

CRS Report for Congress

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Charitable Choice, Faith-Based Initiatives, and TANF

Vee Burke
Domestic Social Policy Division

Summary

By regulatory action, the Bush Administration has expanded the coverage of basic charitable choice principles, which seek to promote use of religious groups as providers of social services while protecting the religious freedom of beneficiaries. On September 30, 2003, the Department of Housing and Urban Development (HUD) issued final regulations, in response to an executive order from President Bush, to extend charitable choice principles to eight housing programs. On September 23, the White House announced that the Departments of Education, Labor, and Justice, and the Veterans Administration were proposing new regulations or policy changes to facilitate partnerships of faith-based groups with the federal government. The 108th Congress has resumed efforts to pass tax incentives for private giving (S. 476, passed by the Senate on April 9, and H.R. 7, passed on September 17, 2003). However, these bills do not contain provisions intended to promote religious organizations as providers of federally funded social services — charitable choice provisions. The House voted in 2001 to extend charitable choice rules, which now apply to a limited set of programs, to numerous new programs (H.R. 7 in the 107th Congress), as the President urged, but the Senate refused. The House-passed H.R. 7 in 2001 aroused major controversy, especially over religious discrimination in employment and possible “voucherization” of social services. Opposition to charitable choice has brought together a coalition of religious and secular groups who, for different reasons, want to maintain separation of church and state — the former to protect their independence and sense of mission, the latter to guard against use of public funds for religious activities. In two cases concerning a Wisconsin faith-based program for drug addicts (Faith Works), direct government funding has been found unconstitutional, but indirect funding (by voucher) has been found constitutional. For background and selected legal issues on public aid and faith-based groups, 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

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.

of certificates, vouchers or other forms of disbursement to provide aid.³ However, other 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.”

Faith-Based Initiative of President George W. Bush. President Bush on January 29, 2001, launched his faith-based initiative with executive orders that established an Office of Faith-Based and Community Initiatives (OFBCI) in the White House and directed five Cabinet departments, Education, Justice, HHS, Labor, and Housing and Urban Development to set up similar offices, called centers (in December 2002, he directed the Department of Agriculture and the Agency for International Development also to establish centers). In his original call for faith-based initiatives, the President advocated expansion of charitable choice and tax incentives to promote charitable giving. In addition, he called for several specific projects. Congress has acted on four of the latter proposals: It established a new matching grant program to help children of prisoners (\$10 million appropriation for FY2003), directed the Justice Department to use \$5 million in FY2002 funds to set up five multi-faith prison pre-release pilot programs, appropriated \$30 million for FY2002 to create a Compassion Capital fund to provide technical aid and start-up costs for small groups, and voted to allow state educational agencies to award 21st Century Community Learning Center grants to groups other than schools, including community based organizations. However, Congress took no action on two other faith-based initiatives: responsible fatherhood grants and second-chance maternity homes.

In July 2002, the Labor Department announced award of \$17.5 million in grants designed “to link faith-based and grassroots community organizations” to the nation’s One-Stop Career system under the Workforce Investment Act (WIA), and later said it would award another \$3.75 million in such grants. On October 3, 2002, HHS announced matching grants from the Compassion Capital fund totaling almost \$25 million to 21 organizations (called intermediaries) that are to provide technical assistance to faith-based and community-based organizations and issue awards or sub-awards for start-up and operational costs to qualified faith- and community-based organizations to expand or replicate promising or best practices. On September 23, 2003, HHS announced award of 60 new compassion capital grants totaling \$8.1 million (including some to intermediary organizations) and \$24 million to continue the 21 original grants made in 2002. The FY2003 budget requested \$100 million for the Compassion Capital Fund. Both S 476 and the new H.R. 7 contain compassion capital fund provisions. For information about the HHS Center for Faith-Based and Community Initiatives, see [<http://www.gov/faith>] For guidance to FBOs on partnering with the federal government, see [<http://www.whitehouse.gov/government/fbci/>].

Senate Action in the 107th Congress. After House passage of H.R. 7, a bipartisan group introduced S. 1924, the Charity Aid, Recovery, and Empowerment Act

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

(CARE), which was welcomed by the White House as representing an agreement “to move a faith-based initiative” out of the Senate. It omitted the most disputed provisions of H.R. 7. Instead, in a Title called *Equal Treatment for Nongovernmental Providers*, it provided that a nongovernmental organization “involved” in the delivery of a federally funded social service could not be required to remove art, icons, scripture, or other symbols, or to alter its name, because the symbols or name were religious, or to alter or remove provisions in its chartering documents that were religious, or to alter or remove religious qualifications of membership on governing boards. These equal treatment provisions applied to all social service programs administered by the federal government (excepting educational assistance under major federal education acts) or by a state or local government using federal financial assistance (not counting tax credits, deductions, or exemptions). The bill also proposed to establish tax incentives for charitable giving more generous than those of the House bill, establish a new Individual Development Account (IDA) program financed by business tax credits to financial institutions, and authorize \$150 million for FY2003 for technical assistance to small nonprofit community groups.

Before scheduled Finance Committee markup in mid-June, the equal treatment title of the original CARE bill was deleted. Thereafter, the Finance Committee incorporated modified versions of some of the CARE provisions into its substitute for H.R. 7, approving the bill on July 16 (S.Rept. 107-211) and entitling it *Care Act of 2002*. The committee version of H.R. 7, which never reached the Senate floor, included tax incentives for private giving, establishment of new tax credit-funded IDAs, increased funding for the Social Services Block grant, revenue measures, and other tax provisions. It did not contain provisions to expand charitable choice rules. After death of the original H.R. 7 at the end of the 107th Congress, President Bush on December 12, 2002 issued an Executive Order (EO 13279) directing six cabinet secretaries and the administrator of the Agency for International Development, to adopt charitable choice rules “to the extent permitted by law.”

Legislative Activity in 2003. On April 9, the Senate passed S. 476 (entitled CARE) without provisions that Senator Santorum had sought to add to require equal treatment of religious and other nongovernmental organizations as providers of federally funded social services. To win passage of the CARE Act, which contains tax incentives for charitable giving, increases funding for the Social Services Block Grant, and establishes new tax credit-financed Individual Development Accounts, Senator Santorum agreed to a compromise adding technical assistance (“compassion capital fund”) grants for community-based organizations and funding for maternity group homes. His omitted “equal treatment” title would have stated that religious groups could not be required to alter religious symbols or art or to change their name or to make various other religious deletions or changes to be providers of social services.

On May 9, a new version of H.R. 7, entitled Charitable Giving Act, was introduced in the House. It contains tax incentives for charitable donations, and it authorizes new Compassion Capital Fund grants and funding for maternity group homes. It also extends the expiring program of IDAs (under the Assets for Independence Act) for 5 years. However, it does not contain charitable choice provisions; nor does it increase funding for the Social Services Block Grant. On May 8, in passing a bill (H.R. 1261) to reauthorize the Workforce Investment Act (WIA), the House voted to remove a provision in current WIA law prohibiting employment discrimination on grounds of religion..

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.

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 Dakota, Tennessee, and Washington). Some spoke of service “partnerships” that included the “faith community” and community based/action agencies. 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. The Labor Department awarded six competitive WtW grants (out of 188) to faith-based groups. Most projects were to provide employment services; some focused on persons with limited English proficiency.

Dr. Amy Sherman, Hudson Institute, told a research conference of the Roundtable on Religion and Social Welfare Policy in April, 2002, that a survey about implementation of charitable choice in 15 states found 726 contracts totaling about \$124 million. (For nine states this was a followup survey.) She said more congregations are “getting involved” in contracting to provide services, that roughly half of the faith-based organizations and

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.

congregations identified in the survey were “new players,” and that some states showed a dramatic increase in contracting with faith-based groups. The survey found much more contracting activity with faith-based groups under TANF than in the other programs covered by charitable choice. She also said the new survey found a decline in the use of indirect financial contracting by way of intermediary 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.

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). However, a remaining issue is yet to be decided — whether the training program should be required to return the funds it received. The second suit, (*Freedom from Religion Foundation, Inc. vs. McCallum*, filed October 12, 2000) 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. 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. Later, on July 26, 2002, the judge ruled on a second issue in the Faith Works case. She found a contract between Faith Works and the Wisconsin Department of Corrections to be constitutional because the religious organization received public funds only when offenders chose to receive treatment there.

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. For a discussion of areas of agreement and disagreement about charitable choice issues, see *In Good Faith* at [<http://www.temple.edu/feinsteinctr>].