

STORAGE NAME: h0169.jud

DATE: November 15, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HB 169

RELATING TO: State Contracts/Religious Organizations

SPONSOR(S): Representatives Byrd and others

TIED BILL(S):

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

- (1) GOVERNMENTAL OPERATIONS YEAS 6 NAYS 0
 - (2) JUDICIARY
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

HB 169 authorizes state agencies or political subdivisions of the state to contract with religious organizations under certain direct assistance programs and allows religious organizations to accept certificates, warrants, or other forms of disbursement under applicable programs in the same manner as any other nongovernmental provider.

The bill also provides that no state agency or political subdivision receiving funds under any program shall discriminate against any organization that is or applies to be a contractor or that accepts certificates, warrants, or other forms of disbursement, on the grounds that the organization has a religious character.

The bill provides that a religious organization that enters into a contract with a state agency or political subdivision or that accepts certificates, warrants, or other forms of disbursement will retain its independence from state or local government. Moreover, a state agency or political subdivision is prohibited from requiring a religious organization to change its governance practices or the display of religious symbols or scripture as a condition of contract or prior to its acceptance of any certificates, warrants, or other forms of disbursement.

This bill requires agencies that administer a program affected by the bill to submit an implementation plan by September 1, 2000, and creates a 16 member Religious Organization Contractor Implementation Task Force to review the policies of state agencies and make recommendations to carry out the legislative intent. The task force must report its findings and recommendations to the Legislature by February 1, 2001.

The bill does not appear to have any significant fiscal impact.

The bill will be effective upon becoming law.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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 U.S. 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).

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 U.S. 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 U.S. 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 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); chapters. 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).

C. EFFECT OF PROPOSED CHANGES:

The bill defines the term "program" to include: (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; or (c) any other state program or policy initiative that provides direct assistance to individuals or families.

The bill allows 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 (as defined) on the same basis as any other nongovernmental provider without impairing the religious character of such organizations. 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 provides that a religious organization is eligible as a contractor, on the same basis as any other nongovernmental organization, to provide assistance or to accept certificates, warrants, or other forms of disbursement under any program.

The bill prohibits a state agency or political subdivision that receives funds under any program from discriminating against an organization that is or applies to be a contractor or that accepts certificates, warrants, or other forms of disbursement under, on the basis that the organization has a religious character. The bill also provides that such religious organizations that contract with the state or otherwise accept certificates, etc., shall retain their independence from state and local governments, including their control over the definition, development, practice, and expression of their religious beliefs. Similarly, the bill prohibits the state from requiring a religious organization to alter its form of internal governance or to remove religious art, icons, scripture, or other symbols in order for that organization 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 an affected program to prepare a plan to implement the bill and to report such plan to the Governor, President of the Senate, and Speaker of the House no later than September 1, 2000.

The bill creates the Religious Organization Contractor Implementation Task Force, to serve through February 1, 2001. The the task force's membership will not be compensated for their service but will be entitled to per diem and travel expenses per s. 112.061, F.S. The task force is charged with reviewing the policies and procedures of each state agency or political subdivision that administers any program, and is required to make recommendations to the Governor and Legislature on a coordinated plan to carry out the legislative intent of the bill. The task force must issue a report to the Legislature no later than February 1, 2001, summarizing its findings, stating its conclusions, and making its recommendations.

D. SECTION-BY-SECTION ANALYSIS:

See Effect of Proposed Changes, supra.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The estimated fiscal impact of the task force is indeterminate. The total per diem and travel expenses is dependent upon how frequently the task force meets and where it chooses to meet.

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 may 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:

See Present Situation, supra.

The bill does not explicitly prohibit the use of funds by a religious organization for sectarian worship, instruction, or proselytization. While it does require the funds to be used in accordance with federal rules applicable to federal programs (which rules prohibit the nonsecular use of such funds), it does not place any limitations on the use of funds drawn from

state programs. The amendment traveling with the bill speaks broadly to this issue, but is not specific as to the use of funds for nonsecular purposes.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The bill does not provide for any auditing or financial review of funds used by a religious organization. The Department of Children and Families has suggested that such language 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 bill does not attach the Task Force to any state agency for administrative purposes. Therefore, it is unclear which agency will handle the Task Force's expenses, and facilitate the first meeting.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On November 3, 1999, the Committee on Governmental Operations adopted an amendment that provides that nothing in the act shall be construed to endorse or permit violation of the principle of separation of church and state.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

Staff Director:

Douglas Pile

Jimmy O. Helms

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:

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