Welfare – Charitable Choice

PHOTOCOPY
PRESERVATION

Welfare – Char. Choice

Watts-Talent (Sec. 202) vs. Frist (Sec. 305)
05/05/00 DRAFT

Section	Watts-Talent (Sec. 202)	Discussion Status	Frist (Sec. 305)	Comments
1. Bill status and summary	The American Community Renewal Act was introduced in House (H.R. 815) and Senate (S.463) in February 1999 to target 100 poorest communities for pro-growth tax and regulatory relief, Brownfields cleanup and home ownership opportunities.		The Youth Drug and Mental Health Services Act (S.976) was introduced in May 1999 and passed in November, and sent to the House. The bill reauthorizes SAMHSA and addreses need to help children deal with violence.	HHS supports the Frist bill
2. Applicable statute	Amends title V of Public Health Service Act.		Amends title V and XIX of the Public Health Service Act.	
3. Applicable programs	Substance Abuse Prevention and Treatment block grant only ($1.6B in FY00,$1.631 proposed for FY01).		Substance Abuse Prevention and Treatment block grant ($1.6B in FY00, $1.631 proposed for FY01) & substance abuse competitive grants ($361M in FY00, $401M proposed for FY01).	
4. Program definitions	Sec. 581(c) on p69, line 8 and Sec. 582(a) on p71, line 16 Defines several terms to make clear the scope of the authority for religious organizations and to explicitly authorize a voucher system.	**TENTATIVELY RESOLVED**: House leg counsel in conforming definitions to SAMHSA law. We're waiting to see language.	Sec. 1955(b) Generally requires states to consider religious organizations among other nongovernmental providers to provide services.	
5. Use of vouchers	Sec. 581(c)(5)&(10) on p 70, line 1 and Sec. 582(a)(1)(C) &(D) on p71, line 20 States can fund religious orgs through grants, contracts, cooperative agreements, or voucherized assistance, where bene chooses the svc provider and the org is reimbursed.	**UNRESOLVED:** They reject proposal to drop term "voucher" since welfare law explicitly allows vouchers. We need to consult with HHS re: program implications. Also raises broader policy concerns (we need to check re: Education).	Silent on vouchers.	Welfare law allows vouchers, but SAMHSA law is silent. SAMHSA believes that one state (NM) and several substate areas already use vouchers.
6. Nondiscrimination against religious organizations	Sec. 582(c)(1) on p72, line 18 Finds that the Establishment Clause doesn't require welfare programs to discriminate against faith-based providers or to censor relig character.	**RESOLVED:** Agree to drop findings section.	Sec. 1955(a)(1) Prohibits discrimination of nongov'l orgs and individuals on basis of religion.	Frist language is similar to welfare law.
	Sec. 582(c)(2) on p73, line 3 Prohibits fed and state gov'ts from discriminating against orgs on basis of religious character.	**TENTATIVELY RESOLVED:** Agree to add language saying law must be implemented consistent with Establishment Clause and the Free Exercise Clause, ensuring that funds don't go to "pervasively sectarian" orgs. Need to see language.	Sec 1955(b)(2) States can't discriminate against relig orgs "so long as the programs ... are implemented in a manner consistent with the Establishment Clause of the first amendment to the Constitution."	Frist language is similar to welfare law.

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7. Employment practices	Sec. 582(e) on p74, line 3 This section doesn't affect other federal or state laws relating to discrimination in employment on basis of religions. Exception – relig orgs can require employees to adhere to religious beliefs and practices of the org.	**TENTATIVELY RESOLVED:** Replace with welfare law language, which refer to title VII Civil Rights Act exemption. However, Section 584(a) provision making aid to individual rather than institution, may still cause a problem. They may see it as a way to get around the employment issue, although whether or not the organization receives federal funds has no bearing on its requirement to comply with Title VII.	Sec. 1955(d) A relig org's exemption from title VII of Civil Rights Act allowing them to hire individual of a particular religion isn't affected by receipt of federal funds under this program.	Frist language is similar to welfare law.
8. Arrangements for alternative providers	Sec. 582(f)(1)-(4) on p74, line 20 If a bene objects to program bc it's a religious org, the org or the non-fed entity shall arrange for an alternative provider.	**TENTATIVELY RESOLVED**: Agree to conform with welfare law so (1) states provide alternative provider, (2) relig orgs must refer individuals back to state for new placement, and (3) individuals must get list of option, including secular placements. Need to see language.	Sec. 1955(e) If an individual objects to relig character of the org, the appropriate gov'l entity must provide w/in reasonable time period, equivalent svcs from an alternate provider that is accessible to the individual.	Frist is similar to welfare law.
9. Nondiscrimination against beneficiaries	Sec. 582(f)(5)(B) on p75, line 23 Relig orgs can't discriminate against beneficiary on basis of religion or relig belief, except that: A religious organization may require a beneficiary to actively participate in religious practice, worship and instruction, and to follow rules of behavior that are religious in content	**RESOLVED:** Agree to drop due to serious constitutional concerns with allowing organizations to require beneficiaries to participate in religious practice.	Sec. 1955(f) Relig orgs can't discriminate on basis of religion, a relig belief, a refusal to hold a relig belief, or a refusal to actively participate in religious practice.	Frist is similar to welfare law.
10. Fiscal accountability	Sec. 582(g)(2) on p76, line 16 Provides special audit procedures for religious organizations, so that only gov't funds are subject to audit by gov't.	**UNRESOLVED:** Limited audit is consistent with welfare law, but it conflicts with Single Audit Act which subjects all federal government grantees to identical audit rules. Prefer silence, but they want it in.	Sec. 1955(g) Same as Watts-Talent and welfare law.	
11. Limitations on use of funds	Sec. 583(b) on p77, line 7 Allows funds to be used for sectarian worship or instruction in cases where bene can choose where to get svcs such as voucherized assistance.	**RESOLVED:** Agree to drop.	Sec. 1955(i) Funds provided thru grant or contract to a relig org to provide sub abuse svcs can't be used for sectarian worship, instruction, or proselytization.	Frist language is similar to welfare law, prohibiting use of funds for sectarian worship, instruction, or proselytization
12. Treatment of funds	Section 584(a) on p77, line 13-19 Financial assistance provided to or on behalf of program beneficiaries is aid to beneficiaries, not organizations. Receipt	**UNRESOLVED:** They will drop the 2nd sentence, and clarify the 1st sentence by striking "provided to or on behalf of program beneficiaries".	N/A	No similar language in Frist or welfare law.

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	of program services at an organization shall not constitute Federal financial assistance to the organization.	This raises serious problems: (1) As written, this would apply to all substance abuse grants to public or private entities (per definition of designated program) **[Cliff/Paul** – see if you agree with this reading. This was the objection we'd raised at the very beginning but I don't think they've fixed it. It's not something that OLC flagged but it appears to be at the minimum a drafting problem]. (2) Declaring that aid is to the individual doesn't have legal effect and determination should be left to the courts. They say this reflects their intent that aid is to help the individual get clean and hope this provision will protect organizations from Constitutional criticism that funds can't go to "pervasively sectarian organizations" though OLC thinks courts will make their own determination. They may also believe this would allow the organization to engage in employment discrimination on the basis of religion but we don't see how it would.		
13. Preemption of State Laws and Constitutions	Section 584(b) on p77, line 20 Allows federal funds to be expended in a religious facility or by a religious organization even if forbidden by state laws or constitutions by segregating federal funds from state funds.	**RESOLVED**: Agree to drop.	Silent.	Under welfare law, nothing shall be construed to preempt state constitutions or state statutes prohibiting or restricting expenditure of state funds in or by religious organizations.
14. Educational requirements for personnel in drug treatment programs	Sec. 585(b)(1) on p78, line 17 Requires state or locals to treat religious education as equivalent to secular course work in drug treatment. Sec'y may waive state/local qualifications for applicant religious organizations. **[Genie, I couldn't find statutory basis for this 2nd sentence.]**	**TENTATIVELY RESOLVED**: They will amend to specify that state/locals shall give credit for substance abuse education and training provided by the religious organization for personnel who provide substance abuse treatment in religious organizations. Also adding language that if State requires educational qualifications unrelated to substance abuse, religious education	None.	Nothing similar in welfare law.

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		should be given equivalent credit. Specifying training in substance abuse is an improvement. Remaining concerns: 1) Limiting to training provided by the particular organization may be too narrow [could be religious training in substance abuse provided by another entity, such as in the case of pastoral counseling] 2) Still raises preemption issue and, unlike welfare law, they do not have a non preemption clause **[Paul/Cliff** – I'm suggesting this for first time – what do you think? AK		

Charitable Choice

These provisions would allow States to award federal funds to religious organizations for providing drug treatment services under the Substance Abuse and Mental Health Services Act (SAMHSA). The original ACRA language raised 14 issues in our first pass through the bill. At the staff level, we have negotiated what we believe are acceptable positions on most provisions, but have stated strongly that these must be reviewed by WH, OLC and HHS before final agreement.

Outstanding Issues

1. Characterization of Federal Funds: Rs would like to adopt language that "Financial assistance under a designated program is aid to the beneficiary, not to the organization providing program services". The Rs have not fully clarified their intent here – whether it's to try to avoid the Establishment or Free Exercise Clause, or to sidestep the statutory restrictions that normally accompany the receipt of federal funds. They say they want to state for the record their intent that the funds are designed to help people break addiction, not to support organizations.

Neither the welfare reform law nor the Senate-passed Frist substance abuse bill has this language. Rs had previously agreed to silence on this issue. OLC advises that courts would not accept this characterization without conducting their own examination of the facts and circumstances. Thus, as a legal matter, this provision may not have practical effect. However, the provision seems to state a philosophical political position that would raise objections from some quarters. The Rs may see this as part of a longer-term strategy to change the terms of the political discussion.

> Next: We can discuss this more fully with Rs to clarify their intent. We can seek further legal advice from OLC on how to curb the proposed language. However, we also need guidance on how to proceed.

2. Educational Qualifications for Employment: In determining educational requirements for personnel in SAMSHA-funded facilities, Rs want to specify that (1) substance abuse training provided by the religious organization to its personnel shall given the same credit as secular training in drug treatment, and (2) if the educational requirements include qualifications not specific to substance abuse treatment, then religious education and training shall be given credit equivalent to the secular education and training.

Neither the welfare reform law nor the Senate-passed Frist substance abuse bill has this language. We have three major concerns:

- First, to assure that the training is related to substance abuse and is of acceptable quality.
- Second, not to preempt any state law in licensing, an area where states have traditionally had responsibility.

- Third, a test that preempts state licensing requirements only for religious organizations is particularly vulnerable to a legal challenge.

Reps. Scott, Edwards and Waxman have noted serious policy concerns. Rep. Scott submitted letters from professional, religious and civil liberties groups expressing concern over undermining treatment effectiveness and that drug treatment is a medical service requiring scientific knowledge that is not comparable to religious education.

> Next: We can work to further narrow the language, or we can push back hard on the entire provision.

3. Use of Vouchers: Rs would like language that permits SAMHSA assistance to come in vouchers for eligible beneficiaries to redeem at qualified service providers.

The underlying SAMHSA statute is silent on vouchers. The Rs want the Welfare Reform Act provisions. The Senate-passed Frist substance abuse bill does not authorize vouchers.

> Next: This raises broader policy concerns, including possible implications for school voucher debate (don't know specifics here). We would also seek HHS's input on the programmatic impact.

Other important issues that may not require policy decisions:

4. Employment practices: The Rs seek language that says receiving federal funding under SAMHSA would not alter religious organizations' existing exemption from Title VII anti-discrimination laws. This long-standing exemption allows organizations with a "primarily religious purpose" (caselaw) to discriminate on the basis of religion in hiring. In Bowen v. Kendrick, 487 U.S. 589 (1988), the Supreme Court held that organizations that are "pervasively sectarian" cannot receive federal funds. In combination, these provisions imply that an organization that is not pervasively sectarian, but is nonetheless exempt from Title VII because it has a primarily religious purpose, could discriminate in hiring on the basis of religion.

We have pointed out where the original ACRA language went beyond the WRA. We believe Rs would accept the WRA language. Although these provisions were inserted too late in the Welfare Reform debate to get full hearing, they have subsequently come under greater criticism. Therefore, agreeing to WRA language would still be vulnerable to criticism. Furthermore, according to OLC, constitutional law is not settled on this precise point, viz., whether religious organizations with a Title VII exemption that receive federal funds may discriminate in their hiring. Legitimate legal arguments can be marshaled for both positions.

We are inquiring with HHS (under Welfare Reform) and HUD (section 202 Elderly Housing) whether any grantees currently fit this description (Salvation Army?).

5. Limited Audit procedures: In cases where religious organizations segregate federal funds from the organization's other funds, Rs would like to limit federal audits only to the segregated funds.

We are concerned that this violates the Single Audit Act which subjects all federal government grantees to identical audit rules. We prefer silence, but they want it in. A similar provision is in WRA.

Andrea Kane 05/08/2000 09:5[illegible]

WELFARE -
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CHOICE

Record Type: Record

To: Bruce N. Reed/OPD/EOP@EOP, Eric P. Liu/OPD/EOP@EOP

cc: Anna Richter/OPD/EOP@EOP
Subject: charitable choice update

Here's an updated side-by-side comparing House provisions in Watts-Talent to Senate-passed Frist bill and welfare reform, along with status of discussions with House staff.

faithSideXSide_050500.

Here's a note Cliff Kellogg sent Gene summarizing the major issues

faith0508-CCsumm.d

And, I'll bring over a hard copy of marked up version of bill reflecting changes we expect House to make. We should get revised language tomorrow morning. I'd like to discuss with you because I think Gene is going to start getting more involved in this. He's hearing some concerns from Ds.

Charitable Choice

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Housing) whether any grantees currently fit this description (Salvation Army?).

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VERY CLOSE HOLD as of 5/5

(11) UNIT OF GENERAL LOCAL GOVERNMENT.—The term "unit of general local government" has the meaning given the term in section 102(a) of the Housing and Community Development Act of 1974.

(12) UNOCCUPIED.—The term "unoccupied" means, with respect to a residential property, that the unit of general local government having jurisdiction over the area in which the project is located has certified in writing that the property is not inhabited.

SEC. 202. PREVENTION AND TREATMENT OF SUBSTANCE ABUSE; SERVICES PROVIDED THROUGH RELIGIOUS ORGANIZATIONS.

Title V of the Public Health Service Act (42 U.S.C. 290aa et seq.) is amended by adding at the end the following part:

"PART G—SERVICES PROVIDED THROUGH RELIGIOUS ORGANIZATIONS

"SEC. 581. APPLICABILITY TO DESIGNATED PROGRAMS.

"(a) DESIGNATED PROGRAMS.—Subject to subsection (b), this part applies to each program under this Act that makes awards of Federal financial assistance to public or private entities for the purpose of carrying out activities to prevent or treat substance abuse (in this part referred to as a 'designated program'). Designated programs include the program under subpart II of part B of title XIX (relating to formula grants to the States).

"(b) LIMITATION.—This part does not apply to any award of Federal financial assistance under a designated program for a purpose other than the purpose specified in subsection (a).

"(c) DEFINITIONS.—For purposes of this part (and subject to subsection (b)):

"(1) The term 'designated award recipient' means a public or private entity that has received an award under a designated program (whether the award is a designated direct award or a designated subaward).

"(2) The term 'designated direct award' means an award under a designated program that is received directly from the Federal Government.

"(3) The term 'designated subaward' means an award of financial assistance made by a non-Federal entity, which award consists in whole or in part of Federal financial assistance provided through an award under a designated program.

"(4) The term 'designated program' has the meaning given such term in subsection (a).

will work w/ House leg counsel to streamline defns to be consistent w/ SAMHSA; consider Frist bill language.
(need to see language)

"(5) The term 'financial assistance' means a grant, cooperative agreement, contract, or voucherized assistance.

want to leave in – similar to welfare reform language

"(6) The term 'program beneficiary' means an individual who receives program services.

"(7) The term 'program participant' has the meaning given such term in section 582(a)(2).

"(8) The term 'program services' means treatment for substance abuse, or preventive services regarding such abuse, provided pursuant to an award under a designated program.

"(9) The term 'religious organization' means a nonprofit religious organization.

"(10) The term 'voucherized assistance' means—

"(A) a system of selecting and reimbursing program services in which—

"(i) the beneficiary is given a document or other authorization that may be used to pay for program services;

"(ii) the beneficiary chooses the organization that will provide services to him or her according to rules specified by the designated award recipient; and "(iii) the organization selected by the beneficiary is reimbursed by the designated award recipient for program services provided; or

"(B) any other mode of financial assistance to pay for program services in which the program beneficiary determines the allocation of program funds through his or her selection of one service provider from among alternatives.

"SEC. 582. RELIGIOUS ORGANIZATIONS AS PROGRAM PARTICIPANTS.

"(a) IN GENERAL.—

"(1) SCOPE OF AUTHORITY.—Notwithstanding any other provision of law, a religious organization—

"(A) may be a designated award recipient;

"(B) may make designated subawards to other public or nonprofit private entities (including other religious organizations);

"(C) may provide for the provision of program services to program beneficiaries through the use of voucherized assistance; and

"(D) may be a provider of services under a designated program, including a provider that accepts voucherized assistance.

See note in definitions p69
want to keep reference to "vouchers;" similar to welfare reform.
Need to consult w/ HHS, but also raises broader policy concerns.

"(2) DEFINITION OF PROGRAM PARTICIPANT.—For purposes of this part, the term 'program participant' means a public or private entity that has received a designated direct award, or a designated subaward, regardless of whether the entity provides program services. Such term includes an entity whose only participation in a designated program is to provide program services pursuant to the acceptance of voucherized assistance.

"(b) RELIGIOUS ORGANIZATIONS.—The purpose of this section is to allow religious organizations to be program participants on the same basis as any other nonprofit private provider without impairing the religious character of such organizations, and without diminishing the religious freedom of program beneficiaries.

"(c) NONDISCRIMINATION AGAINST RELIGIOUS ORGANIZATIONS.—

"~~(1) FINDINGS.—The Congress finds that the establishment clause of the first amendment to the Constitution of the United States does not require that—~~

will drop(1)

"~~(A) social welfare programs discriminate against faith-based providers of services; or~~

"~~(B) faith-based providers of services, as a prerequisite to participation in Federal pro-~~

~~grams, abandon their religious character and censor their religious expression~~.

"(2) NONDISCRIMINATION.—Religious organizations are eligible to be program participants on the same basis as any other nonprofit private organization. Neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization that is or applies to be a program participant on the basis that the organization has a religious character.

will insert language saying must be implemented consistent w/ Establishment Clause & the free exercise clause.

"(d) RELIGIOUS CHARACTER AND FREEDOM.—

"(1) RELIGIOUS ORGANIZATIONS.—Except as provided in this section, any religious organization that is a program participant shall retain its independence from Federal, State, and local government, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

"(2) ADDITIONAL SAFEGUARDS.—Neither the Federal Government nor a State shall require a religious organization to—

"(A) alter its form of internal governance; or

"(B) remove religious art, icons, scripture, or other symbols;

in order to be a program participant.

"(e) NONDISCRIMINATION IN EMPLOYMENT.—

"(1) IN GENERAL.—Except as provided in paragraph (2), nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment on the basis of religion.

"(2) EXCEPTION.—A religious organization that is a program participant may require that an employee rendering programs services adhere to—

"(A) the religious beliefs and practices of such organization; and

"(B) any rules of the organization regarding the use of drugs or alcohol.

will replace w/ welfare reform language which refers to title VII exemption. Sec. 554(a) p 77 will address fact that courts have been interpreting welfare type language as applying to entire institution.

"(f) RIGHTS OF PROGRAM BENEFICIARIES.—With respect to an individual who is a program beneficiary or a prospective program beneficiary, if the individual objects to a program participant on the basis that the participant is a religious organization, the following applies:

"(1) ~~If the organization received a designated direct award~~, the State ~~organization~~ shall arrange for the individual to receive program services through an alternative entity.

"~~(2) If the organization received a designated subaward, the non-Federal entity that made the~~

will revise to conform w/ welfare reform so (1) states provide non relig alternative (2) require relig org to refer individuals back to state or other entity for new placement (3) ensure individuals get list of options, including secular placements.

need to add lang on (2) & (3)

~~subaward shall arrange for the individual to receive the program services through an alternative program participant~~.

"~~(3) If the organization is providing services pursuant to voucherized assistance, the designated award recipient that operates the voucherized assistance program shall arrange for the individual to receive the program services through an alternative provider~~.

"(4) Arrangements under any of paragraphs (1) through (3) with an alternative entity shall provide for program services the monetary value of which is not less than the monetary value of the program services that the individual would have received from the religious organization involved.

"(5) NONDISCRIMINATION.—

"(A) IN GENERAL.—Except as provided in subparagraph (B) or as otherwise provided in law, a religious organization that is a program participant shall not in providing program services discriminate against a program beneficiary on the basis of religion or religious belief.

~~"(B) LIMITATION.—A religious organization that is a program participant may require a program beneficiary who has elected in ac-~~ will drop (B)

~~cordance with paragraph (1) to receive program services from such organization—~~

"~~(i) to actively participate in religious practice, worship, and instruction; and~~

~~"(ii) to follow rules of behavior devised by the organizations that are religious in content or origin~~.

"(g) FISCAL ACCOUNTABILITY.—

"(1) IN GENERAL.—Except as provided in paragraph (2), any religious organization that is a program participant shall be subject to the same regulations as other recipients of awards of Federal financial assistance to account, in accordance with generally accepted auditing principles, for the use of the funds provided under such awards.

"(2) LIMITED AUDIT.—With respect to the award involved, if a religious organization that is a program participant maintains the Federal funds in a separate account from non-Federal funds, then only the Federal funds shall be subject to audit.

want to keep; similar to welfare reform.

"(h) COMPLIANCE.—With respect to compliance with this section by an agency, a religious organization may obtain judicial review of agency action in accordance with chapter 7 of title 5, United States Code.

"SEC. 583. LIMITATIONS ON USE OF FUNDS FOR CERTAIN PURPOSES.

"(a) IN GENERAL.—Except as provided in subsection (b), no funds provided directly to an entity under a designated program shall be expended for sectarian worship or instruction.

"~~(b) EXCEPTION.—Subsection (a) shall not apply to assistance provided to or on behalf of a program beneficiary if the beneficiary may choose where such assistance is redeemed or allocated~~.

will drop (b)

"SEC. 584. ADMINISTRATION OF PROGRAM AND TREATMENT OF FUNDS.

"(a) FUNDS NOT AID TO INSTITUTIONS.—Financial assistance under a designated program ~~provided to or on behalf of program beneficiaries~~ is aid to the beneficiary, not to the organization providing program services. ~~The receipt by a program beneficiary of program services at the facilities of the organization shall not constitute Federal financial assistance to the organization involved~~.

will revise as shown. Intent is to reflect Congress. intent that funds are aid to individuals, not institution.

"~~(b) PROHIBITION ON STATE DISCRIMINATION IN USE OF FUNDS.—No provision in any State constitution or State law shall be construed to prohibit the expenditure of Federal funds under a designated program in a religious facility or by a religious organization that is a program participant. If a State law or constitution would prevent the expenditure of State or local public funds in such~~

agreed to drop (b)

~~a facility or by such an organization, then the State or local government shall segregate the Federal funds from State or other public funds for purposes of carrying out the designated program.~~

"SEC. 585. EDUCATIONAL REQUIREMENTS FOR PERSONNEL IN DRUG TREATMENT PROGRAMS.

"(a) FINDINGS.—The Congress finds that—

"(1) establishing formal educational qualification for counselors and other personnel in drug treatment programs may undermine the effectiveness of such programs; and

"(2) such formal educational requirements for counselors and other personnel may hinder or prevent the provision of needed drug treatment services.

"(b) LIMITATION ON EDUCATIONAL REQUIREMENTS OF PERSONNEL.—

"(1) TREATMENT OF RELIGIOUS EDUCATION.—If any State or local government that is a program participant imposes formal educational qualifications on providers of program services, including religious organizations, such State or local government shall treat religious education and training of personnel as having a critical and positive role in the delivery of program services. In applying to religious organizations educational qualifications for personnel who provide substance abuse treatment in religious organizations,

Propose revised language as shown to clarify that religious training must be related to substance abuse such State or local government shall give credit for ~~religious~~ substance abuse education and training provided by the religious organization equivalent to credit given for secular course work in drug treatment ~~or any other secular subject that is of similar grade~~ level ~~and duration~~. If the education qualifications established by States for providing substance abuse treatment includes education qualifications not specific to substance abuse treatment, religious education and training should be given credit equivalent to secular education and training not related to substance abuse services.

"(2) RESTRICTION OF DISCRIMINATION REQUIREMENTS.—

"(A) IN GENERAL.—Subject to paragraph (1), a State or local government that is a program participant may establish formal educational qualifications for personnel in organizations providing program services that contribute to success in reducing drug use among program beneficiaries.

"(B) EXCEPTION.—The Secretary shall waive the application of any educational qualification imposed under subparagraph (A) for an individual religious organization, if the Secretary determines that—

"(i) the religious organization has a record of prior successful drug treatment for at least the preceding three years;

"(ii) the educational qualifications have effectively barred such religious organization from becoming a program provider;

"(iii) the organization has applied to the Secretary to waive the qualifications; and

"(iv) the State or local government has failed to demonstrate empirically that the educational qualifications in question are necessary to the successful operation of a drug treatment program.".

SEC. 203. CRA CREDIT FOR INVESTMENTS IN COMMUNITY DEVELOPMENT ORGANIZATIONS LOCATED IN RENEWAL COMMUNITIES.

Section 804 of the Community Reinvestment Act of 1977 (12 U.S.C. 2903) is amended by adding at the end the following new subsection:

"(c) INVESTMENTS IN CERTAIN COMMUNITY DEVELOPMENT ORGANIZATIONS.—In assessing and taking into account, under subsection (a), the record of a regulated financial institution, the appropriate Federal financial supervisory agency may consider, as a factor, investments of the institution in, and capital investment, loan participation, and other ventures undertaken by the institution in cooperation with, any community development organization (as defined in section 234 of the Bank Enterprise

Watts-Talent (Sec. 202) vs. Frist (Sec. 305)
05/05/00 DRAFT

Section	Watts-Talent (Sec. 202)	Discussion Status	Frist (Sec. 305)	Comments
1. Bill status and summary	The American Community Renewal Act was introduced in House (H.R. 815) and Senate (S.463) in February 1999 to target 100 poorest communities for pro-growth tax and regulatory relief, Brownfields cleanup and home ownership opportunities.		The Youth Drug and Mental Health Services Act (S.976) was introduced in May 1999 and passed in November, and sent to the House. The bill reauthorizes SAMHSA and addreses need to help children deal with violence.	HHS supports the Frist bill
2. Applicable statute	Amends title V of Public Health Service Act.		Amends title V and XIX of the Public Health Service Act.	
3. Applicable programs	Substance Abuse Prevention and Treatment block grant only ($1.6B in FY00,$1.631 proposed for FY01).		Substance Abuse Prevention and Treatment block grant ($1.6B in FY00, $1.631 proposed for FY01) & substance abuse competitive grants ($361M in FY00, $401M proposed for FY01).	
4. Program definitions	Sec. 581(c) on p69, line 8 and Sec. 582(a) on p71, line 16 Defines several terms to make clear the scope of the authority for religious organizations and to explicitly authorize a voucher system.	**TENTATIVELY RESOLVED**: House leg counsel in conforming definitions to SAMHSA law. We're waiting to see language.	Sec. 1955(b) Generally requires states to consider religious organizations among other nongovernmental providers to provide services.	
5. Use of vouchers	Sec. 581(c)(5)&(10) on p 70, line 1 and Sec. 582(a)(1)(C) &(D) on p71, line 20 States can fund religious orgs through grants, contracts, cooperative agreements, or voucherized assistance, where bene chooses the svc provider and the org is reimbursed.	**UNRESOLVED:** They reject proposal to drop term "voucher" since welfare law explicitly allows vouchers. We need to consult with HHS re: program implications. Also raises broader policy concerns (we need to check re: Education).	Silent on vouchers.	Welfare law allows vouchers, but SAMHSA law is silent. SAMHSA believes that one state (NM) and several substate areas already use vouchers.
6. Nondiscrimination against religious organizations	Sec. 582(c)(1) on p72, line 18 Finds that the Establishment Clause doesn't require welfare programs to discriminate against faith-based providers or to censor relig character.	**RESOLVED:** Agree to drop findings section.	Sec. 1955(a)(1) Prohibits discrimination of nongov'l orgs and individuals on basis of religion.	Frist language is similar to welfare law.
	Sec. 582(c)(2) on p73, line 3 Prohibits fed and state gov'ts from discriminating against orgs on basis of religious character.	**TENTATIVELY RESOLVED:** Agree to add language saying law must be implemented consistent with Establishment Clause and the Free Exercise Clause, ensuring that funds don't go to "pervasively sectarian" orgs. Need to see language.	Sec 1955(b)(2) States can't discriminate against relig orgs "so long as the programs … are implemented in a manner consistent with the Establishment Clause of the first amendment to the Constitution."	Frist language is similar to welfare law.

Section	Watts-Talent (Sec. 202)	Discussion Status	Frist (Sec. 305)	Comments
7. Employment practices	Sec. 582(e) on p74, line 3 This section doesn't affect other federal or state laws relating to discrimination in employment on basis of religions. Exception – relig orgs can require employees to adhere to religious beliefs and practices of the org.	**TENTATIVELY RESOLVED:** Replace with welfare law language, which refer to title VII Civil Rights Act exemption. However, Section 584(a) provision making aid to individual rather than institution, may still cause a problem. They may see it as a way to get around the employment issue, although whether or not the organization receives federal funds has no bearing on its requirement to comply with Title VII.	Sec. 1955(d) A relig org's exemption from title VII of Civil Rights Act allowing them to hire individual of a particular religion isn't affected by receipt of federal funds under this program.	Frist language is similar to welfare law.
8. Arrangements for alternative providers	Sec. 582(f)(1)-(4) on p74, line 20 If a bene objects to program bc it's a religious org, the org or the non-fed entity shall arrange for an alternative provider.	**TENTATIVELY RESOLVED**: Agree to conform with welfare law so (1) states provide alternative provider, (2) relig orgs must refer individuals back to state for new placement, and (3) individuals must get list of option, including secular placements. Need to see language.	Sec. 1955(e) If an individual objects to relig character of the org, the appropriate gov'l entity must provide w/in reasonable time period, equivalent svcs from an alternate provider that is accessible to the individual.	Frist is similar to welfare law.
9. Nondiscrimination against beneficiaries	Sec. 582(f)(5)(B) on p75, line 23 Relig orgs can't discriminate against beneficiary on basis of religion or relig belief, except that: A religious organization may require a beneficiary to actively participate in religious practice, worship and instruction, and to follow rules of behavior that are religious in content	**RESOLVED:** Agree to drop due to serious constitutional concerns with allowing organizations to require beneficiaries to participate in religious practice.	Sec. 1955(f) Relig orgs can't discriminate on basis of religion, a relig belief, a refusal to hold a relig belief, or a refusal to actively participate in religious practice.	Frist is similar to welfare law.
10. Fiscal accountability	Sec. 582(g)(2) on p76, line 16 Provides special audit procedures for religious organizations, so that only gov't funds are subject to audit by gov't.	**UNRESOLVED:** Limited audit is consistent with welfare law, but it conflicts with Single Audit Act which subjects all federal government grantees to identical audit rules. Prefer silence, but they want it in.	Sec. 1955(g) Same as Watts-Talent and welfare law.	
11. Limitations on use of funds	Sec. 583(b) on p77, line 7 Allows funds to be used for sectarian worship or instruction in cases where bene can choose where to get svcs such as voucherized assistance.	**RESOLVED:** Agree to drop.	Sec. 1955(i) Funds provided thru grant or contract to a relig org to provide sub abuse svcs can't be used for sectarian worship, instruction, or proselytization.	Frist language is similar to welfare law, prohibiting use of funds for sectarian worship, instruction, or proselytization
12. Treatment of funds	Section 584(a) on p77, line 13-19 Financial assistance provided to or on behalf of program beneficiaries is aid to beneficiaries, not organizations. Receipt	**UNRESOLVED:** They will drop the 2nd sentence, and clarify the 1st sentence by striking "provided to or on behalf of program beneficiaries".	N/A	No similar language in Frist or welfare law.

Section	Watts-Talent (Sec. 202)	Discussion Status	Frist (Sec. 305)	Comments
	of program services at an organization shall not constitute Federal financial assistance to the organization.	This raises serious problems: (1) As written, this would apply to all substance abuse grants to public or private entities (per definition of designated program) [**Cliff/Paul** – see if you agree with this reading. This was the objection we'd raised at the very beginning but I don't think they've fixed it. It's not something that OLC flagged but it appears to be at the minimum a drafting problem]. (2) Declaring that aid is to the individual doesn't have legal effect and determination should be left to the courts. They say this reflects their intent that aid is to help the individual get clean and hope this provision will protect organizations from Constitutional criticism that funds can't go to "pervasively sectarian organizations" though OLC thinks courts will make their own determination. They may also believe this would allow the organization to engage in employment discrimination on the basis of religion but we don't see how it would.		
13. Preemption of State Laws and Constitutions	Section 584(b) on p77, line 20 Allows federal funds to be expended in a religious facility or by a religious organization even if forbidden by state laws or constitutions by segregating federal funds from state funds.	**RESOLVED**: Agree to drop.	Silent.	Under welfare law, nothing shall be construed to preempt state constitutions or state statutes prohibiting or restricting expenditure of state funds in or by religious organizations.
14. Educational requirements for personnel in drug treatment programs	Sec. 585(b)(1) on p78, line 17 Requires state or locals to treat religious education as equivalent to secular course work in drug treatment. Sec'y may waive state/local qualifications for applicant religious organizations. **[Genie, I couldn't find statutory basis for this 2nd sentence.]**	**TENTATIVELY RESOLVED**: They will amend to specify that state/locals shall give credit for substance abuse education and training provided by the religious organization for personnel who provide substance abuse treatment in religious organizations. Also adding language that if State requires educational qualifications unrelated to substance abuse, religious education	None.	Nothing similar in welfare law.

Section	Watts-Talent (Sec. 202)	Discussion Status	Frist (Sec. 305)	Comments
		should be given equivalent credit. Specifying training in substance abuse is an improvement. Remaining concerns: 1) Limiting to training provided by the particular organization may be too narrow [could be religious training in substance abuse provided by another entity, such as in the case of pastoral counseling] 2) Still raises preemption issue and, unlike welfare law, they do not have a non preemption clause **[Paul/Cliff** – I'm suggesting this for first time – what do you think? AK		

Possible Issues – Section 202 (Internal/Annotated)

04/11/00 DRAFT

Working —
Cam
Chris

Ensure Government Funds Aren't Used for Religious Worship

1) Section 582(f)(5)(B) allows federally-funded programs to require participants who elect the program to participate in religious practice, worship, and instruction or to follow rules of behavior that are religious in content or origin. In addition, Section 583(b) allows federal funds to be used for sectarian worship or instruction if the beneficiary may choose where such assistance is redeemed or allocated.

The welfare reform law and the Senate-passed Frist substance abuse bill and House-passed Homeownership Act prohibit funds from being used for sectarian worship, instruction, or proselytization, with no exceptions. Welfare reform and Frist prohibit discrimination against beneficiaries for refusal to actively participate in religious practice as well as on the basis of religion or religious belief; Homeownership Act does not.

Last June, during debate on a House-passed resolution on community renewal (in support of faith-based efforts, including reference to section 202), Rep. Scott (D-VA), Edwards (D-TX) and Lewis (D-GA) strongly opposed section 582(f)(5)(B) requiring religious practice or allowing funds to be used for proselytization. Rep. Scott submitted for the record a letter from the Working Group for Religious Freedom in Social Services (a coalition of 31 groups representing professional, civil liberties, and various religious interests) opposing federally funded substance abuse treatment allowing evangelism or proselytization. Members supporting the House-passed resolution on community renewal, including Reps. Souder (R-IN), Davis (D-IL) and Meek (D-FL), argued that participants aren't required to participate in religious practice as long as there is a choice among providers.

RESPONSE #1: *Resolved* -- Agrees to silence.

KEY POINTS:
- ✓ Silence is best option.
- ✓ Do not even provide same anti-discrimination protections as Frist and welfare reform.
- ✓ We have very little latitude on this point.
- ✓ Our lawyers believe there are serious constitutional issues with going down this path
- ✓ The Vice President said "must continue to prohibit direct proselytizing as part of any publicly funded efforts."
- ✓ Providing individual choice does not address use of federal funds issue.
- ✓ The controversy caused by pushing the envelope on this issue could detract from our shared goal of enacting New Markets initiatives this year.

Make Clear Programs Must Adhere to Establishment Clause

2) Section 582(c) makes clear that the program cannot discriminate against religious organizations, but does not state that the program must be implemented consistent with the Establishment Clause; also includes Congressional findings regarding the meaning of the Establishment Clause.

The welfare reform law, Senate-passed Frist substance abuse bill, and House-passed Homeownership Act require programs to be implemented consistent with the Establishment Clause. This language was added to the welfare reform law as a result of a 59-41 floor vote which had the support of 14 Republicans, including Campbell, Domenici, Jeffords, Lugar, Snowe, Specter, Stevens and Thomas (Cohen was the amendment's sponsor). Neither welfare reform nor Frist has Congressional findings regarding the meaning of Establishment Clause, instead properly leaving constitutional interpretation to the courts. Homeownership Act also added "consistent with the Free Exercise Clause" based on Barney Frank amendment by U.C.

RESPONSE #3: *Resolved* -- Agree to add Establishment Clause language and to drop findings on the Establishment Clause. They want to add free exercise language, which we agreed to. *Need to see language.*

3) Section 581(c)(9) definition of "religious organization" does not make clear it means religious organizations eligible to receive federal funding consistent with the Establishment Clause.

Both the welfare reform law and the Senate-passed Frist substance abuse bill have language saying overall programs must be implemented consistent with Establishment Clause; neither bill attempts to define "religious organization." Since this bill includes a definition of "religious organization" it provides an opportunity to clarify that these organizations should be eligible to receive federal funding consistent with the Establishment Clause. Such a change in the definition section would also therefore apply when the term "religious organization" is used elsewhere in the statute, such as Section 582(a)(1) related to subawards and Section 582(d)(2) related to religious character and freedom.

A related issue was debated on the House floor last November when Rep. Chet Edwards (D-TX) offered an amendment to the Fathers Count Act of 1999 to prohibit federal funds to pervasively sectarian organizations. The amendment was defeated 183-238, with 176 Democrats and 7 Republicans supporting the measure, including: the Democratic leadership; members of the Black Caucus such as Conyers, Clyburn, Meek, Rangel, Waters; Commerce Committee members Dingell, Waxman, Markey, and Boucher; Ways and Means Committee members Rangel, Stark, Matsui, Cardin, Coyne, and Levin. Thirty-four Democrats, including Roemer, Stenholm and a few Hispanic Caucus members such as Hinojosa, Ortiz and Pastor, opposed the prohibition on funds to pervasively sectarian organizations. Rep. Nancy Johnson, the bill manager, opposed the Edwards amendment, arguing that the Congress should not put in the statute the term "pervasively sectarian" since the court would likely continue to more clearly define the Establishment Clause in future decisions. Rep. Scott also raised this issue in June during the debate on the House-passed resolution on community renewal.

RESPONSE: It doesn't appear that they responded specifically to this point, though they did agree to work with House legislative Counsel to streamline definitions (see Response #6 in our Issue #5 below). *Tentatively resolved: we'll need to see language and consult with HHS.*

4) Section 584(a) defines what kind of financial assistance is aid to beneficiaries versus aid to institutions.

Neither the welfare reform law nor the Senate-passed Frist substance abuse bill has this language which in effect makes a constitutional interpretation, instead properly leaving such interpretation to the courts.

RESPONSE #2: *Unresolved*—Reject proposal to be silent, but would clarify that the funds are aid to the individual, not the institution. This would protect institutions from Constitutional cases, and address the employment discrimination concerns in issue #7 below [unclear -- how?]. They had previously agreed to silence so we need to revisit this issue.

Treat Religious and Non-Religious Organizations Equally

5) Section 582(g)(2) provides special audit procedures for religious organizations; in addition, certain other program changes (certain definitions – Section 581(c); grant award and subaward authority – Section 582(a); and educational requirements – Section 585) apply only to religious organizations.

Neither the welfare reform law, the Senate-passed Frist substance abuse bill, or House-passed Homeownership Act provides special program rules for religious organizations, but all three, like this bill, include special audit provisions for religious organizations. The special audit provision in effect provides an exception to the Single Audit Act, enacted July 5, 1996, which subjects all federal government grantees to identical audit rules including examining organizations' federal and non-federal funds during audits.

RESPONSE #5: *Unresolved* -- Reject proposal to be silent on audit procedures.

KEY POINT:
✓ We're not in a position to oppose audit language consistent with welfare reform and Frist

RESPONSE #6: Agree to work with House legislative Counsel to streamline definitions and consider Frist definitions. *Tentatively resolved: we'll need to see language and consult with HHS.*

KEY POINT:
✓ Does this just apply to 581(c)?; what about grant award and subaward authority? [Do we know why these are even necessary? SAMHSA doesn't use these terms]
✓ See RESPONSE #8 for educational requirements.

Other Possible Issues

6) Section 582(f) makes clear individuals can receive services through an alternative provider but may not include certain desired safeguards.

Both the welfare reform law and the Senate-passed Frist substance abuse bill include certain specific safeguards, including requiring a government agency to provide equivalent services from an accessible alternate provider that is not a religious organization within a reasonable period of time. The House-passed Homeownership Act does not contain these safeguards; specifically, it does not require alternative services to be provided nor does it prohibit discrimination against the recipient based on their religion. During debate on the House-passed resolution on community renewal, Rep. Scott submitted letters from the National Association of Alcohol and Drug Abuse Counselors (NAADAC) and the Working Group for Religious Freedom in Social Services (a coalition of 31 groups representing professional, civil liberties, and various religious interests) expressing concerns that section 582(f) does not require that alternative services be accessible nor require states to notify individuals in religious programs of their right to receive alternative services.

RESPONSE #9: *Tentatively Resolved* – Agree to: (a) streamline language to welfare law so the state or other entity must arrange for alternative placements, (b) require non-elected organizations to refer individuals back to the state or other entity for new placement, (c) ensure that individuals receive a list of accessible options, including secular placements. *Need to see language.*

KEY POINTS:

- ✓ First, clarify whether they've substituted list for arranging alternative services.
- ✓ Does not go as far as safeguards in Frist and welfare reform. Providing a list may not be as helpful as actually arranging for the service. Does not reference "within a reasonable period of time" and "in the region" does not necessarily mean "accessible"
- ✓ Alternatives should be provided by a government agency – as in Frist and welfare reform. Having the religious organization provide the list or arrange alternatives does not provide comfort. NOTE: this may be more of an issue for direct awards since 582(f) says that for sub-awardees, the non-Federal entity that made the sub-award shall arrange for alternative services.
- ✓ VP says must provide secular alternative for anyone who wants one.
- ✓ NOTE: 582(f) generally follows welfare reform language in saying "If individual objects to a program participant on the basis that participant is a religious organization..." which seems to imply the alternative would be non-religious. Does also say should be of comparable monetary value.

7) Section 582(e)(2)(A) says religious organizations receiving federal funds can require employees to adhere to the religious beliefs and practices of their organizations.

The welfare reform law, Senate-passed Frist substance abuse bill,, and House-passed Homeownership Act state that the Civil Rights Act exemption allowing religious organizations to hire on the basis of religion will not be affected by organizations' receipt of federal funds, in essence, keeping in place current law. The language in this bill potentially expands the current law Civil Rights exemption to new organizations.

Concerns have recently been expressed about the welfare reform law and Frist provisions, as well the language in this bill. During the Frist Senate debate last November, Senator Kennedy called "barring many trained, qualified professionals from providing services for faith-based organizations" seriously flawed. Last November in the House, Rep. Bobby Scott (D-VA) made a motion to recommit the Fathers Count Act of 1999 to prohibit religious organizations receiving federal funds from hiring on the basis of religion. The motion was defeated 175-246 with 173 Democrats and 2 Republicans supporting the measure. Voting patterns were similar to the Edwards amendment (see #3 above) except that Hispanic Caucus members Hinojosa, Ortiz and Pastor supported this restriction on charitable choice. In last June's debate on the House-passed resolution on community renewal, Reps. Scott, Edwards (D-TX) and Lewis (D-GA) voiced strong opposition to section 582(e)(2)(A) to "allow faith-based organizations to engage in employment discrimination based on religion with public funds," submitting a letter of support from the Working Group for Religious Freedom in Social Services (a coalition of 31 groups representing professional, civil liberties, and various religious interests).

RESPONSE #10: *Resolved* – Agree to adopt welfare language. They note that courts are interpreting the welfare "type" language as meaning the provision applies to the whole institution and not just the program. However, if agree to proposal under issue #4, then this is not a problem in court interpretation *[not clear on this connection].*

KEY POINTS:

- ✓ Anything other than silence or welfare reform/Frist language is problematic (and even that is problematic for many Democrats). Need to stick with current standard.
- ✓ Organizations that impose a religious qualification for hiring are more likely to be viewed as pervasively sectarian by a court since this is one of the factors that courts consider in making that

determination. A statute that encourages organizations to impose that requirement on employees could have the unfortunate effect of making them vulnerable to court challenges.

- ✓ With or without TANF language, a religious organization could still argue they are exempt.
- ✓ Courts have interpreted 'religious organization' under Title VII exemption as where "primary mission is religious". A Baptist hospital would not be covered by the exemption. Adding new language would allow a potentially broader group of faith-based organizations receiving substance abuse funding to self-define as religious organizations for purposes of exemption.
- ✓ [checking on whether employers can create a sub that would qualify for the exemption – *Counsel*: what is status??.]

8) Section 581(c)(5) explicitly authorizes substance abuse treatment and prevention funds to be distributed via vouchers.

The Senate-passed Frist substance abuse bill does not authorize vouchers; funds are provided only in form of grants, contracts or cooperative agreements.

RESPONSE #7: *Unresolved* -- (referring to section 582(a)(1)(C)) Reject proposal to drop term "voucher" on basis that welfare law explicitly authorizes use of vouchers. *We'll need to consult with HHS re: SAMHSA implications, but also raises broader policy concerns.*

KEY POINTS:

- ✓ Policy concerns if vouchers used for religious organizations.
- ✓ We can't address at this time without broader discussions with agencies.

9) Section 584(b) allows federal law to preempt state laws or constitutions, and 585(b) overrides state or local educational or certification requirements of providers.

The welfare reform law includes a provision saying nothing shall be construed to preempt state constitutions or statutes prohibiting or restricting expenditure of state funds in or by religious organizations. The Senate-passed Frist substance abuse bill and House-passed Homeownership Act is silent (has no provision allowing federal preemption).

During the June debate on the House-passed resolution on community renewal, Rep. Scott and the Working Group for Religious Freedom in Social Services (a coalition of 31 groups representing professional, civil liberties, and various religious interests) objected to section 584(b) which "undercuts states constitutional and statutory provisions, including civil rights laws." Reps. Scott, Edwards, and Waxman also noted serious policy concerns with section 585(b) to treat religious education as credit toward drug treatment coursework. Rep. Scott submitted letters signed by professional, religious and civil liberties groups stating that section 585(b) would undermine treatment effectiveness and that alcohol and drug treatment is a medical services requiring scientific knowledge that is not comparable to religious education. In response, Rep. Davis (D-IL) and Souder (R-IN) argued that section 584(b) rewards programs proven to be effective rather than simply credentials.

RESPONSE #4: *Resolved* -- Agree to be silent on preemption of state law provision (section 584(b)).

RESPONSE #8: *Tentatively resolved* -- Reject proposal to specify equal treatment of "religious drug and alcohol treatment education and training" and to apply waiver for other non-religious programs with a 3-

year track record of success but don't meet state requirements. Need to work to find appropriate definition of "religious education." They will look at state requirements. *We should consult with HHS.*

KEY POINTS:

- ✓ Language preempts state law in licensing -- an area where states have traditionally had responsibility. This raises particular federalism concerns.
- ✓ A test that favors religious organizations over non-religious organizations (by only preempting state licensing requirements for religious organizations) makes this provision particularly vulnerable to a legal challenge.
- ✓ Concern about equal treatment stands – no similar provisions for non-religious organizations.
- ✓ Why reject 3 year track record?

OTHER ISSUES FOR HOMEOWNERSHIP ACT—FOR INTERNAL DISCUSSION

- Allows HUD or a state or local government to fund a religious organization on the same basis as other non-governmental organizations. NOTE: This means direct federal funding, whereas other block grant programs where charitable choice exists or has been proposed leave it to states or local governments to choose to fund religious organizations. Does this raise any issues?

- Provides that if an eligible entity or other organization (referred to in this subsection as an `intermediate organization'), acting under a contract, or grant or other agreement, with the Federal Government or a State or local government, is given the authority under the contract or agreement to select nongovernmental organizations to provide assistance under the programs described in subsection (a), the intermediate organization shall have the same duties under this section as the government. NOTE: Since they also have authority to select non-governmental organizations, this does not appear to violate equal treatment principle. Does it raise any other issues?

Lieberman —
Chair Groups

Possible Issues – Section 202 (Internal/Annotated)
03/23/00 DRAFT

Ensure Government Funds Aren't Used for Religious Worship

1) Section 582(f)(5)(B) allows federally-funded programs to require participants who elect the program to participate in religious practice, worship, and instruction or to follow rules of behavior that are religious in content or origin. In addition, Section 583(b) allows federal funds to be used for sectarian worship or instruction if the beneficiary may choose where such assistance is redeemed or allocated.

The welfare reform law and the Senate-passed Frist substance abuse bill both prohibit funds from being used for sectarian worship, instruction, or proselytization, with no exceptions. Both also prohibit discrimination against beneficiaries for refusal to actively participate in religious practice as well as on the basis of religion or religious belief.

Last June, during debate on a House-passed resolution on community renewal (in support of faith-based efforts, including reference to section 202), Rep. Scott (D-VA), Edwards (D-TX) and Lewis (D-GA) strongly opposed section 582(f)(5)(B) requiring religious practice or allowing funds to be used for proselytization. Rep. Scott submitted for the record a letter from the Working Group for Religious Freedom in Social Services (a coalition of 31 groups representing professional, civil liberties, and various religious interests) opposing federally funded substance abuse treatment allowing evangelism or proselytization. Members supporting the House-passed resolution on community renewal, including Reps. Souder (R-IN), Davis (D-IL) and Meek (D-FL), argued that participants aren't required to participate in religious practice as long as there is a choice among providers.

RESPONSE #1: On 582(f)(5)B), reject proposal to be silent on basis that it acts as protection for participating groups. willing to move

(1+7)

KEY POINTS:

- ✓ Silence is best option.
- ✓ Do not even provide same anti-discrimination protections as Frist and welfare reform.
- ✓ We have very little latitude on this point.
- ✓ Our lawyers believe there are serious constitutional issues with going down this path:

** The Supreme Court in Bowen v. Kendrick upheld granting government funds to a religiously-affiliated organization. However, the Court said that such organizations can receive funds only if they are not pervasively sectarian. In addition, the funds cannot be used to support religious activities.

** In cases where the organization engages in both sectarian and secular activities, the opinion indicates that funds cannot be used to support programs where the secular and sectarian activities are inextricably intertwined. If conveying a religious message constitutes a significant component of a program, or if a program requires participants to engage in religious activities, the religious and non-religious aspects of the program would be inextricably intertwined. Consequently, using government funds to support the program would violate the standard in Kendrick.

- ✓ Kendrick and other cases allow a recipient to administer both religious and non-religious programs simultaneously as long as the federal funds are not used to support the religious program. Individuals could participate in both types of programs.

- ✓ The Vice President said "must continue to prohibit direct proselytizing as part of any publicly funded efforts."

- ✓ Providing individual choice does not address use of federal funds issue.

- ✓ The controversy caused by pushing the envelope on this issue could detract from our shared goal of enacting New Markets initiatives this year. [Sarah – what do you think?]

Make Clear Programs Must Adhere to Establishment Clause

2) Section 582(c) makes clear that the program cannot discriminate against religious organizations, but does not state that the program must be implemented consistent with the Establishment Clause; also includes Congressional findings regarding the meaning of the Establishment Clause.

The welfare reform law and the Senate-passed Frist substance abuse bill both require programs to be implemented consistent with the Establishment Clause. This language was added to the welfare reform law as a result of a 59-41 floor vote which had the support of 14 Republicans, including Campbell, Domenici, Jeffords, Lugar, Snowe, Specter, Stevens and Thomas (Cohen was the amendment's sponsor). Neither welfare reform nor Frist has Congressional findings regarding the meaning of Establishment Clause, instead properly leaving constitutional interpretation to the courts.

RESPONSE #3: Agree to add Establishment Clause language. In addition, they want to add language regarding the free exercise clause.

KEY POINTS:
- ✓ OK with saying "consistent with the Establishment Clause and Free Exercise Clause". If other language, need to consult.
- ✓ Need to clarify whether they agreed to drop Congressional findings as well. Including them is problematic.

3) Section 581(c)(9) definition of "religious organization" does not make clear it means religious organizations eligible to receive federal funding consistent with the Establishment Clause.

Both the welfare reform law and the Senate-passed Frist substance abuse bill have language saying overall programs must be implemented consistent with Establishment Clause; neither bill attempts to define "religious organization." Since this bill includes a definition of "religious organization" it provides an opportunity to clarify that these organizations should be eligible to receive federal funding consistent with the Establishment Clause. Such a change in the definition section would also therefore apply when the term "religious organization" is used elsewhere in the statute, such as Section 582(a)(1) related to subawards and Section 582(d)(2) related to religious character and freedom.

A related issue was debated on the House floor last November when Rep. Chet Edwards (D-TX) offered an amendment to the Fathers Count Act of 1999 to prohibit federal funds to pervasively sectarian organizations. The amendment was defeated 183-238, with 176 Democrats and 7 Republicans supporting the measure, including: the Democratic leadership; members of the Black Caucus such as Conyers, Clyburn, Meek, Rangel, Waters; Commerce Committee members Dingell, Waxman, Markey, and Boucher; Ways and Means Committee members Rangel, Stark, Matsui, Cardin, Coyne, and Levin. Thirty-four Democrats, including Roemer, Stenholm and a few Hispanic Caucus members such as Hinojosa, Ortiz and Pastor, opposed the prohibition on funds to pervasively sectarian organizations. Rep.

Nancy Johnson, the bill manager, opposed the Edwards amendment, arguing that the Congress should not put in the statute the term "pervasively sectarian" since the court would likely continue to more clearly define the Establishment Clause in future decisions. Rep. Scott also raised this issue in June during the debate on the House-passed resolution on community renewal.

RESPONSE: It doesn't appear that they responded specifically to this point, though they did agree to work with House legislative Counsel to streamline definitions (see Response #6 in our Issue #5 below).

KEY POINTS:
✓ OK to leave definition of religious organization as is if add Establishment Clause language elsewhere.

4) Section 584(a) defines what kind of financial assistance is aid to beneficiaries versus aid to institutions.

Neither the welfare reform law nor the Senate-passed Frist substance abuse bill has this language which in effect makes a constitutional interpretation, instead properly leaving such interpretation to the courts.

RESPONSE #2: Agree to drop.

Treat Religious and Non-Religious Organizations Equally

5) Section 582(g)(2) provides special audit procedures for religious organizations; in addition, certain other program changes (certain definitions – Section 581(c); grant award and subaward authority – Section 582(a); and educational requirements – Section 585) apply only to religious organizations.

Neither the welfare reform law nor the Senate-passed Frist substance abuse bill provides special program rules for religious organizations, but both, like this bill, include special audit provisions for religious organizations. The special audit provision in effect provides an exception to the Single Audit Act, enacted July 5, 1996, which subjects all federal government grantees to identical audit rules including examining organizations' federal and non-federal funds during audits.

RESPONSE #5: Reject proposal to be silent on audit procedures.

KEY POINT:
✓ We're not in a position to oppose audit language consistent with welfare reform and Frist

RESPONSE #6: Agree to work with House legislative Counsel to streamline definitions.

KEY POINT:
✓ Does this just apply to 581(c)?; what about grant award and subaward authority? [Do we know why these are even necessary? SAMHSA doesn't use these terms – Genie please confirm]
✓ See RESPONSE #8 for educational requirements.

Other Possible Issues

6) Section 582(f) makes clear individuals can receive services through an alternative provider but may not include certain desired safeguards.

Both the welfare reform law and the Senate-passed Frist substance abuse bill include certain specific safeguards, including requiring a government agency to provide equivalent services from an accessible alternate provider that is not a religious organization within a reasonable period of time. During debate on the House-passed resolution on community renewal, Rep. Scott submitted letters from the National Association of Alcohol and Drug Abuse Counselors (NAADAC) and the Working Group for Religious Freedom in Social Services (a coalition of 31 groups representing professional, civil liberties, and various religious interests) expressing concerns that section 582(f) does not require that alternative services be accessible nor require states to notify individuals in religious programs of their right to receive alternative services.

RESPONSE #9: Modify provision so the organization, not the state, "shall provide to the individual a list of the available options for alternative placements in the region."

KEY POINTS:
- ✓ First, clarify whether they've substituted list for arranging alternative services.
- ✓ Does not go as far as safeguards in Frist and welfare reform. Providing a list may not be as helpful as actually arranging for the service. Does not reference "within a reasonable period of time" and "in the region" does not necessarily mean "accessible"
- ✓ Alternatives should be provided by a government agency – as in Frist and welfare reform. Having the religious organization provide the list or arrange alternatives does not provide comfort. NOTE: this may be more of an issue for direct awards since 582(f) says that for sub-awardees, the non-Federal entity that made the sub-award shall arrange for alternative services.
- ✓ VP says must provide secular alternative for anyone who wants one.
- ✓ NOTE: 582(f) generally follows welfare reform language in saying "If individual objects to a program participant on the basis that participant is a religious organization…" which seems to imply the alternative would be non-religious. Does also say should be of comparable monetary value.

7) Section 582(e)(2)(A) says religious organizations receiving federal funds can require employees to adhere to the religious beliefs and practices of their organizations.

Both the welfare reform law and the Senate-passed Frist substance abuse bill state that the Civil Rights Act exemption allowing religious organizations to hire on the basis of religion will not be affected by organizations' receipt of federal funds, in essence, keeping in place current law. The language in this bill potentially expands the current law Civil Rights exemption to new organizations.

Concerns have recently been expressed about the welfare reform law and Frist provisions, as well the language in this bill. During the Frist Senate debate last November, Senator Kennedy called "barring many trained, qualified professionals from providing services for faith-based organizations" seriously flawed. Last November in the House, Rep. Bobby Scott (D-VA) made a motion to recommit the Fathers Count Act of 1999 to prohibit religious organizations receiving federal funds from hiring on the basis of religion. The motion was defeated 175-246 with 173 Democrats and 2 Republicans supporting the measure. Voting patterns were similar to the Edwards amendment (see #3 above) except that Hispanic Caucus members Hinojosa, Ortiz and Pastor supported this restriction on charitable choice. In last June's debate on the House-passed resolution on community renewal, Reps. Scott, Edwards (D-TX) and Lewis (D-GA) voiced strong opposition to section 582(e)(2)(A) to "allow faith-based organizations to engage in employment discrimination based on religion with public funds," submitting a letter of support from the Working Group for Religious Freedom in Social Services (a coalition of 31 groups representing professional, civil liberties, and various religious interests).

RESPONSE #10: Reject proposal to use welfare reform/Frist language. They note that courts are interpreting the welfare "type" language as meaning the provision applies to the whole institution and not just the program.

KEY POINTS:
- ✓ Anything other than silence or welfare reform/Frist language is problematic (and even that is problematic for many Democrats). Need to stick with current standard.
- ✓ Organizations that impose a religious qualification for hiring are more likely to be viewed as pervasively sectarian by a court since this is one of the factors that courts consider in making that determination. A statute that encourages organizations to impose that requirement on employees could have the unfortunate effect of making them vulnerable to court challenges.
- ✓ With or without TANF language, a religious organization could still argue they are exempt.
- ✓ Courts have interpreted 'religious organization' under Title VII exemption as where "primary mission is religious". A Baptist hospital would not be covered by the exemption. Adding new language would allow a potentially broader group of faith-based organizations receiving substance abuse funding to self-define as religious organizations for purposes of exemption. KBI
- ✓ [checking on whether employers can create a sub that would qualify for the exemption.]

[illegible] votes [illegible]

8) Section 581(c)(5) explicitly authorizes substance abuse treatment and prevention funds to be distributed via vouchers. L new fund

The Senate-passed Frist substance abuse bill does not authorize vouchers; funds are provided only in form of grants, contracts or cooperative agreements.

RESPONSE #7: (referring to section 582(a)(1)(C)) Reject proposal to drop term "voucher" on basis that welfare law explicitly authorizes use of vouchers.

KEY POINTS:
- ✓ Policy concerns if vouchers used for religious organizations.
- ✓ We can't address at this time without broader discussions with agencies. ✓
- ✓ [Any other points??] educ plates – needlessly open up fight

9) Section 584(b) allows federal law to preempt state laws or constitutions, and 585(b) overrides state or local educational or certification requirements of providers.

The welfare reform law includes a provision saying nothing shall be construed to preempt state constitutions or statutes prohibiting or restricting expenditure of state funds in or by religious organizations. The Senate-passed Frist substance abuse bill is silent (has no provision allowing federal preemption).

During the June debate on the House-passed resolution on community renewal, Rep. Scott and the Working Group for Religious Freedom in Social Services (a coalition of 31 groups representing professional, civil liberties, and various religious interests) objected to section 584(b) which "undercuts states constitutional and statutory provisions, including civil rights laws." Reps. Scott, Edwards, and Waxman also noted serious policy concerns with section 585(b) to treat religious education as credit toward drug treatment coursework. Rep. Scott submitted letters signed by professional, religious and civil liberties groups stating that section 585(b) would undermine treatment effectiveness and that alcohol and drug treatment is a medical services requiring scientific knowledge that is not comparable to religious education. In response, Rep. Davis (D-IL) and Souder (R-IN) argued that section 584(b) rewards programs proven to be effective rather than simply credentials.

RESPONSE #4: Agree to be silent on preemption of state law provision (section 584(b)).

RESPONSE #8: Reject proposal to specify equal treatment of "religious drug and alcohol treatment education and training" on basis that employees have non-treatment responsibilities such as GED or life skills. Reject proposal to apply waiver for other non-religious programs with a 3-year track record of success but don't meet state requirements.

KEY POINTS:

- ✓ Language preempts state law in licensing -- an area where states have traditionally had responsibility. This raises particular federalism concerns.
- ✓ A test that favors religious organizations over non-religious organizations (by only preempting state licensing requirements for religious organizations) makes this provision particularly vulnerable to a legal challenge.
- ✓ Concern about equal treatment stands – no similar provisions for non-religious organizations.
- ✓ Why reject 3 year track record?

?

possible O's to bring in & who can bring other O's

- Tony Hall
- Roemer
- Ellen Tauscher ?
- Stenholm
- LaFalce

Issues – Section 202 of HR 815
2/24/00 DRAFT

WELFARE – CHARITABLE CHOICE

Requiring beneficiaries to participate in religious practice: Eliminate language allowing a program to require program participants to participate in religious practice, worship, and instruction or to follow rules of behavior that are religious in content or origin, or amend to make clear that this does not apply to individuals that opt for alternative service providers. (section 582 (f)(5)(B))

Allowing federal funds to be used for sectarian worship or instruction: Eliminate language allowing federal funds to be used for sectarian worship or instruction in cases when the beneficiary chose where the assistance is redeemed or allocated. (section 583 (b))

References to the Establishment Clause: Eliminate Congressional findings regarding meaning of the Establishment Clause, and insert language from original charitable choice provision of welfare law saying programs shall be implemented consistent with the Establishment Clause. (section 582 (c)(1) – eliminate; section 582 (c)(2) – insert at end of first sentence "so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution.")

Type of organization that can receive funds: Define "religious organization" as "religious organization that is not pervasively sectarian." (section 581 (c)(9))

Employment practices of religious organizations: Eliminate language saying religious organizations receiving federal funds can require employees to adhere to the religious beliefs and practices of their organizations. (section 582 (e)(2)(A))

Authorization of vouchers: Eliminate explicit authorization of vouchers by eliminating "voucherized assistance" from definition of "financial assistance" (section 581 (c)(5))

State preemption: Eliminate language allowing federal funds to be expended in a religious facility or by a religious organization even if forbidden by state laws or constitutions; substitute language from section 104 (k) of 1996 welfare law saying provision should not be construed to preempt such state laws and constitutions. (section 584 (b))