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Charitable Choice and TANF

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Summary

A bipartisan group of Senators on February 8 introduced a measure (S. 1924) that the White House said represented an agreement "to move a faith-based initiative" out of the Senate. The House on July 19, 2001, passed legislation (H.R. 7) to expand "charitable choice" rules, which forbid discrimination on grounds of religion against a faith-based organization that seeks to provide federally funded services. However, no one has sponsored the House bill in the Senate because of controversy about it. S. 1924 omits the most disputed provisions of H.R. 7, but seeks to assure "equal treatment for nongovernmental providers" of federally-funded social services. As passed by the House, the Charitable Choice Act of 2001 (Title II of H.R. 7) would apply its rules, which are significantly different from those in four existing charitable choice laws, to nine new program areas. Under charitable choice, if a state or other grantee decides to use a nongovernmental body to administer a benefit or service, it cannot discriminate against faith-based organizations that apply to do so, and the religious organization generally is forbidden to discriminate against a beneficiary on grounds of religion. A large group of religious, civil rights, civil liberties, and education organizations known as the Coalition against Religious Discrimination opposes expansion of charitable choice. On January 8, 2002, a federal judge struck down as unconstitutional direct funding for a Wisconsin faith-based substance abuse treatment program (Faith Works) that she found was indoctrinating participants in religion. The judge said her decision did not deal with the constitutionality of the charitable choice section of the 1996 welfare law, which does not authorize direct funding of religious activities. For background and selected legal issues on public aid and faith-based organizations, see CRS Report RL31043. This report will be updated for developments.

Charitable Choice Option in TANF Law. If a state chooses to administer and provide TANF services or benefits through a contract with a nongovernmental entity or to provide TANF recipients with certificates or vouchers redeemable with a private entity, it must allow religious organizations to participate on the same basis as any other nongovernmental provider without impairing the religious character of the organization and without diminishing the religious freedom of TANF beneficiaries. The law (Section 104 of P.L. 104-193) imposes the following rules:

- Direct government aid may not be used for sectarian worship, instruction, or proselytization (Subsection j);
- Government is barred from discriminating against an organization that applies to administer and provide services on the basis that it has a religious character (c);
- The religious organization must implement the benefit/service program in a manner "consistent with the Establishment Clause of the United States Constitution" (c);[1]
- The religious grantee or contractor retains control over the definition, development, practice, and expression of its religious beliefs (d)(1);
- Government is barred from requiring the organization to alter its form of governance or to remove religious art and other symbols as a condition of eligibility (d)(2);
- If a welfare recipient objects to the religious character of an organization providing services, the state must provide an alternate and accessible provider (e)(1);
- The religious organization retains freedom to hire on the basis of religion (the organization's exemption from Civil Rights Act rules about employment practices is not affected by its administration of welfare benefits) (f);
- Except as otherwise provided in law,[2] a religious organization shall not discriminate against a beneficiary on the basis of religion, a religious belief, or refusal to actively participate in a religious practice (g); and
- Nothing in the charitable choice section of the law shall be construed to preempt any provision of a state constitution or law that prohibits or restricts expenditure of state funds in or by religious organizations (k).

Two other provisions are implicit: Religious contractors and grantees may use their own funds for sectarian worship, instruction, and proselytization (an explicit rule against using funds for sectarian purposes applies to public funds provided "directly" for welfare benefits or services, but not to aid received in the form of vouchers). Government may require religious grantees to be separately incorporated from their sponsoring institution.

P.L. 104-193 also applies charitable choice rules to other programs modified by its Title I or Title II that permit contracts with organizations to provide services or permit use of certificates, vouchers or other forms of disbursement to provide aid.[3] However, other

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[1] The First Amendment says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... "It has long been interpreted to allow religious organizations to participate in publicly funded social service programs. But in the past it has generally been interpreted to forbid religious activities or proselytizing in the publicly funded programs and to require religious providers to set up a corporation separate from their religious sponsor and to remove religious symbols from the premises where services are provided (see CRS Report RL30388, *Charitable Choice: Background and Selected Legal Issues*, by David Ackerman).

[2] Legal researchers say they have found no instance of a law providing "otherwise," but this phrase is regarded as a loophole by some; an effort to delete it failed during debate on H.R. 4678.

[3] These programs are food stamps, Medicaid, Supplemental Security Income (SSI), and child (continued...)

provisions of law preclude use of private organizations to perform some basic administrative activities. For example, eligibility determinations for food stamps and Medicaid must be made by government personnel or by persons employed under federally comparable "merit systems."

Legislative Action in 2001. Introduced on March 28, 2001 as the Community Solutions Act and sponsored by Representative Watts, H.R. 7 was referred to the House Committees on the Judiciary (which acted on Title II on June 28) and on Ways and Means, which acted on Titles I (tax incentives) and III (Individual Development Accounts) on July 11. House passage occurred on July 19, without floor amendment. Six hearings (the first ever held on charitable choice) were conducted in April-June: House Judiciary subcommittee on the Constitution, *State and Local Implementation of Existing Charitable Choice Programs* and *The Constitutional Role of Faith-based Organizations in Competitions for Federal Social Service Funds*; House Government Reform Subcommittee on Criminal Justice, Drug Policy, and Human Resources, *The Role of Community and Faith-Based Organizations in Providing Effective Social Services* and *Effective Faith-Based Drug Treatment Programs;* Senate Judiciary Committee, *Faith-Based Solutions: What Are the Legal Issues?*; and House Ways and Means subcommittees on human resources and on select revenue (jointly) H.R. 7. For testimony, see the committees' Web sites. In January 2002, the General Accounting Office issued a report (GAO-02-337) requested by two Members on use of existing charitable choice laws and the performance of faith-based organizations in providing federally paid services.

The Senate Bill (S. 1924). The Charity Aid, Recovery, and Empowerment Act (CARE), whose lead sponsor is Senator Lieberman, omits the most disputed provisions of H.R. 7. Instead, in a Title called *Equal Treatment for Nongovernmental Providers,* it provides that a nongovernmental organization "involved" in the delivery of a federally funded social service shall not be required to remove art, icons, scripture, or other symbols, or to alter its name, because the symbols or name are religious, or to alter or remove provisions in its chartering documents that are religious, or to alter or remove religious qualifications of membership on governing boards. These provisions would apply to all social service programs administered by the federal government, or by a state or local government using federal financial assistance (not counting tax credits, deductions, or exemptions). Excepted from the social service program definition are programs having the purpose of delivering educational assistance under the Elementary and Secondary Education Act or the Higher Education Act. The bill has numerous other provisions. It would expedite application for tax-exempt status of an organization organized and operated for the primary purpose of providing social services, and it would provide that lack of prior experience not be a disadvantage in bidding for a contract, grant, or cooperative agreement to deliver social services. Also, the bill would raise funding for the Title XX Social Services Block Grant (SSBG) to $1.975 billion for FY2003 and $2.8 billion (the ceiling enacted in 1996) for FY2004, establish tax incentives for charitable giving more generous than those of the House bill, establish a new Individual Development Account (IDA) program financed by income tax credits to financial institutions, and

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[3] (...continued)
support enforcement. In 1996, food stamps and medicaid generally allowed states to use private organizations, including charitable and religious organizations, in providing services like nursing home care and group living arrangements (Medicaid),outreach and training (food stamps).

authorize $150 million for FY2003 for technical assistance to small nonprofit community groups.

Origin of Charitable Choice. In June, 1995, the Senate Finance Committee reported an amended version of the House-passed *Personal Responsibility Act,* H.R. 4, which proposed to replace the program of Aid to Families with Dependent Children (AFDC) with a block grant. The Finance Committee bill added two sentences concerning religious organizations. They provided that religious organizations who participated in the new state block grant program were to retain their independence from government and that the organizations could not deny aid to needy families with children "on the basis of religion, a religious belief, or refusal to participate in a religious practice." This language was adapted from another AFDC block grant bill (S. 842, sponsored by Senator Ashcroft). In August, 1995, Senator Dole introduced *The Work Opportunity Act,* the Republican leadership alternative to the House-passed H.R. 4. Responding to growing interest in "privatization" of welfare services,[4] the section on provision of aid by religious organizations was enlarged to deal with "services provided by charitable, religious, or private organizations." Also, it stated affirmatively that *states had an option* to administer and provide block grant services through contracts with religious organizations and by means of certificates, vouchers or other forms of disbursement redeemable with them. Before passage the Senate adopted a two-part amendment proposed by Senator Cohen. The first added the requirement that programs be implemented consistent with the Establishment Clause of the Constitution; the second removed a provision that would have barred government from requiring a religious organization to form a separate nonprofit corporation in order to be eligible to provide assistance. Senate-House conferees added a stipulation that religious organizations would not lose their right to consider religion in their hiring practices because of participating in welfare programs or receiving funds from them. H.R. 4 was vetoed, but the charitable choice rules of the final 1996 welfare reform law are virtually identical to those of the conference report on H.R. 4.

State Use of Contractors under JOBS. Under AFDC, state agencies determined eligibility and administered benefits. However, AFDC agencies were authorized to carry out programs of education, work, and training (Job Opportunities and Basic Skills [JOBS] training program) directly or through arrangements or under contracts. JOBS law allowed contracts with administrative entities under the Job Training Partnership Act (JTPA) and with other public agencies or private organizations, including community-based organizations as defined in JTPA. The JTPA definition of community-based organizations did not include religious organizations.

Use of Charitable Choice in TANF. TANF state plans are not required to provide charitable choice information. However, in their 2000-2001 plans more than a dozen jurisdictions mentioned plans to use religious or "faith-based" organizations, usually along with other groups, in providing services (Arkansas, Delaware, District of Columbia, Georgia, Indiana, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, South

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[4] A major proposal to "privatize" welfare administration emerged in Texas; the state developed a plan for administration by a private contractor of an integrated state eligibility system for TANF, Medicaid and food stamps. However, in May, 1997, the Clinton Administration held that law required eligibility for Medicaid and food stamps to be determined by a public official.

Dakota, Tennessee, and Washington). Some spoke of service "partnerships" that included the "faith community" and community based/action agencies.

Dr. Amy Sherman, Hudson Institute, testified at a hearing by the House Judiciary Subcommittee on the Constitution on April 24, 2001, that in a study of nine states[5] completed in August 1999 she found 84 examples of financial collaborations established since 1996 between government and faith-based organizations (FBOs). She said more than half of these FBOs had no history of receiving government funds and that these "new players" were doing new things. In most cases, she said, the religious groups without previous government funds shifted from merely providing commodities to the poor to working intensively with TANF recipients, face-to-face, through mentoring and job training programs. In the 84 collaborations, direct contracts totaled $5.7 billion (64 FBOs) and $1.8 billion represented indirect contracts (20 FBOs). In the case of indirect contracts, Dr. Sherman said, government wrote a generally large contract with an intermediary organization, which then wrote sub-contracts for specific services with smaller-sized FBOs. She testified that she had found examples of charitable choice collaborations (totaling $61 million in contracting) in seven states[6] other than the nine in her original study. She said it was reasonable to conclude that under charitable choice only about one-third of the states had pursued new financial contracting opportunities with faith-based organizations.

An Urban Institute study of persons who left AFDC/TANF between 1995-1997 found that 72% did not seek help from nongovernmental sources. However, of those who did, about one-third used a faith-based provider, about one-tenth used a secular provider; and the rest relied on families and friends for help.

Welfare-to-Work TANF Grants. Congress in 1997 added special welfare–to-work (WtW) formula and competitive grants to TANF for FY1998 and FY1999. As parts of TANF, the new grants were subject to charitable choice rules. Further, regulations issued by the Department of Labor (DoL) stated that "faith based organizations" were eligible to bid for competitive grants. The Department of Labor awarded six competitive grants (out of a total of 188) to faith-based groups. Most projects were to provide employment services; some concentrated on persons with limited English proficiency.

Proposed Fatherhood Grants under TANF. In the 106th Congress, the House twice voted (Fathers Count Act, H.R. 3073, and Child Support Distribution Amendments, H.R. 4678) to establish grants under TANF to promote marriage and "successful parenting," but the Senate did not act on its companion bill (S. 3189). As parts of TANF, the new grants would have been subject to charitable choice rules. During House debate, amendments were defeated to disallow fatherhood grants to any "pervasively sectarian" faith-based institution (Congressional Record, November 10, 1999. H11895) and to forbid a fatherhood grantee from subjecting "a participant in a program assisted with the grant to sectarian worship, instruction, or proselytization" (Congressional Record, September 7, 2000. H7316). Also defeated was a proposal to forbid religious organizations from discriminating in their hiring on the basis of religion. Representative Pelosi, who sought

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[5] California, Illinois, Massachusetts, Mississippi, Missouri, New York, Texas, Virginia, and Wisconsin.

[6] Arizona, Indiana, Maryland, North Carolina, Ohio, Washington, and West Virginia.

to amend H.R. 4678, said she was joined by a coalition of national religious, civil rights, civil liberties, and education organizations known as the Work Group for Religious Freedom in Social Services. The proposal for TANF fatherhood grants (under charitable choice rules) has been reintroduced (H.R. 1471) in the 107th Congress, and the Ways and Means Human Resources Subcommittee held a hearing on fatherhood and child support proposals (including H.R. 1471) on June 28.

Faith-Based Initiative of President George W. Bush. President Bush on January 29, 2001, launched his faith-based initiative with an executive order that established Offices of Faith-Based and Community Initiatives in the White House and in five Cabinet departments (Education, Justice, HHS, Labor, and Housing and Urban Development). The President advocated expansion of charitable choice, tax incentives to promote charitable giving and some specific faith-based projects. The House voted to expand charitable choice (H.R. 7) and to offer tax incentives for private giving (but scaled the tax incentives sharply back from proposals in the FY2002 budget). S. 1924 and the President's FY2003 budget contain much larger tax incentives than H.R. 7 for charitable giving. (For information about the HHS Center for Faith-Based and Community Initiatives, see [http://www.hhs.gov/faith/].

Constitutional Challenges. In July and October 2000, two court suits were filed challenging the constitutionality of TANF charitable choice programs. One suit charged that a job training and placement program for TANF recipients funded by the Texas Department of Human Services and operated by the Jobs Partnership of Washington County was "permeated" by Protestant evangelical Christianity in violation of both the state and federal constitution (*American Jewish Congress and Texas Civil Rights Project v. Bost*, filed July 24, 2000, but dismissed in February 2001 as moot after Texas discontinued the program). The second suit, which resulted in an order to cease direct funding, charged that a job placement and support services program for drug addicts in Milwaukee, Wisconsin, violated the state and federal constitutions by giving welfare-to-work funds directly to a "pervasively sectarian" organization [Faith Works] and using the funds to indoctrinate clients in the Christian faith (*Freedom from Religion Foundation, Inc. vs. Governor Tommy Thompson*, filed October 12, 2000.) A federal judge on January 8, 2002 ordered Wisconsin to cease this direct funding as unconstitutional, but she said her ruling did not deal with constitutionality of the 1996 charitable choice law, which does not authorize direct funding of religious activities.

Conclusion. Advocates of charitable choice maintain that faith-based organizations have special ability to help persons toward self-respect, healthy family dynamics and independence. They maintain that existing charitable choice rules give protection against religious discrimination both to religious organizations providing welfare services and to beneficiaries of the services. However, many religious spokesmen have expressed concerns that government grants could diminish their vitality and religious commitment. Proposed expansions of charitable choice are likely to cause Congress to examine again the balance between the religious freedom of service providers and that of welfare recipients, along with the relationship of charitable choice to the Establishment clause of the First Amendment. For a discussion of areas of agreement and disagreement about charitable choice issues, see In Good Faith at [http://www.temple.edu/feinsteinctr].