respect to that problem. Its existence terminates upon the completion of its assignment.

III. Effect of Proposed Changes:

Section 1. The bill contains legislative findings and intent. This section of the bill notes that many faith-based organizations have been successful at helping people to lead happier, more productive, and more successful lives, and that when this occurs the state, its communities, and people receive important benefits.

The section also notes that faith-based organizations have been particularly important to and effective in the delivery of essential services to the state's most vulnerable and needy people, both on a voluntary and contractual basis.

The section states that it is the Legislature's intent that neither state agencies nor political subdivisions of the state, either by action or inaction, impair any contributions to the common good, and that neither the state nor any of its agencies or political subdivisions be permitted to express hostility toward the free exercise of religious liberties by people in the state. Further, the Legislature intends that, whenever possible and reasonable, the agencies and political subdivisions of the state engage faith-based organizations to work collaboratively in the delivery of services to people in the state, consistent with state and federal constitutional law.

Section 2. The term "program" is defined in this section 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, warrants, 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 assitance to individuals or families.

The bill permits a state agency or political subdivision to contract with a religious organization and allows a religious organization to accept certificates, warrants, or other forms of disbursement under any program meeting the definition in the act on the same basis as any other nongovernmental provider without impairing the religious character of such organizations. It also permits faith-based organization to act as subcontractors in the delivery of services. The bill requires that programs that are affected by it be operated in compliance with the federal requirements that might be applicable to such programs. The bill also requires all programs that are applicable to be operated in accordance with the Establishment Clause of the United State Constitution and with Art. I, s. 3 of the State Constitution.

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

The bill further provides that a faith-based organization that has entered into a contract with an agency or political subdivision of the state, or that accepts certificates, warrants, 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. Similarly, the bill prohibits an agency or political subdivision from requiring a faith-based organization to alter its form of internal governance or remove religious art, icons, scripture, or other symbols in order to be eligible to contract to provide assistance, or to accept certificates, warrants, or other forms of disbursement, funded under a program.

The bill requires each agency that administers any program described in the section to prepare a plan to implement the section and to submit it, by no later than September 1, 2000, to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

The bill creates the Task Force on Florida Partnerships, which is to serve through February 1, 2001. Appointments must be made and reported to the Department of Management Services by no later than September 1, 2000. The task force includes the following members, who serve at the pleasure of the appointing member:

- Five members who are affiliated with a community or faith-based organization, to be appointed by the Governor.
- Two members who are affiliated with a community or faith-based organization, to be appointed by the Senate President.
- Two members who are affiliated with a community or faith-based organization, to be appointed by the Speaker of the House of Representatives.
- One representative each from the Department of Children and Families, the Department of Juvenile Justice, the Department of Corrections, and the WAGES Board, to be appointed by the head of the agency.

The task force must review, for compliance with the provisions of the act, the policies and procedures of each agency of the state or agency of a political subdivision of the state which administers any program. The task force must identify any barriers in state laws, rules, or policies that may prevent a faith-based organization from providing assistance under any program, and to

recommend solutions to those barriers. Further, the task force must evaluate the potential usefulness of a statewide clearinghouse, district or regional liaisons, or other mechanism that would provide information to assist faith-based and other community-based organizations in navigating the state procurement process. The report of the task force is due no later than February 1, 2001.

Section 3. The act takes effect upon becoming law.

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:

See Present Situation, *supra*.

Under 42 U.S.C. section 604a.(j), funds provided under the act may not be used for sectarian worship, instruction, or proselytization. The bill does not contain an identical, explicit prohibition. It does, however, require that the program funds affected by the bill must be used in compliance with the Establishment Clause of the U.S. Constitution and Art. I, s. 3 of the State Constitution. Under either constitutional provision, the use of program funds for nonsecular purposes would be most likely prohibited. Moreover, the bill expressly provides that any federal program funds must be used in compliance with applicable federal rules, and current federal law prohibits the nonsecular use of such funds.

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 any programs which provide direct assistance to individuals or families.

C. Government Sector Impact:

This bill provides specific authority to state agencies and political subdivisions to contract with religious organizations to provide any programs which provide direct assistance to individuals or families.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not define the term "faith-based organization" nor does it refer to another section of Florida law which would provide such a definition. Without a definition or a reference to a definition in another section of law, there is no standard provided in this bill regarding what entity is or is not a faith-based organization for purposes of this act.

Typically, Florida's governmental contracts with private entities contain performance measures, consistent with performance-based budgeting requirements, as well as fiscal accountability measures. For example, s. 414.065(9), F.S., requires performance-based contracts under the WAGES program. Further, 42 U.S.C. section 604a.(h), contains a fiscal accountability measure. No performance-based contractual requirements or fiscal accountability provisions are contained in this bill. The Department of Children and Families has suggested that such language should be included to guarantee that religious organizations that contract with the state will be subject to the same regulations as other contractors to account, in accord with generally accepted accounting principles, for the use of state or federal funds.

The language authorizing "any other state program or policy initiative that provides direct assistance to individuals or families" to serve as a program for purposes of this act expands the impact of this act to practically any state agency. The Department of Children and Family Services advises that the definition of "program" should apply only to paragraphs (2)(a) and (b) (Temporary Assistance for Needy Families and Supplemental Security Income programs) which tracks the federal law in 42 USC section 604(1)(2), and recommends that the portion of the bill expanding it to any other state program or policy initiative be removed.

Further, the language authorizing "any other state program or policy initiative that provides direct assistance to individuals or families" to serve as a "program" for purposes of this act, the bill could have a financial impact on other departments.

42 U.S.C. 604a.(g) explicitly provides that religious organizations shall not discriminate against individuals in rendering services. The bill does not contain a similar provision.

The bill provides that the task force is created to serve through February 1, 2001, which is in compliance with the requirement of s. 20.03(8), F.S., that a task force created in statute be created for a time not to exceed 3 years.

VIII. Amendments:

#1 by Governmental Oversight and Productivity:
Prohibits discrimination by a faith-based organization that has entered into a contract with an agency or political subdivision or that accepts certificates, warrants, or other disbursements, against an individual in rendering assistance funded under any program on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

#2 by Governmental Oversight and Productivity:
Requires any contractor or provider receiving state funds to have a separate 501(c)(3) organization for the purposes of receiving funds and for administration, record keeping, accounting and other necessary functions relating to the usage of such funds.