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HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS

BILL #: HB 169

RELATING TO: State Contracts/Religious Organizations

SPONSOR(S): Representatives Byrd and others

TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) GOVERNMENTAL OPERATIONS
(2) JUDICIARY
(3)
(4)
(5)

I. SUMMARY:

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

This bill also requires the affected agencies to submit a plan regarding compliance, and creates a 16 member task force to review the policies of state agencies and make recommendations to carry out the legislative intent.

This bill does not exempt religious providers from audits or other requirements of a state agency direct assistance program.

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 seems to be moving toward principles of neutrality and accommodation toward religion in its recent Establishment Clause and Free Exercise Clause cases, and against the often confusing application of the Lemon test. To the extent state agencies and religious providers misunderstand or do not know the full application of the constitutional principles involved in the separation of church and state, this bill provides an easier to understand and more readily accessible statutory reference. This may increase awareness among state agencies and religious providers regarding eligibility to participate in such direct assistance programs, thus reducing any hesitation among religious providers who might apply for participation, and also reducing the potential for discrimination or interference by state agencies who administer such programs.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

B. 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 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. "The Court has enforced a scrupulous neutrality by the State as among religions, . . . but a hermetic separation of the two is an impossibility it has never required." *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976). State action which exhibits a preference for or hostility towards any religious belief, activity or institution will violate this clause unless the action is narrowly tailored to promote a compelling state interest. See *Board of Education of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994) (violation to establish a school district within a religious enclave as a favor to that group).

The Free Exercise clause prohibits restraints on religious activity if the intent or effect is to prevent the religious activity. States can regulate general conduct, however, even when such regulations inadvertently impact religious practices. The Free Exercise clause also permits neutrality and accommodation toward religious activity. In *Employment Div. v. Smith*, 494 U.S. 872 (1990), the court upheld a regulation which prohibited the use of peyote, even in religious ceremonies. 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 ordinance's purpose was to restrain certain practices of the Santeria religion.

Where state action 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 frequently used to determine any violation of the Establishment Clause or Free Exercise Clause. See, *Lemon v. Kurtzman*, 403 U.S. 602 (1971). 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. See, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993)(Scalia, J., concurring).

The Supreme Court seems to be moving toward principles of neutrality and accommodation toward religion in its recent Establishment Clause and Free Exercise Clause cases, and against the often confusing application of the Lemon test. See generally, Carl Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 Notre Dame J.L. Ethics & Public Policy 285 (1999). Most recently in *Agostini v. Felton*, 521 U.S. 203 (1997), the court overruled one case and portions of another dealing with the strict application of the Lemon test. The *Agostini* opinion upheld the constitutionality of "a federally funded program [which provides] supplemental, remedial instruction to disadvantaged children on a neutral basis . . . on the premises of a sectarian school by government employees pursuant to a program containing [certain] safeguards."

States may provide valuable services, such as grants and tax exemptions, on a neutral basis to religious institutions as any other similar institution in society 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 that 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 organization to receive student activity fee support from a state university for printing its religious newspaper on the same basis as any other eligible

student organization publication. In *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 746 (1976), the court recognized 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 prong 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 that benefits 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 . . . ." However, Justice O'Connor, writing for the majority in *Agostini*, suggested that in the future the court will examine the "excessive entanglement" prong of the Lemon test in the same context as the "primary effect" prong, thus reducing the three part test to two.

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. "It has long been established, for example, that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task." *Roemer v. Maryland Public Works Bd*. The supreme court noted the successful partnership between public programs and religious providers in *Bowen v. Kendrick*, 487 U.S. 589 (1988). In *Bowen*, the court upheld the constitutionality of the federal Adolescent Family Life Act, which allowed religious organizations to provide publicly-funded teen pregnancy counseling, writing:

> [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 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." (internal cites omitted)

The Florida Legislature has similarly recognized the importance of involving religious organizations in resolving certain secular problems, such as: sec. 430.705 (3), F.S., community diversion pilot project for long term care; chs. 984 and 985, F.S., juvenile

delinquency prevention programs; sec. 381.0045, F.S., targeted outreach for high-risk pregnant women; sec. 741.0305, F.S., marriage preparation course; and ch. 240, F.S., post-secondary education tuition assistance and scholarship programs.

C. EFFECT OF PROPOSED CHANGES:

The effect of the bill is less than one may expect, since Florida already contracts with religious organizations to provide direct services, and current Establishment Clause cases already uphold the constitutionality of such contracts. The restrictions on state agencies in the bill track the language from P.L. 104-193, and are consistent with the supreme court opinions that prohibit "excessive entanglement" between church and state, and protect the "free exercise" of religion.

The paragraphs of section 1 of the bill provide: (1) a definition of "program"; (2) that any agency may contract with religious organizations under any program, and that the program will be administered in compliance with any federal requirements (which include the provision of an alternative provider if the recipient objects to the religious character of the provider, and a prohibition on use of the funds for religious purposes, see sec. 104(e)(1) and (j), P.L. 104-193); (3) that any religious organization is eligible as any other nongovernmental organization, and that a state agency shall not discriminate on the basis of their religious character; (4) that religious organizations retain their independence over their practice and beliefs, and agencies shall not require a religious organization to remove religious icons or alter their internal forms of governance to be eligible; (5) a requirement that the affected agencies submit a plan regarding compliance by September 1, 2000, and the creation of an appointed 16 member task force to review the policies of state agencies, make recommendations to carry out the legislative intent, and issue a report to the Legislature by February 1, 2001.

This bill does not exempt religious providers from audits, monitoring for compliance or other requirements of a state agency direct assistance program.

To the extent state agencies and religious providers misunderstand or do not know the full application of the constitutional principles involved in the separation of church and state, this bill provides an easier to understand and more readily accessible statutory reference. This may increase awareness among state agencies and religious providers regarding eligibility to participate in such direct assistance programs, thus reducing any hesitation among religious providers who might apply for participation, and also reducing the potential for discrimination or interference by state agencies who administer such programs.

D. SECTION-BY-SECTION ANALYSIS:

See the "EFFECT OF PROPOSED CHANGES" section above.

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

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The estimated fiscal impact of the task force is not yet known. The total per diem and travel expenses depends upon who is chosen for membership, and how frequently and where the task force meets.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that additional religious organizations apply for and enter into contracts to deliver publicly-funded benefit programs, there will be increased competition for such contracts.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require a city or county to expend funds or to take action requiring the expenditure of 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:

A. CONSTITUTIONAL ISSUES:

An unresolved issue is whether the state can intentionally exclude religious organizations from eligibility to participate in certain programs. Treating religious institutions differently than non-religious institutions could be seen as an impermissible hostility to religion rather than the required neutrality, a violation of the Free Exercise clause or even the Equal Protection clause. See, *Hartmann v. Stone*, 68 F.3d 973 (CA6 1995) (invalidating a policy excluding religious day care centers from Army program). In *Strout v. Albanese*, No. 98-1986 (CA1 May 27, 1999), the circuit court held that the exclusion of religious schools in eligibility for the direct tuition grant did not violate the Free Exercise clause because the exclusion did not substantially burden any religious practice. But see, *Brown v. Borough of Mahaffey*, 35 F.3d 846 (CA3 1994) ("Applying such a [substantial] burden test to non-neutral governmental actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment.").

The *Strout* opinion also rejected a claim under the Equal Protection clause of the Fourteenth Amendment, which prohibits state action based on arbitrary classifications, and applies a "strict scrutiny" test to justify a substantial burden of a fundamental right or the use of a suspect classification. The court held that regardless of the level of scrutiny, Maine has a compelling state interest in not violating the Establishment Clause by directly subsidizing a religious school. But even the concurring opinion noted that the Supreme Court may yet "someday decide that inclusion of sectarian schools in a scheme like this is permissible under the establishment clause. A strong argument can be made to that effect." The Supreme Court dodged the issue in 1998 when it declined to hear a challenge to the Milwaukee school voucher plan, which allowed parents of qualified students to endorse a tuition voucher to participating religious schools, *Jackson v. Benson*, No. 97-0270 (Wisc., June 10, 1998); and dodged it again in 1999 when it declined to hear a challenge to *Strout* itself and a companion case, *Bagley v. Raymond School Dept.*, No. 98-281 (Maine, April 23, 1999).

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

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