

CRS Report for Congress

Received through the CRS Web

Charitable Choice, Faith-Based Initiatives, and TANF

Vee Burke
Domestic Social Policy Division

Summary

The Senate Finance Committee version of H.R. 7, approved on July 16, 2002, does not contain the “charitable choice” title of the House-passed H.R. 7; nor does it include a compromise “faith-based” provision (from S. 1924 as introduced) that sought to assure equal treatment for nongovernmental providers of almost all federally-funded social services. Remaining in the Senate Finance bill are tax incentives to promote private giving. The Charitable Choice Act of 2001 (Title II of the House bill) would apply its rules, which are significantly different from those in four existing charitable choice laws, to nine new program areas. The House bill has aroused dispute, especially over possible “voucherization” of social services and employment discrimination. A large group of religious, civil rights, civil liberties, and education organizations known as the Coalition against Religious Discrimination opposes expansion of charitable choice. On January 8, 2002, a federal judge struck down as unconstitutional direct government funding for a Wisconsin faith-based substance abuse treatment program (Faith Works) that she found was indoctrinating participants in religion. Later, on July 26, 2002, the judge ruled on a second issue in the Faith Works case. She held that a contract between the Wisconsin Department of Corrections (DOC) and Faith Works for residential treatment services to offenders did not violate the Establishment Clause because government funds were received only when individual offenders chose to receive treatment there. For background and selected legal issues on public aid and faith-based organizations, see CRS Report RL31043. For a summary of the House-passed H.R. 7, see CRS Report RS20948. This report will be updated for developments.

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

- ! Direct government aid may not be used for sectarian worship, instruction, or proselytization (Subsection j);

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

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

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

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

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

³ These programs are food stamps, Medicaid, Supplemental Security Income (SSI), and child support enforcement. In 1996, food stamps and medicaid generally allowed states to use private organizations, including charitable and religious organizations, in providing services like nursing

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

Legislative Action in 2001. Introduced on March 28, 2001 as the Community Solutions Act, H.R. 7 was referred to the House Committees on the Judiciary (which acted on Title II on June 28) and on Ways and Means, which acted on Titles I (tax incentives) and III (Individual Development Accounts) on July 11. House passage occurred on July 19, without floor amendment. Six hearings (the first ever held on charitable choice) were conducted in April-June by the House Judiciary subcommittee on the Constitution, the House Government Reform Subcommittee on Criminal Justice, Drug Policy, and Human Resources, the Senate Judiciary Committee, and the House Ways and Means Subcommittees on Human Resources and on Select Revenue (jointly). For testimony, see the committees’ Web sites. In January 2002, the General Accounting Office issued a report (GAO-02-337) on use of existing charitable choice laws and the performance of faith-based organizations in providing federally paid services.

Senate Legislation. The Charity Aid, Recovery, and Empowerment Act (CARE), introduced in February, 2002, by a bipartisan group, was welcomed by the White House as representing an agreement “to move a faith-based initiative” out of the Senate. CARE omits the most disputed provisions of H.R. 7. Instead, in a Title called *Equal Treatment for Nongovernmental Providers*, it provides that a nongovernmental organization “involved” in the delivery of a federally funded social service shall not be required to remove art, icons, scripture, or other symbols, or to alter its name, because the symbols or name are religious, or to alter or remove provisions in its chartering documents that are religious, or to alter or remove religious qualifications of membership on governing boards. These provisions would apply to all social service programs administered by the federal government (excepting educational assistance under major federal education acts) or by a state or local government using federal financial assistance (not counting tax credits, deductions, or exemptions). The bill also would expedite application for tax-exempt status of an organization organized and operated for the primary purpose of providing social services. It would establish tax incentives for charitable giving more generous than those of the House bill, establish a new Individual Development Account (IDA) program financed by business tax credits to financial institutions, and authorize \$150 million for FY2003 for technical assistance to small nonprofit community groups.

Before scheduled Finance Committee markup in mid-June, the equal treatment title of CARE was deleted. Thereafter, the Finance Committee incorporated modified versions of some of the CARE provisions into its substitute for H.R. 7, approving the bill on July 16 (S.Rept. 107-211). The committee bill includes tax incentives for private giving, establishment of new tax credit-funded Individual Development Accounts, funding for the Social Services Block grant, revenue measures, and other tax provisions. It does not contain provisions to expand charitable choice rules.

³ (...continued)

home care and group living arrangements (Medicaid), outreach and training (food stamps).

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

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

Use of Charitable Choice in TANF. TANF state plans are not required to provide charitable choice information. However, in their 2000-2001 plans more than a dozen jurisdictions mentioned plans to use religious or “faith-based” organizations, usually along with other groups, in providing services (Arkansas, Delaware, District of Columbia, Georgia, Indiana, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, South Dakota, Tennessee, and Washington). Some spoke of service “partnerships” that included the “faith community” and community based/action agencies.

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

Dr. Amy Sherman, Hudson Institute, recently concluded a survey about implementation of charitable choice in 15 states (for 9 states, this was a followup survey). She told a research conference of the Roundtable on Religion and Social Welfare Policy in April, 2002, that the survey found 726 contracts totaling about \$124 million. She said more congregations are “getting involved” in contracting to provide services, that roughly half of the faith-based organizations and congregations identified in the survey were “new players,” and that some states showed a dramatic increase in contracting with faith-based groups (for example, she said Michigan gave 129 contracts in the recent survey period, compared with 9 in a survey ended in 1999). The survey found much more contracting activity with faith-based groups under TANF than in the other programs covered by charitable choice. She also said the new survey found a decline in the use of indirect financial contracting by way of intermediary organizations.

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

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

Proposed Fatherhood Grants under TANF. In the 106th Congress, the House twice voted (Fathers Count Act, H.R. 3073, and Child Support Distribution Amendments, H.R. 4678) to establish grants under TANF to promote marriage and “successful parenting,” but the Senate did not act on its companion bill (S. 3189). As parts of TANF, the new grants would have been subject to charitable choice rules. During House debate, amendments were defeated to disallow fatherhood grants to any “pervasively sectarian” faith-based institution (Congressional Record, November 10, 1999. H11895) and to forbid a fatherhood grantee from subjecting “a participant in a program assisted with the grant to sectarian worship, instruction, or proselytization” (Congressional Record, September 7, 2000. H7316). Also defeated was a proposal to forbid religious organizations from discriminating in their hiring on the basis of religion. The proposal for TANF fatherhood grants (under the charitable choice rules of the 1996 law) has been reintroduced and passed by the House as a provision of the TANF reauthorization bill (H.R. 4737). The Senate Finance Committee version of H.R. 4737 also includes fatherhood grants, but it does not make them subject to charitable choice rules.

Faith-Based Initiative of President George W. Bush. President Bush on January 29, 2001, launched his faith-based initiative with an executive order that established Offices of Faith-Based and Community Initiatives in the White House and in five Cabinet departments (Education, Justice, HHS, Labor, and Housing and Urban Development). The President advocated expansion of charitable choice, tax incentives to promote charitable giving and some specific faith-based projects, including creation of a Compassion Capital fund.

On July 1, 2002, the Labor Department announced award of three sets of grants designed “to link faith-based and grassroots community organizations” to the nation’s One-Stop Career system under the Workforce Investment Act (WIA). \$12 million was awarded to 12 states to create partnerships with faith-based and community groups, \$5 million to 9 non-profit intermediary organizations, and \$500,000 to 20 small organizations. Also, in June, HHS announced plans for the Compassion Capital Fund Demonstration Program, for which Congress appropriated \$30 million for FY2002. (For information about the HHS Center for Faith-Based and Community Initiatives, see [<http://www.gov/faith>])

Constitutional Challenges. In July and October 2000, two court suits were filed challenging the constitutionality of TANF charitable choice programs. One suit charged that a job training and placement program for TANF recipients funded by the Texas Department of Human Services and operated by the Jobs Partnership of Washington County was “permeated” by Protestant evangelical Christianity in violation of both the state and federal constitution (*American Jewish Congress and Texas Civil Rights Project v. Bost*, filed July 24, 2000, but dismissed in February 2001 as moot after Texas discontinued the program). However, a remaining issue is yet to be decided – whether the training program should be required to return the funds it received. The second suit, which resulted in an order to cease direct funding, charged that a job placement and support services program for drug addicts in Milwaukee, Wisconsin, violated the state and federal constitutions by giving welfare-to-work funds directly to a “pervasively sectarian” organization [Faith Works] and using the funds to indoctrinate clients in the Christian faith (*Freedom from Religion Foundation, Inc. vs. McCallum*, filed October 12, 2000.) A federal judge on January 8, 2002 ordered Wisconsin to cease this direct funding as unconstitutional, but she said her ruling did not deal with constitutionality of the 1996 charitable choice law, which does not authorize direct funding of religious activities. Later, on July 26, 2002, the judge ruled on a second issue in the Faith Works case – constitutionality of a contract with the Wisconsin Department of Corrections (DOC) under which Faith Works provides residential treatment services. The judge found that Faith Works receives government funds only when individual offenders choose to receive treatment there. She held that the contract did not violate the Establishment clause because this private choice “breaks the circuit” between government and the faith-intensive program. Plaintiffs have appealed the decision.

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