CC: Gene

Andrea, Cliff:

Attached are: (1) committee report containing Rep. Scott's views and CRS memo; and (2) EEOC memo and Education comments.

Paul

106TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 106–50

To: Paul Oetken

LITERACY INVOLVES FAMILIES TOGETHER ACT

FEBRUARY 29, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLING, from the Committee on Education and the Workforce, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 3222]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 3222) to amend the Elementary and Secondary Education Act of 1965 to improve literacy through family literacy projects, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Literacy Involves Families Together Act".

TITLE I—FAMILY LITERACY

SEC. 101. AUTHORIZATION OF APPROPRIATIONS.

Section 1002(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6302(b)) is amended—

(1) by striking "$118,000,000 for fiscal year 1995" and inserting "$ 00,000,000 for fiscal year 2001"; and

(2) by striking "four" and inserting "three".

SEC. 102. IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES.

Section 1111(c) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6311(c)) is amended—

is to coordinate existing federal, state and local programs to increase the number of family literacy programs within a state. While a total of $20 million has been appropriated for this purpose, not all states wishing to receive such grants have done so. The Committee believes it is important that all states seeking to receive a grant to coordinate family literacy services should have an opportunity to do so. H.R. 3222 would require the Secretary to use $1 million of appropriated funds for coordination grants in any year states apply and qualify to receive grants under this section of the law. In any year that a state does not apply and qualify to receive a grant, the Secretary would not have to reserve funds for this purpose. The Committee bill only permits states to receive one grant for purposes of developing a statewide family literacy initiative.

Participations by religious organizations

H.R. 3222 amends the definitions of eligible organization and eligible entity to clarify that religious organizations are eligible service providers under the Even Start Program. According to the Department of Education, such organizations are already providing services under this Act. However, the Committee thought it was important to amend current definitions to clarify that such providers may not be barred from providing services in the future, because of their religious nature.

During Committee consideration of H.R. 3222, Rep. Mark Souder (R–IN) offered an amendment instituting "charitable choice"—a concept designed to ensure that all levels of government give consideration to religious organizations, on the same basis as other nongovernmental organizations, in carrying out the Even Start program, and that such consideration be consistent with the Establishment Clause of the Constitution.

It is important to note, however, that under Even Start the grant recipient at the local level is a partnership, not an individual religious organization or other nonprofit organization. By law the partnership must consist of a local educational agency and a nonprofit community-based organization, a public agency other than a local educational agency, an institution of higher education, or a public or private nonprofit organization (such as a religious organization) other than a local educational agency. The language of charitable choice should be read in the context of a religious organization as a partnership member.

In addition to providing that religious organizations be considered on the same basis as other nongovernmental organizations, the amendment states that religious organizations may not be discriminated against on the basis of their religious character. The amendment would: (1) clarify that a religious organization that provides assistance retains its religious character and control over the definition, development, practice and expression of its religious beliefs; (2) clarify that neither the federal, state or local governments may require the religious organization to alter its form of governance or remove religious art, icons, scripture or other symbols in order to be eligible for assistance; (3) clarify that religious organizations are exempt from employment nondiscrimination requirements of Title VII of the Civil Rights Act as is true under the current Title VII civil rights law; (4) clarify that no government funds may be used for sectarian worship, instruction or proselytization; (5) clarify that a religious organization may not serve as the fiscal agent for the partnership; and (6) protect beneficiaries of the Even Start program from discrimination on the basis of religion, a religious belief, or refusal actively to participate in a religious practice.

The charitable choice language is substantially similar to language that is already a part of current law in the Community Services Block Grant (P.L. 105–285), the welfare reform law (P.L. 104–193), the House-passed version of the Fathers Count Act of 1999 (H.R. 3073), and the House-passed version of the Juvenile Justice legislation (H.R. 1501). Each of these two laws as well as the fatherhood bill passed the House with broad bipartisan support. Additionally, with respect to the Juvenile Justice bill, on June 17, 1999, the House passed a specific charitable choice amendment offered by Rep. Souder by a vote of 346–83. Furthermore, in prior years we enacted child care legislation whereby the federal government funds child care services, in many cases, through private faith-based organizations. Pell grants, too, are funded by the government and may be used by students who attend private church-supported colleges. In short, Congress is clearly on record as supporting more choices across the board that involve religiously affiliated entities. The language of the Souder amendment extends charitable choice to the family literacy arena.

The executive branch is also an advocate for charitable choice. The Clinton Administration has been a strong advocate for allowing religious organizations to compete with traditional non-religious organizations in providing social and other services to the needy. In fact, on May 24, 1999 during a speech in Atlanta, Georgia, Vice President Gore said,

> I have seen the transformative power of faith-based approaches through the national coalition I have led to help people move from welfare to work—the Coalition to Sustain Success * * * I believe government should play a greater role in sustaining this quiet transformation—not by dictating solutions from above, but by supporting the effective new policies that are rising up from below. And I believe the lesson for our nation is clear: in those specific instances where this approach can help us meet crushing social challenges that are otherwise impossible to meet—such as drug addiction and gang violence—we should explore carefully-tailored partnerships with our faith community, so we can use the approaches that are working best.

Similarly, President Clinton has stated "Common sense says that faith and faith-based organizations from all religious backgrounds can play an important role in helping children to reach their fullest potential * * *"

The Committee notes that under the Souder amendment no religious organization is required to participate in Even Start. Rather, under the amendment, the government may not discriminate against religious organizations that seek to participate in the local partnership and may not require those religious organizations to note – Andy

"secularize" or eliminate their religious character in order to participate.

A second-degree amendment to the Souder amendment was offered by Rep. Dale Kildee (D–MI) and was accepted by a voice vote. The amendment stated that no services under Even Start may be provided by a voucher or certificate. This amendment clarifies that both in current law and under the bill, there is no authority for Even Start services to be offered through a voucher or certificate program.

Another amendment that was adopted during mark-up prohibited an eligible entity from subjecting a participant in an Even Start program and during the conduct of such program to sectarian worship or instruction or proselytization. This amendment was offered by Rep. Bobby Scott (D–VA). The Souder amendment already prohibited Even Start funds from being used for worship, instruction or proselytization. The Scott amendment goes one step further to include a prohibition in the program regardless of the funding source. While the language provides a safeguard, First Amendment jurisprudence in any event would likely prohibit such activities as a part of an Even Start program.

A second amendment of Rep. Scott was accepted which states that receipt of financial assistance under Even Start constitutes receipt of federal financial assistance. The Committee views the amendment as nothing more than restating current law and what is patently obvious. Regardless of whether the entity is a school district or a nonprofit organization, if you receive federal money under Even Start, it is considered federal financial assistance. In no way, however, does the Committee view the Scott language as otherwise extending any new rights or extending civil rights protections beyond current law.

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Finally, some argue that continuing to include charitable choice in federal programs will lead to endless litigation. However, charitable choice has been in the welfare law for a little over three years and has not produced endless litigation over the separation of church and state. In fact, the Committee is informed that no federal district court or appellate court has published any court decision litigating this matter.

Focusing on areas in greatest need

The Even Start law focuses funding on local projects that serve areas with a high percentage or large number of children and families in need of services. Indicators of need include high levels of poverty, illiteracy, unemployment, or Limited-English proficiency. Having a high percentage of children who live in a school attendance area eligible to receive services under Title I would be another indicator of need.

The Committee believes there are other indicators of need that states can use when reviewing applications for funding. For example, there are areas where a large number of parents are receiving government assistance. In many instances, their primary barrier to employment or higher paying jobs is a poor education. In addition, the Committee believes that states should take into account whether or not applicants are serving a large number of parents who are being physically abused by a spouse or other person with whom

Bobby Scott

ADDITIONAL VIEWS

I continue to have grave concerns about the constitutional and policy implications of the "charitable choice" provision added to H.R. 3222, the "Literacy Involves Families together Act", by an amendment offered by Representative Mark Souder. The amendment offered by Rep. Souder and adopted by the Committee seeks to provide that religious organizations may retain their exemption from the prohibition against religious discrimination in title VII of the 1964 Civil Rights Act, regardless of the receipt of federal funds, and therefore are permitted to discriminate with those funds on the basis of religion.

The idea that religious bigotry may take place with federal funds is not speculative. During several debates on this issue and reaffirmed during the consideration in committee, it has been established that a religious organization using federal funds under charitable choice could fire or refuse to hire a perfectly qualified employee because of that person's religion. ("* * * [A] Jewish organization can fire a Protestant if they choose," 145 CONG. REG. H4687 (daily ed. June 22, 1999)). Unfortunately, the Committee failed to adopt my amendment which would have ensured that the exemption under Title VII should not apply to any employment position funded by an Even Start grant.

The current exemption provided under Title VII is a common sense provision which allows religious organizations to discriminate based on religion when, for example, a Catholic church hires a priest. They can, of course, require that require that the job applicant be Catholic. This exemption was intended to apply to the use of private funds for the religious organization and it was never expected to be applied to the use of federal funds. It is an incorrect assertion that the extension of the Title VII exemption is consistent with current law. I specifically disagree with the Committee that "[t]he amendment would: * * * (3) clarify that religious organizations are exempt from employment nondiscrimination requirements of Title VII of the Civil Rights Act as is true under the current Title VII civil rights law." In fact, the Supreme Court has never addressed the issue with respect to the Title VII exemptions for religious organizations in which public funds were involved. Past court cases have only dealt with the Title VII exemption for religious organizations in which private funds were at stake. Furthermore, the only court to consider this issue, a Federal District Court in Mississippi, held (in an unpublished case) that the funds "constituted direct financial support in the form of a substantial subsidy, and therefore, to allow the Salvation Army to discriminate on the basis of religion, * * * would violate the Establishment Clause of the First Amendment." Dodge v. Salvation Army, 1989 WL 53857 (S.D. Miss.)

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There are broader implications for extending the Title VI exemption than merely the hiring or firing of an individual on the sole basis of that person's religion. An excerpt from a Congressional Research Service memorandum best illuminates the potential consequences of including such a provision: "If a religious provider's faith mandates or ordains observance of precepts based on race or gender or sexual orientation or marital status or behavior the * * * provision allows the provider to discriminate against employees and potential employees on that basis." While the Supreme Court would, I hope, find racial discrimination constitutionally suspect even if it were to be motivated by a religious belief, it should, nonetheless, cause concern that there are questions about the interplay between charitable choice and other nondiscrimination provisions.

It is a result of these very questions that made it necessary to offer an amendment to make it clear that any receipt of Even Start grant funds constituted receipt of federal financial assistance. For the purposes of establishing legislative history, my intent with this amendment is that religious organizations operating with federal funds must abide by anti-discrimination laws. I agree with the Committee that this amendment does not extend "civil rights protections beyond current law" but I would note that these laws can be enforced if a religious organization is found to have violated any anti-discrimination laws. One of the traditional enforcement mechanisms includes the withholding of federal funds from entities found in violation of federal law. This option would be available to any agency in its oversight over religious organizations' participation in the Even Start program.

The second of my amendments that was adopted with modifications improves the likelihood that religious organizations operating with Even Start funds would do so without being in violation of the Constitution. Without my amendment, the charitable choice provision prohibited only the public funds from being used for "sectarian worship, instruction, or proselytization". This would not, of course, cover the privately paid employee or volunteer from engaging in such activity. The concern here is that you have vulnerable families with very young children who are seeking to improve their lives by attending a federally funded literacy program. In essence, they are a captive audience. For purposes of establishing legislative history, the amendment I offered which was accepted provided that a grant recipient could not subject a participant in an Even Start program to sectarian worship or instruction or proselytization, through any means regardless of whether it is paid for with federal funds, provided through a volunteer, or in any other way. Again, my amendment improves the charitable choice provision and increases the possibility that it could be implemented consistent with the Constitution.

It is important to note that charitable choice has not been enacted without its controversies or without questions about its constitutionality. When signing charitable choice into law as part of S. 2206, the Community Services Block Grant reauthorization, President Clinton included the following statement:

> The Department of Justice advises, however, that the provision that allows religiously affiliated organizations to

> be providers under CSBG would be unconstitutional if and to the extent it were construed to permit governmental funding of "pervasively sectarian" organizations, as that term has been defined by the courts. Accordingly, I construe the Act as forbidding the funding of pervasively sectarian organizations and as permitting Federal, State, and local governments involved in disbursing CSBG funds to take into account the structure and operations of a religious organization in determining whether such an organization is pervasively sectarian.

In various cases, the Supreme Court lists several criteria to be used to determine if an institution is "pervasively sectarian": (1) location near a house of worship; (2) an abundance of religious symbols on the premises; (3) religious discrimination in the institution's hiring practices; (4) the presence of religious activities; and (5) the purposeful articulation of a religious mission.

Yet, the legislative history of charitable choice is very clear—its purpose is to provide government funding to "pervasively sectarian" religious organizations. During the debate on an amendment offered by Rep. Chet Edwards to H.R. 3073, "The Fathers Count Act of 1999", proponents of charitable choice argued that to not allow funding of pervasively sectarian organizations would "gut" the bill. Unfortunately, Rep. Edwards' amendment to prohibit federal funding of "pervasively sectarian" organizations was defeated on a vote of 184 to 238.

In a Congressional Research Service report entitled "Charitable Choice: Background and Selected Legal Issues" (RL30388) it contemplates the difficulty of implementing all of the seemingly contradictory elements of charitable choice in a manner consistent with the Constitution.

> As noted above, one of the issues that has been raised about charitable choice measures is whether it is possible to implement all of their provisions or whether some necessarily have to be ignored, i.e., whether the various provisions of charitable choice are internally contradictory. But that issue of the administrative feasibility of implementing charitable choice is, in fact, a question of its constitutionality. All of the charitable choice provisions enacted or approved to date require that they be implemented "consisted with the Establishment Clause of the United States Constitution." But they also allow the religious organizations that receive grants or administer contracts under the pertinent programs to hire only adherents of their own faith, to display religious symbols and scripture on the premises where services are provided, to practice and express their religious beliefs "independent" of any government restrictions, and apparently, to invite the participants in the publicly funded programs to take part in religious activities funded with the organizations' own funds. Such organizations also need not, although they may, be incorporated separately from a sponsoring religious entity. Administratively, the question is whether the programs can be implemented in full compliance with all of these

> provisions. But more fundamentally, the question is whether it is "consistent with the Establishment Clause" for the government to fund religious organizations with these characteristics. * * * That means for purposes of direct public aid a religious organization's secular functions and activities must be able to be separated from its religious functions and activities. If they are separable, government can directly subsidize those functions. However, if the entity is so permeated by a religious purpose and character that its secular functions and religious functions are "inextricably intertwined," i.e., if the entity is "pervasively sectarian," the Court has held the establishment clause generally to forbid direct assistance.

The premise of charitable choice seems to suggest that religious organizations participating in Even Start may operate without regard to providing a religiously neutral atmosphere. Their constitutional requirement to provide services in a neutral environment which is not "pervasively sectarian" is not lessened by the provisions in charitable choice. It is unfortunate that the language in charitable choice, specifically subsection (b), may lead some religious organizations to operate in a manner that violates the Constitution and subject them to unwanted lawsuits.

Charitable choice presents a myriad of constitutional and policy implications. Unfortunately, we have failed to fully investigate these issues because it is not a serious attempt by its proponents to set appropriate, responsible policy for religious organizations' participation in federally funded grant programs. Rather, it is nothing but political window dressing for those who have continually sought in this Congress and the previous one to intrude upon the religious liberties and protections afforded by the First Amendment of our Constitution.

A copy of the Congressional Research Service Memorandum entitled "Questions Concerning Possible Charitable Choice Amendment to the Even Start Program," is submitted for the record as part of my additional views.

ROBERT C. "BOBBY" SCOTT.

CONGRESSIONAL RESEARCH SERVICE,
LIBRARY OF CONGRESS,
Washington, DC, February 15, 2000.

MEMORANDUM

To: Honorable Robert C. Scott. Attention: Theresa Thompson.
From: David M. Ackerman, Legislative Attorney, American Law Division.
Subject: Questions Concerning Possible Charitable Choice Amendment to the Even Start Program.

This is in response to your request for a brief analysis of the possible legal implications of the employment discrimination provision of a charitable choice amendment that may be proposed to the Even Start program and for information on the constitutional standards governing direct public assistance to religious organizations. This memorandum responds to these inquiries in order.

Employment discrimination

The text of the charitable choice amendment has not been made available to us. But previous charitable choice proposals have included one or both of the following provisions regarding employment discrimination:

> (1) TITLE VII EXEMPTION.—The exemption of a religious organization provided under section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–1) regarding employment practices shall not be affected by the religious organization's provision of services under, or receipt of funds from, [name of program].
>
> (2) TENETS AND TEACHINGS.—A religious organization that provides services under [name of program] may require that its employees providing services under such program adherer to the religious tenets and teachings of such organization, and such organization may require that those employees adhere to rules forbidding the use of drugs or alcohol.

Time limitations prevent a thorough analysis of these provisions, but several observations might be made.

First, with the exception of the part concerning the use of drugs and alcohol in the second provision, it appears doubtful that there is any significant difference in the scope of the two provisions. Both provisions appear to allow religious organizations receiving funds under the pertinent program to discriminate on religious grounds in their employment practices. Title VII of the Civil Rights Act of 1964 generally prohibits public and private employers from discriminating in their employment practices on the basis of race, color, religion, sex, or national origin. But § 702(a) of that statute exempts religious organizations from the ban on religious discrimination, as follows:

> Section 702(a): This subchapter shall not apply to * * * a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

That exemption, it might be noted, applies not only to the religious activities of a religious organization but also to its secular activities.[1]

Title VII, of course, applies without regard to whether an organization receives public funds. The provision in the first charitable choice amendment noted above, thus, would extend the Title VII exemption for religious organizations to situations in which the organizations receive public funds under the pertinent program and allow them to discriminate on religious grounds in their employ-

[1] *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987).

ment practices to the same extent as is currently allowed by Title VII.

The language in the second provision allowing a religious organization that receives funds under the pertinent program to require its employees "to adhere to the religious tenets and teachings of such organization" appears congruent with the Title VII exemptions. Under both provisions a religious organization can restrict its hiring not only to members of its own faith but to those who abide by its precepts and otherwise give preference to such persons in their other employment practices.

Second, the scope of each exemption appears to be quite broad. The Title VII exemption, for instance, has been held to protect employment discrimination by religious organizations in a variety of circumstances:

- the Church of Jesus Christ of Latter-Day Saints when it fired several employees because they failed to qualify for a "temple recommend," *i.e.*, a certificate that they were Mormons who abided by the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco (*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987));
- a Christian school that fired a teacher for having an affair with the father of three children at the school and breaking up his marriage (*Gosche* v. *Calvert High School*, 997 F.Supp 867 (N.D. Ohio 1998), *aff'd mem.*, 181 F.3d 101 (6th Cir. 1999));
- a Baptist university that barred a professor from teaching at its divinity school because his theological views differed from those of the dean (*Killinger* v. *Samford University*, 113 F.3d 196 (11th Cir. 1997));
- a number of Christian schools that fired female teachers for having extramarital sex or committing adultery (*Boyd* v. *Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996) and *Dolter* v. *Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980);
- a Christian college that refused to hire a Jewish professor (*Siegel* v. *Truett-McConnell College, Inc.*, 13 F.Supp.2d 1335 (N.D. Ga. 1994), *aff'd mem.*, 73 F.3d 1108 (11th Cir. 1995));
- a Catholic school for firing a teacher who remarried without seeking an annulment of her first marriage in accord with Catholic doctrine (*Little* v. *Wuerl*, 929 F.2d 944 (3d Cir. 1991));
- a Catholic university that refused to hire a female professor because her views on abortion were not in accord with Catholic teaching (*Maguire* v. *Marquette University*, 814 F.2d 1213 (7th Cir. 1987));
- a Baptist nursing school that fired a student services specialist after she was ordained a minister in a gay and lesbian church that advocated views on homosexuality "which were inconsistent with the [school's] perception of its purpose and mission" (*Hall* v. *Baptist Memorial Health Care Corporation*, 27 F.Supp.2d 1029, 1038–39 (W.D. Tenn. 1998));
- a Presbyterian college for dismissing a Catholic professor (*Wirth* v. *College of the Ozarks*, 26 F.Supp.2d 1185 (W.D Mo. 1998));

• a Christian retirement home that fired a Muslim receptionist after she insisted on wearing a head covering as required by her faith (*EEOC* v. *Presbyterian Ministries, Inc.*, 788 F.Supp. 1154 (W.D. Wash. 1992));

• the Christian Science Monitor when it refused to hire a non-Christian Scientist (*Feldstein* v. *Christian Science Monitor*, 555 F.Supp. 974 (D. Mass. 1983)); and

• a Catholic school when it fired a teacher for marrying a divorced man (*Bishop Leonard Regional Catholic School* v. *Unemployment Compensation Board of Review*, 140 Pa.Cmwlth. 428, 593 A.2d 28 (1991)).

Third, the language in the second provision allowing religious providers to "require that * * * employees adhere to rules forbidding the use of drugs or alcohol" potentially has an application broader than the discrimination permitted by the Title VII provision. Rules forbidding the use of drugs and alcohol are an integral part of some religious faiths and in those cases would be legitimate grounds for discrimination under both the tenets and teachings language and the exemption based on Title VII. But not all faiths forbid the use of drugs or alcohol, and in some religions such use is even part of the rituals of the faith. For those faiths the discrimination authorized by the foregoing language would not duplicate either the tenets and teachings language or the exemption based on Title VII. Such organizations could discriminate not only on the basis of the religious character of their employees or applicants for employment but also on the basis of their use of drugs or alcohol. To that extent, then, the second employment discrimination provision is slightly broader than the first.

Finally, under both provisions there may be some question about their interplay with other nondiscrimination provisions. Title VII, for instance, allows religious organizations to discriminate on religious grounds but not on grounds of race, color, sex, or national origin. What happens, then, when religious doctrine mandates discrimination that may also implicate the other prohibited bases for discrimination? A number of cases for example have involved the legality of Christian schools firing unmarried female teachers after they became pregnant. At least two courts have said that the Title VII exemption would allow the schools to dismiss a female teacher for adultery under these circumstances but that a dismissal simply for pregnancy would raise a possibility of prohibited sex discrimination.[2] Similarly, Title VII's ban on sex discrimination was held to apply to a Christian school's policy of extending health insurance benefits to men and single persons that were not available to married women in its employ, notwithstanding the school's contention that its religious beliefs regarded husbands as the head of the household in any marriage and as the primary provider for that household.[3]

Although there does not appear to be any dispositive case law, some question may also exist if an organization whose religious tenets mandate racial separation or differential treatment on the basis of race discriminates on racial grounds in its employment

[2] See *Vigars* v. *Valley Christian Center of Dublin, California*, 805 F.Supp. 802 (N.D. Cal. 1992) and *Ganzy* v. *Allen Christian School*, 995 F.Supp. 340 (E.D. N.Y. 1998).

[3] *EEOC* v. *Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986).

practices. One case involving a charge of racial discrimination by a religious institution violative of Title VII, at least, held that "if a religious institution * * * presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."[4] In the context of a program that receives public funds, of course, racial discrimination is constitutionally dubious even if it is motivated by religious belief.[5]

Similar questions would seem to be raised by either of the employment discrimination provisions.

Constitutional standards governing public aid to religious organizations

With respect to public aid provided directly to a religious organization in the form of a grant or contract, a basic tenet of the Supreme Court's interpretation of the establishment of religion clause of the First Amendment[6] is that the clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[7] Thus, the Court has held that such public assistance must be limited to aid that is "secular, neutral, and nonideological * * *"[8] That is, under the establishment clause government can provide direct support to secular programs and services sponsored or provided by religious entities but it cannot directly subsidize such organizations' religious activities or proselytizing.[9] Direct assistance must be limited to secular use.

Thus, religious organizations are not automatically disqualified from participating in publicly funded programs, and numerous religious organizations do so. But they must carry out the programs in a secular manner. That means that for purposes of direct public

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[4] *EEOC* v. *Mississippi College*, 626 F.2d 477 (1980), *cert. denied*, 453 U.S. 912 (1981)

[5] *Cf. Bob Jones University* v. *United States*, 461 U.S. 574 (1983) (holding in part that the federal government has an interest in eliminating racial segregation sufficiently compelling to override the university's claim that its policies of racial discrimination are protected by the free exercise of religion clause).

[6] The clause provides in pertinent part that "Congress shall make no law respecting an establishment of religion * * *"

[7] *Grand Rapids School District* v. *Ball*, 473 U.S. 373, 385 (1985).

[8] *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 780 (1973).

[9] In most of the cases involving aid to religious institutions, the Court has used what is known as the *Lemon* test to determine whether a particular aid program violates the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * *; finally, the statute must not foster "an excessive entanglement with religion." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971).

The secular purpose prong of this test has rarely posed an obstacle to public aid programs benefiting sectarian entities, but the primary effect and entanglement prongs have operated, in Chief Justice Rehnquist's term, as a "Catch-22" for such programs. That is, under the primary effect test a direct aid program benefiting religious organizations but not limited to secular use has generally been held unconstitutional because the aid can be used for the organizations' religious activities and proselytizing. But if a program is limited to secular use, it has often still foundered on the entanglement test because the government's monitoring of the secular use restriction has intruded it too much into the affairs of the religious organizations. See *Lemon* v. *Kurtzman*, *supra*. The Court has for some time been sharply divided on the utility and applicability of the tripartite test and particularly of the entanglement prong. Nonetheless the Court still uses the *Lemon* test, although it is no longer the exclusive test for establishment clause cases. Moreover, in *Agostini* v. *Felton*, 521 U.S. 203 (1997) the Court eliminated excessive entanglement as a separate element of the tripartite *Lemon* test and held it to be part of the inquiry into primary effect. As reformulated, the entanglement inquiry now asks whether government monitoring of a program would have the effect of inhibiting religion.

aid a religious organization's secular functions and activities must be able to be separated from its religious functions and activities. If they are separable, government can directly subsidize those functions. However, if the entity is so permeated by a religious purpose and character that its secular functions and religious functions are "inextricably intertwined," i.e., if the entity is "pervasively sectarian," the Court has held the establishment clause generally to forbid direct public assistance.[10]

The Court has not articulated precise rules for determining what makes a religious organization "pervasively sectarian." It has looked at such factors as the proximity of the organization in question to a sponsoring church; the presence of religious symbols and paintings on the premises; formal church or denominational control over the organization; whether a religious criterion is applied in the hiring of employees or in the selection of trustees or, in the case of a school, to the admission of students; statements in the organization's charter or other publications that its purpose is the propagation and promotion of religious faith; whether the organization engages in religious services or other religious activities; its devotion, in the case of schools, to academic freedom; etc.[11] But the Court has also made clear that "it is not enough to show that the recipient of a * * * grant is affiliated with a religious institution or that it is 'religiously inspired.'"[12] Indeed, none of these factors, by itself, has been held sufficient to make an institution pervasively sectarian and therefore ineligible for direct aid.[13] Such a finding has always rested on a combination of factors.

As a practical matter the Court has generally found religious elementary and secondary schools to be pervasively sectarian. In contrast, it has generally held religiously affiliated hospitals, social welfare agencies, and colleges not to be pervasively sectarian. But in its most recent decision involving public aid to religious social welfare agencies, the Court held open the possibility that some agencies might be pervasively sectarian.[14]

Thus, the secular use limitation on direct public aid under the establishment clause has two dimensions. The aid cannot be used for religious purposes, nor can it flow to institutions that are pervasively sectarian. As the Court summarized in *Hunt* v. *McNair*[15]:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

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[10] *Committee for Public Education* v. *Nyquist*, *supra*; *Lemon* v. *Kurtzman*, *supra*; *Bowen* v. *Kendrick*, *supra*.

[11] See e.g., *Bradfield* v. *Roberts*, 175 U.S. 291 (1989); *Lemon* v. *Kurtzman*, *supra*; *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Committee for Public Education* v. *Nyquist*, *supra*; *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Roemer* v. *Maryland Board of Public Works*, 426 U.S. 736 (1976); and *Bowen* v. *Kendrick*, 487 U.S. 589 (1988).

[12] *Bowen* v. *Kendrick*, *supra*, at 621.

[13] For helpful lower federal court discussions of the criteria bearing on whether an institution is pervasively sectarian or not, see *Minnesota Federation of Teachers* v. *Nelson*, 740 F.Supp. 694 (D. Minn. 1990) and *Columbia Union College* v. *Clark*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 2357 (1999).

[14] Id.

[15] 413 U.S. 734, 743 (1973).

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36 (1976);

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Supp. 694
rt. denied,

I hope the foregoing is responsive to your request. If we may be of additional assistance, please call on us.

Taylor, Velma

From: Constance_J._Bowers@omb.eop.gov@inetgw2
Sent: Friday, April 07, 2000 7:52 AM
To: EEOC.OCLA@EEOC.gov@inetgw2; velma.taylor@usdoj.gov@inetgw2; justice.lrm@usdoj.gov@inetgw2; Edward_W._Correia@who.eop.gov@inetgw 2; Rosalyn_J._Rettman@omb.eop.gov@inetgw2
Subject: RE: Charitable Choice Amendment

EEOC.doc EEOC-EDresponse.doc ATTACHMENT.TXT PIC03953.PCX

X-Lotus-FromDomain: EOP

See below attachments containing ED's response to EEOC's memo regarding HR 3222. Thanks.
---------------------- Forwarded by Constance J. Bowers/OMB/EOP on 04/07/2000 08:02 AM ---------------------------

OLA-Kt
Send to same people
Comments due 2pm

(Embedded image moved to file: PIC03953.PCX) "Riddle, Paul" <Paul_Riddle@ed.gov> 04/06/2000 04:12:11 PM

Record Type: Record

To: Constance J. Bowers/OMB/EOP

cc: See the distribution list at the bottom of this message
Subject: RE: Charitable Choice Amendment

Connie: My response to the EEOC memo is attached. The main point is that the particular provision that the EEOC writes about (a religious organization that participates in a Federal program can require its employees who provide program services to adhere to its religious tenets and teachings) isn't in HR 3222 (or, for that matter, in any current law or any bill affecting the ESEA).
Feel free to send my response to others.
ED folks: I've converted the EEOC memo to WORD.

-----Original Message-----
From: Constance_J._Bowers@omb.eop.gov
[mailto:Constance_J._Bowers@omb.eop.gov <mailto:Constance_J._Bowers@omb.eop.gov>]
Sent: Wednesday, April 05, 2000 5:38 PM
To: paul_riddle@ed.gov; Edward_W._Correia@who.eop.gov; Rosalyn_J._Rettman@omb.eop.gov; justice.lrm@usdoj.gov
Subject: Charitable Choice Amendment

Attached is a memo from the EEOC commenting on these provisions in HR 3222, the Literacy Bill. Based on your recommendations, we had decided that the SAP we are preparing on this bill should not include a discussion of this section. Please let me know if you still agree, or if other action should be taken in response to the EEOC memo. Thanks.
---------------------- Forwarded by Constance J. Bowers/OMB/EOP on

04/05/2000 06:36 PM ---------------------------

(Embedded
image moved SYLVIA ANDERSON <SYLVIA.ANDERSON@EEOC.GOV>
to file: 04/05/2000 06:25:49 PM
PIC12575.PCX)

Record Type: Record

To: Constance J. Bowers/OMB/EOP
cc:
Subject: Charitable Choice Amendment

As discussed last week, attached please find EEOC views on the proposed Charitable Choice amendment to the Even Start Program. I have also faxed a copy.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

April 5, 2000

MEMORANDUM

TO: Constance Bowers
Legislative Reference Division
Office of Management and Budget

FROM: William J. White, Jr.
Acting Director of Communications and Legislative Affairs

SUBJECT: Comments on the employment discrimination provisions o the proposed Charitable Choice Amendment to the Even Start Prograr

The Equal Employment Opportunity Commission has reviewed the employment discrimination provisions of the proposed Charitable Choice Amendments to the Even S art Program. We have the following comments.

Background

As we understand it, charitable choice provisions are intended to permit religious organizations that receive federal funds for providing public services to retain their relig ous character. Charitable choice amendments have been added to several pieces of legislatic n, including Welfare Reform, the Community Services Block Grant Program, the "Child S ifety and Protection Act," and the "Fathers Count Act." Each has included a provision related to employment discrimination. The first charitable choice provision appeared as part of w lfare reform legislation and provided that:

> A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described [in this bill].

The charitable choice amendment to the "Even Start" legislation contains additi nal language regarding employment. Specifically, it provides that:

> A religious organization that provides services . . . may require its employees providing services under such program to adhere to the religious tenets and teachings of such organization . . . .

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

The Commission believes that the tenet language is broader than the Title VII exemption. In particular, the Title VII exemption would not apply where a tenet violated another provision of Title VII. Thus, the exemption would not permit a religious organization to fire a white employee because s/he was dating an African-American. As currently written, the exemption would appear to permit a religious organization to so discriminate where interracial relationships violate the "religious tenets and teachings of such organization."

Discussion

Section 702(a) of Title VII exempts religious organizations[1] from Title VII's prohibition against religious discrimination by permitting them to prefer individuals of a particular religion in making hiring and firing decisions.[2] Section 702(a), however, does not relieve such organizations from the other prohibitions in Title VII or other federal employment discrimination statutes.[3]

Indeed, when Title VII was enacted in 1964 Congress expressly rejected amendments that would have exempted religious organizations from coverage under Title VII, and instead adopted a provision that would permit a religious organization to employ individuals of a particular religion to perform work connected with its religious activities. *See EEOC v. Pacific Press Publishing Co.*, 676 F.2d 1272, 1276 (9th Cir. 1982) (discussing legislative history of section 702(a) exemption). In 1972, Congress again rejected an attempt to exempt religious organizations from Title VII coverage, and instead broadened the section 702(a) exemption slightly to permit religious organizations to employ co-religionists to perform work connected with any, not merely religious, activities. In explaining the scope of 702(a), Congress indicated that religious organizations would "remain subject to the provisions of Title VII with regard to race, color, sex or national origin."

To be sure, courts have frequently permitted religious organizations to terminate employees whose actions deviate from religious teachings. For example, in *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991), the court upheld the decision by a religious organization to discharge a teacher not because of her religious denomination but because she failed to get an annulment before remarrying. *See also Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 348-49 (E.D.N.Y. 1998) (court cannot examine legitimate religious reason for termination that is applied equally to both male and female teachers); and *Hall v. Baptist Memorial Health Care Corporation*, 27 F.Supp.2d 1029 (W.D. Tenn. 1998) (student services specialist terminated because she was a minister in a gay and lesbian church that advocated views of homosexuality that were "inconsistent with [the school's] . . . mission and function.) In those cases, however, the religious tenet at issue did not conflict with other prohibitions in Title VII or other federal law.

Courts have not generally permitted religious organizations to take adverse actions against employees who deviate from religious teachings if the religious doctrine at issue impinges on other federally protected rights. For example, in *EEOC v. Pacific Press*, 676 F.2d

1272 (9th Cir. 1982), the court rejected the employer's assertion that it should not be liable for retaliating against the employee because her charge violated church doctrine. While recognizing that imposing liability for disciplinary actions based on religious doctrine would substantially impact the employer's constitutionally protected exercise of religious belief, the burden was justified by the government's compelling interest in ensuring equal employment opportunities. *See also Ganzy*, 995 F. Supp. at 348-49 (Title VII permits religious school to fire employees who do not act in conformance with school's religious belief condemning premarital sex only if religious beliefs are applied equally to both sexes; restriction on becoming pregnant out of wedlock would not be permitted because it is sex discrimination by definition); *Vigars v. Valley Christian Center*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) (discharge of pregnant woman because of religious belief condemning pregnancy out of wedlock may be relevant to First Amendment analysis but does not exempt action from Title VII).

Courts have rejected arguments by religious organizations that federal EEO laws do not apply to employment practices grounded in religious belief. For example, in *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), the court found that Title VII could be applied to a religious school's provision of health insurance benefits to married men but not married women based on the religious belief that only a man can be the "head of a household." The court found that, although Title VII exempts religious organizations from Title VII's prohibition on religious discrimination in choosing who to employ, it does not exempt such organizations from Title VII's other prohibitions. The court also found that subjecting the school to Title VII and the Equal Pay Act was constitutional because the state had a compelling interest in eradicating discrimination and the school's religious beliefs were not significantly restricted. *See also Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.) (application of Equal Pay Act to religious organization that awarded "head of household" allowance to married men but not married women did not unconstitutionally infringe on organization's exercise of religion), *cert. denied*, 498 U.S. 846 (1990); *EEOC v. First Baptist Church*, No. S91-179M, 1992 WL 247584 (N.D. Ind. June 8, 1992) (same); *EEOC v. Tree of Life Christian Schools.*, 751 F. Supp. 700 (S.D. Ohio 1990) (same); *cf Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (application of Fair Labor Standards Act's minimum wage and recordkeeping requirements to religious foundation and its employees did not interfere with free exercise of religion or create excessive government entanglement with religion).

As illustrated by these cases, the exemption of religious organizations under section 702(a) does not permit religious organizations to discriminate on the basis of a protected category, such as race or sex, even if the action was taken because of the organization's religious belief. The Commission believes that the "Tenets and Teachings" provision in the Charitable Choice Amendment does not clearly include this limitation and could, therefore, be interpreted to permit religious organizations to engage in employment discrimination that is not permitted by the EEO statutes.

[1] The exemption applies to an organization whose "purpose and character a e primarily religious." *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 198 3), *cert. denied*, 489 U.S. 1077 (1989); *see id.* at 619 (finding that exemption did not apply to manufacturer of mining equipment that operated for profit and was not affiliated or supp rted by a church, even though the company enclosed Gospel tracts in outgoing mail, printed Bibl e verses on its commercial documents, financially supported religious organizations, and conduct d a weekly devotional service).

[2]

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion . . . .

42 U.S.C. §2000e-1(a).

[3] *See Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th C r. 1996) (section 702(a) merely permits religious organizations to employ members of their own eligion, and thus, Title VII still applies to religious organization charged with sex discrimination ; *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986) (same).

[4] *But see, e.g., Dayton Christian Schs. v. Ohio Civil Rights Comm'n*, 766 F .2d 932 (6th Cir. 1985) (state enforcement of its law barring pregnancy discrimination and retal ation against religious school would violate First Amendment, where the school refused to re ıew the contract of a teacher who "failed to follow Biblical Chain-of- Command" by consulting n attorney after school informed her she would not be rehired because she was pregnant a d "a mother should be home with preschool children"), *rev'd on other grounds*, 477 U.S. 61 (1986). The Commission disagrees with the Sixth Circuit decision. Although the Supreme Cou t did not address whether the antidiscrimination law could be applied to the school's actions, its easoning on the issue of abstention supports the Commission's position. In particular, the Court ound that the state's interest in eliminating sex discrimination was sufficiently important to b ing the case within the principle that federal courts should abstain from enjoining state proceed ngs unless necessary to avoid irreparable injury and that the state agency's investigation vio ated no Constitutional provision.

H.R. 3222, the Literacy Involves Families Together Act, as reported
response to April 5, 2000 memo from the EEOC to OMB
on "charitable choice" (bill, §103(m); proposed ESEA §1213)

April 6, 2000

The EEOC raises an important, but (with respect to the ESEA), premature issue whether a provision in the "charitable choice" language of pending legislation, which would permit religious organizations participating in federally funded programs to require their employees to adhere to its religious tenets and teachings, is inconsistent with Title VII of the Civil Rights Act of 1964 (CRA) to the extent that it could, for example, permit discrimination on the basis of sex or race by an organization whose religious tenets sanction or require that discrimination.

The provision cited by the EEOC appears in the February 15, 2000 memorandum from the Congressional Research Service (CRS) to Representative Bobby Scott on H.R. 3222, then awaiting mark-up by the House Committee on Education and the Workforce. At that point, the bill did not include "charitable choice" provisions, and the CRS was responding to Representative Scott's request for an analysis of such provisions that might be offered as an amendment to the bill. While noting that it did not have the text of the amendment, the CRS stated that "previous charitable choice proposals have included one or both of the following provisions", and then set out language providing that—

> (1) a religious organization's participation in a Government program does not affect its exemption, under §702(a) of the CRA, from Title VII's prohibition on employment discrimination on the basis of religion; and
>
> (2) a religious organization that so participates may require its employees who provide services in such a program to adhere to its religious tenets and teachings, and may require those employees to abide by its rules forbidding the use of drugs or alcohol.

See CRS memo at 1, reprinted in House Report 106-503 (on H.R. 3222) at 47-53.

It is the second provision that the EEOC's memo addresses. As it turns out, however, the language on charitable choice adopted by the House Committee does not include such a provision. See H.R. 3222 (as reported on February 29, 2000), §103(m) adding §1213 to the Elementary and Secondary Education Act of 1965 (p. 16, line 21 through p. 19, line 11).

Nor, as far as I can tell, has such a provision been enacted into law. It's not in the welfare reform act (see P.L. 104-193, §104, 110 Stat. 2161-63, codified at 42 U.S.C. 604a) or in the 1998 amendments to the Community Services Block Grant Act

(CSBGA) (see §679 of the CSBGA as enacted by P.L. 105-285, §201, 112 Stat 2728, 2749-50, codified at 42 U.S.C. 9920).

It's also not in H.R. 3073, the "Fathers Count Act of 1999", as passed by the House, which simply incorporates the welfare reform act by reference (see H.R. 3073 RFS, §101(d), pp. 27-28), or in the charitable choice section (§4147) that would be added to Title IV of the ESEA by H.R. 4141, the bill now in Committee mark-up. Similarly, the House and Senate versions of H.R. 1501, the juvenile crime bill now in conference, simply incorporate §104 of the welfare reform statute by reference (see §292(a) of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), as it would be enacted by §302(a) of the Senate version of the bill (H.R. 1501 EAS) at p. 213, lines 5-11, and §299J of the JJDPA, as it would be added by §114 of the House version of the bill (H.R. 1501 EH), p. 48, lines 5-23). (I don't know about the "Child Safety and Protection Act", cited by the EEOC, because I don't find any legislation by that name in the 106th Congress.)

The only bill I'm aware of in which the language on "tenets and teachings" does appear and that has been reported by a congressional committee in this Congress is S 976, the "Youth Drug and Mental Health Services Act", as reported by the Senate Committee on Health, Education, Labor, and Pensions. See proposed §1955(d)(1) of the Public Health Service Act, as it would be enacted by §305 of the reported bill, p. 128, line 24 through p. 129, line 8. For what it's worth (should this provision be enacted), the Committee Report (S. Rep. 106-196, at 33) says,

Specifically for providing subs. abuse

> One of the most important protections in Charitable Choice concerns the ability of religious organizations to maintain their autonomy over employment decisions. Many organizations, including groups such as the Salvation Army, have indicated that without such a protection, they would be unwilling to receive government funds to provide social services.
>
> The provision makes clear that a religious organization's receipt of government funds to provide substance abuse treatment services does not act as a waiver of the organization's current exemption from Title VII of the Civil Rights Act regarding employment discrimination. Title VII exempts religious organizations from the law's prohibition on employment discrimination based on religion (but does not exempt religious organizations from the duty not to discriminate based upon race, color, national origin, or sex), and allows religious organizations to make employment decisions based upon religious reasons. The Committee believes this protection is necessary to encourage effective religious organizations to apply for government funds to help individuals overcome substance abuse problems. (emphasis added)

Seven of the Committee's eight Democrats included the following statement in their 3-page criticism of the charitable choice provisions:

> In view of these concerns, we were disappointed that the Majority chose to vote against including these important safeguards proposed in an amendment to section 305 by Senators Reed and Kennedy.
>
> First, the Reed-Kennedy amendment would have removed the provision of the bill that allows religious organizations to require that employees hired for SAMHSA funded programs must subscribe to the organization's religious tenets and teachings. Since section 305 prohibits religious organizations from proselytizing in conjunction with the dissemination of social services under SAMHSA programs, we believe it is contradictory to permit religious organizations to require that their employees subscribe to the organization's tenets and teachings. Second, the amendment would have eliminated the bill's provision that extends title VII's religious exemption to cover the hiring practices of organizations participating in SAMHSA funded programs. (Senate Report 106-196 at 45.)

The language on "tenets and teaching" also appears in each of the following bills in the current Congress, but none of them has been acted on:

- H.R. 1607 (Kasich), the "Charity Empowerment Act of 1999", §1994A(f)(1) of Title XXIV of the Revised Statutes, as it would be enacted by §401 of the bill, as introduced on April 28, 1999 (p. 25, lines 18-25).

- H.R. 2901 (Pitts), the "Women and Children's Resources Act", §5(d)(1), as introduced on September 21, 1999 (p. 12, lines 18-25).

- S. 538 (Ashcroft), the "Protect Children From Violence Act", §1805(e)(1) of the Omnibus Crime Control and Safe Streets Act of 1968, as it would be enacted by §201(a) of the bill, as introduced on March 4, 1999 (p. 74, lines 2-9).

- S. 997 (Santorum), the "Charity Empowerment Act of 1999" [the companion to H.R. 1607], §1994A(f)(1) of Title XXIV of the Revised Statutes, as it would be enacted by §401 of the bill, as introduced on May 11, 1999 (p. 25, lines [illegible]-15).

- S. 1113 (Ashcroft), the "Charitable Choice Expansion Act of 1999", §1994A(f)(1) of Title XXIV of the Revised Statutes, as it would be enacted by §1 of the bill, as introduced on May 25, 1999 (p. 5, lines 2-9).

- S. 1605 (Santorum), the "Women and Children's Resources Act" [the com)anion to H.R. 2901], §5(d)(1) of the bill, as introduced on September 21, 1999 (p 12, line 19 through p. 13, line 2).

Andy -

Voucher issue is #5 on side by side, + on p. 70 + p. 71 of legislation

once you've reviewed, give me a call. This is very close hold - don't share w/ anyone.

Andrea

Watts-Talent (Sec. 202) vs. Frist (Sec. 305)
05/08/00 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. However, there are related preemption issues in educational requirements.	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 (with burden of proof on state).	**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 [need to raise with them: 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 [requires states to accept religious substitute – should we argue for "may" rather than "shall"?] 3) Secretarial waivers in 585(b)(2) place federal government in role the states have traditionally held. Is this still necessary with proposed revisions? Could they make 3 year track record a consideration for state/local government? Still have equal treatment problem – non-religious organizations wouldn't have access to same waivers based on track record.		

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 vaucherized 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. 584(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 nonrelig 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 individual, 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