SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1358

SPONSOR: Senator Webster

SUBJECT: State Contracts with Religious Organizations

DATE: April 11, 1999 REVISED: 4/20/99

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable
2.	Crosby	Whiddon	CF	Fav/1 amendment
3.				
4.				
5.				

I. Summary:

The bill provides specific authorization for state agencies and political subdivisions to contract with religious organizations or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement in the same manner as any other nongovernmental provider under any state program or those programs authorized under the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. This bill also contains provisions intended to protect religious organizations from governmental discrimination and interference with their religious practices. Alternatives are provided for certain persons who object to the religious character of the contracting organizations.

This bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

Personal Responsibility and Work Opportunity Reconciliation Act of 1996

In 1996, Congress enacted Public Law 104-193, commonly known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Section 103 of the act ended the Aid to Families with Dependent Children (AFDC) and the Job Opportunities and Basic Skills Training (JOBS) programs under parts A and F of Title IV of the Social Security Act. The law replaced these programs with a single combined program of block grants to eligible states with federally-approved programs for temporary assistance to needy families (TANF). The law required state TANF programs to include certain activities relating to work and education for the purpose of ending dependency on public assistance, promoting self-sufficiency, reducing out-of-wedlock and teen pregnancy, and encouraging the formation of two-parent families. [In Florida our TANF program is known as the Work and Gain Economic Self-Sufficiency (WAGES) program and is established at chapter 414, F.S.]

Section 104 of the federal act authorizes states to contract with charitable, religious and private organizations to provide services and administer programs established or modified under Titles I and II of the act. This section is codified at 42 U.S.C. 604a., which provides in pertinent part:

The programs described in this paragraph are the following programs:

- A state program funded under this part (as amended by section 103(a) of this Act).
- Any other program established or modified under title I or II of this Act, that --

    - permits contracts with organizations; or
    - permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

The purpose of this section is to allow states to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described herein on the same basis as any other nongovernmental provider without impairing the religious character of such organizations and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

In the event a state exercises its authority under this section, religious organizations are eligible contractors, on the same basis as any other private organization, to provide assistance or to accept certificates, vouchers, or other forms of disbursement, under any program described above so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in the preemption subsection (k) of this section, neither the Federal Government nor a state receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, on the basis that the organization has a religious character.

A religious organization with a contract or which accepts certificates, vouchers, or other forms of disbursement shall retain its independence from federal, state, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs. Neither the Federal Government nor a state shall require a religious organization to alter its form of internal governance or remove religious art, icons, scripture, or other symbols in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in this section.

If a beneficiary of assistance has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in this section, the state shall provide such individual (if otherwise eligible for such assistance) with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from another organization.

Except as otherwise provided in law, a religious organization shall not discriminate against an individual in rendering assistance funded under any program described this section on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

Except as otherwise provided, any religious organization contracting to provide assistance funded under any program under this section shall be subject to the same regulations as other contractors to account in accord with generally accepted auditing principles for the use of funds provided under such programs. A limited audit provision is included to read: "If such organization segregates Federal funds provided under such programs into separate accounts, then only the financial assistance provided with such funds shall be subject to audit."

Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate state court against the entity or agency that allegedly commits such violation.

No funds provided directly to institutions or organizations to provide services and administer programs under this section shall be expended for sectarian worship, instruction, or proselytization.

Constitutional Law - Free Exercise of Religion and the Establishment Clause
Article I, s. 3 of the State Constitution, states:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

In applying and interpreting Art. I, s. 3 of the State Constitution, opinions of the Florida Supreme Court have paralleled the Federal law regarding the application of the First Amendment to the United States Constitution, which provides that the Congress shall make no law respecting an establishment of religion (called the "Establishment Clause") or prohibiting the free exercise thereof (called the "Free Exercise Clause").

The Free Exercise clause prohibits restraints on religious activity, if such restraints are imposed to prevent the religious activity. States can regulate general conduct, however, even when such regulations inadvertently impact religious practices. The Free Exercise clause prohibits states from exhibiting hostility toward religion, but permits neutrality and accommodation toward religion. In *Church of the Lukumi Babalu Aye v. Hialeah*[1] the United States Supreme Court struck down a city ordinance forbidding ritualistic animal sacrifice because the purpose was to disfavor the Santeria religion.

The Establishment Clause is said to erect a "wall of separation" between church and state, which limits but does not prevent certain interaction between the state and religious institutions. State action which exhibits a preference for any religious belief or any religious institution violates this clause unless it is narrowly tailored to promote a compelling state interest.[2] Where the state does not expressly exhibit a preference or hostility, but a religious belief or a religious institution

[1]508 U.S. 520 (1993).

[2]*Board of Education of Kiryas Joel Village v. Grumet*, 114 S.Ct. 2481 (1994).

derives a benefit or suffers a burden from the neutral law, a three-part test has been used to determine if there has been a violation of the Establishment Clause. The United States Supreme Court established this three-part test in the case *Lemon v. Kurtzman.*[3] In order for an activity to be permitted under the Establishment Clause:

(1) the challenged activity must have a secular purpose;
(2) the activity's main effect must neither advance nor inhibit religion; and
(3) the challenged activity must not excessively entangle the state with religion.[4]

The *Lemon* test has come under some criticism by some courts and legal scholars for its failure to produce clear guidelines. It has been noted by legal scholars that in many of the Establishment Clause cases brought before the United States Supreme Court in recent years, the *Lemon* test has not been applied.[5] Justice Scalia's dissent (joined by Chief Justice Rehnquist, and Justices White and Thomas) in *Lee v. Weisman* states:

> The Court today demonstrates the irrelevance of Lemon by essentially ignoring it . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.[6]

The *Lemon* test, however, has not been specifically overruled. Nevertheless, it has been noted that First Amendment jurisprudence is in a state of flux.[7] It has been described as " . . . complex, confusing, and sometimes seemingly inconsistent. . . ."[8] Some cases, however, appear to be looking more toward principles of neutrality. States may provide valuable services on a neutral basis to religious institutions as any other similar institution in society, such as grants and tax exemptions, without violating the Establishment Clause. In the case *Nohrr v. Brevard County Educational Facilities Authority*,[9] the Florida Supreme Court upheld the constitutionality of a law which authorized the issuance of revenue bonds for financing construction of facilities for private higher educational institutions, including religiously-affiliated institutions, where the Legislature found a public purpose in addressing the urgent need for private institutions to obtain construction financing.

In *Rosenberger v. University of Virginia*,[10] the United States Supreme Court upheld the right of a religious student newspaper to receive activity fee support from a state university for printing its

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[3]403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[4]*Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111.

[5]See, however, the law review article by Michael Stokes Paulsen entitled *Lemon is Dead*, 43 Case W. Res.L.Rev. 795 (Spring 1993). This article asserts that the U.S. Supreme Court in the case *Lee v. Weisman* 112 S.Ct 2649 (1992) effectively replaced the Lemon Test with a coercion test.

[6]Lee v. Weisman, 112 S.Ct. 2649, 2685 (1992).

[7]Michael Stokes Paulsen, Lemon is Dead, 43 Case W. Res. L.Rev. 795 (1993).

[8]State of Alabama v. ACLU of Alabama, 711 So.2d 952, 969 (1998), quoting from concurrence of Justice Maddox.

[9]247 So.2d 304 (Fla. 1971).

[10]515 U.S. 819 (1995).

newspaper on the same basis as any other student publication. In *Roemer v. Maryland Public Works Board*,[11] the court accepted the proposition that religious institutions may receive an incidental benefit from neutral state action, stating:

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. . . . Neutrality is what is required. . . .

The excessive entanglement part of the *Lemon* test prevents the state from too closely monitoring or regulating the internal affairs of a religious institution in order to separate the permissible public support for secular activities from the impermissible public support for religious activities. A related concept prohibits the state from applying even a neutral law which supports any religious institution that is "pervasively sectarian" in order to avoid supporting its religious activities. As explained in *Hunt v. McNair*,[12]

> Aid may normally 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.

Nevertheless, the United States Supreme Court has noted there may be a partnership between public programs and religious providers. In upholding the constitutionality of the Adolescent Family Life Act, which allowed religious organizations to provide teen pregnancy counseling, the court stated:

> Nothing in our previous cases prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems. . . .[I]t seems quite sensible for Congress to recognize that religious organizations can influence values and have some influence on family life. . . .To the extent that this congressional recognition has any effect of advancing religion, the effects is at most incidental and remote.

The Department of Children and Family Services

There is currently no prohibition in the Department of Children and Family Services against contracting with religious organizations for provision of services under Florida's WAGES program. In fact, s. 414.065, F.S., relating to work requirements, currently provides that the department or the Department of Labor and Employment Security may contract with commercial, charitable, or religious organizations. These contracts must comply with federal requirements with respect to nondiscrimination and other requirements that safeguard the rights of participants. Services may be provided under contract, certificate, voucher, or other form of disbursement.

[11]426 U.S. 736, 746 (1976).

[12]413 U.S. 734, 743 (1973).

III. Effect of Proposed Changes:

Section 1 creates a new section of law which provides, at subsection (2), specific authorization for any agency of the state or political subdivision of the state to contract with any religious organization or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program, on the same basis as any other nongovernmental provider. This authority cannot impair the religious character of the organization nor diminish the religious freedom of assistance beneficiaries.

At subsection (1), the term "program" is defined similarly to that in the federal code with regard to the first two subsections. In this bill, a "program" is defined to mean:

- Any state program funded under part A of Title IV of the Social Security Act, as amended by section 103(a) of Title I of the PRWORA.

- Any other program established or modified under Title I or Title II of the PRWORA that permits contracts with organizations or permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries as a means of providing assistance.

Additionally, this bill extends the definition of the term "program" to include:

- Any other state program or policy initiative that provides direct assistance to individuals or families.

Consistent with 42 U.S.C. 604a.(c), subsection (3) is created to provide that any religious organization is eligible as a contractor to provide assistance or to accept certificates, vouchers, or other forms of disbursement. At this point, the bill requires program operators to permit PRWORA beneficiaries only to select an organization which is not a religious organization as an alternative provider of the equivalent government benefit. This freedom of selection is limited only to those receiving services under PRWORA-authorized programs and does not extend to "any other state program or policy initiative that provides direct assistance to individuals or families." Furthermore, in the event alternate providers are not available, this bill permits that the government benefit may be provided by the religious-based agency in a manner which does not impose a burden upon the religious liberties of the beneficiary. Like federal law, this bill prohibits any agency of the state or any political subdivision of the state receiving program funding from discriminating against any organization which is a contractor or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character. Unlike federal law, this bill provides that the value of disbursement received by any religious organization under contracts governed by the section is not permitted to exceed the greater of the value of assistance received by the beneficiary or the actual direct and indirect costs incurred by such organization in the delivery of the assistance provided by the program.

Consistent with 42 U.S.C. 604a.(d), subsection (4) specifies that a religious organization which enters into a contract with any agency of the state or any political subdivision of the state under a program, or which accepts certificates, vouchers, or other forms of disbursement, retains its independence from state and local governments, including the organization's control over the

definition, development, practice, and expression of its religious beliefs. Agencies and political subdivisions are prohibited from requiring a religious organization to alter its form of internal governance or to remove religious art, icons, scripture, or other symbols in order to be eligible to contract to provide assistance or to accept certificates, vouchers, or other forms of disbursement.

Consistent with 42 U.S.C. 604a.(e), subsection (5) again requires that if an individual eligible for or receiving benefits under PRWORA has an objection to the religious character of the organization providing benefits, the agency administering the program must provide that individual with an equivalent level of assistance from an alternative provider that is accessible to the individual. Unlike federal law, this requirement is limited by the provision "unless the assistance is provided in a manner which does not impose a burden upon the religious liberties of the individual."

Subsection (6) of this bill requires all agencies administering any program described by this bill to prepare a plan to implement this section and to submit that plan to the Governor, the President of the Senate, and the Speaker of the House of Representatives no later than September 1, 1999.

Section 2 provides that this act shall take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill provides that, upon the objection of a beneficiary of PRWORA-authorized services to the religious character of a religious provider, the state shall provide an alternate provider unless the religious provider does not burden the religious liberties of the beneficiary. While federal law requires the state to provide an alternate provider, it does not allow an exception for cases where the religious provider "does not impose a burden upon the religious liberties of the beneficiary."

Secondly, by extending this freedom of selection only to those receiving services under PRWORA-authorized programs -- and by not extending such choice to "any other state program or policy initiative that provides direct assistance to individuals or families" -- it is not inconceivable that a party may claim a violation of equal protection under the law. It is a generally accepted premise that all persons in the state must be treated equally under the

laws. At the very least, the state must show a rational basis for its differing treatment of persons in PRWORA-related programs versus those persons involved in any other state program or policy initiative. However, since religion is a right guaranteed each citizen under the First Amendment of the United States Constitution, it is likely that, if a beneficiary of any other state program or policy initiative is not given the freedom of selection option with regard to religion, the state will have to meet a higher standard than mere rational basis.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Religious organizations may benefit from contracts with state agencies or political subdivisions related to any programs which provide direct assistance to individuals or families.

C. Government Sector Impact:

This bill provides specific authority to state agencies and political subdivisions to contract with religious organizations to provide any programs which provide direct assistance to individuals or families.

VI. Technical Deficiencies:

The language authorizing "any other state program or policy initiative that provides direct assistance to individuals or families" to serve as a program for purposes of this act is over broad and vague. Extending the definition of the term "program" to this degree expands the impact of this act to practically any state agency. This broadening of the definition is not consistent with the federal law.

VII. Related Issues:

No Definition for the Term "Religious Organization"
This bill does not contain a definition of the term "religious organization" nor does it reference another section of Florida law which would provide such a definition. Without a definition or a reference to a definition in another section of law, there is no standard provided in this bill regarding what entity is or is not a religious organization for purposes of this act. The term could be defined in a manner consistent with other chapters of the law. *See e.g.,* ch. 496, F.S.

The Department of Children and Family Services reports that they believe the lack of definition for "religious organization" is subject to too broad an interpretation and has the potential for future difficulties in contracting and contract approval, especially when one considers subsection (3) of the bill (relating to discrimination against contractors on the basis of religion).

The Department of Children and Family Services believes these difficulties could extend to include lawsuits.

Notable Differences with Federal Law
42 U.S.C. 604a.(g) provides that religious organizations shall not discriminate against individuals in rendering services. This protection is not extended to citizens of the state of Florida in this bill; only religious organizations are protected against discrimination under this bill.

42 U.S.C. 604a.(h) contains a fiscal accountability measure. Though Florida's governmental contracts with private entities should contain performance measures, consistent with performance-based budgeting requirements, as well as fiscal accountability measures, there is no fiscal accountability provision in this bill as is stated in federal law. Relatedly, 42 U.S.C. 604a.(j) ensures that limitations on the use of funds will result in no funds provided under this act being used for sectarian worship, instruction, or proselytization. Again, this 1358 bill does not contain a similar provision.

Other
This bill, as well as federal law, require that, if an individual eligible for or receiving benefits under PRWORA has an objection to the religious character of the organization providing benefits, the agency administering the program must provide that individual with an equivalent level of assistance from an alternative provider that is accessible to the individual. Neither federal law nor this bill specify any method of informing beneficiaries of this right.

Due to the broad language authorizing "any other state program or policy initiative that provides direct assistance to individuals or families" to serve as a "program" for purposes of this act, the Department of Children and Family Services reports that the mental health division anticipates the need for two additional positions, along with related costs, in order to provide outreach to religious organizations and to familiarize said organizations with compliance with governmental programmatic, record-keeping/documentation, and contractual requirements. Estimated appropriations consequences total $107,314. Because any state program may be located in any state agency or entity providing direct assistance to individuals or families, it is not unreasonable to presume that there will be a similar fiscal impact to other departments.

VIII. Amendments:

#1 by Children and Families:
Language providing that the religious freedom of beneficiaries will not be diminished is removed. Language allowing certain beneficiaries to select a non-religious provider or, if alternate providers are not available, to provide the benefit in such a manner that the beneficiary's religious liberties are not burdened is struck. Language providing that the value of disbursement received by a religious organization may not exceed the greater of the value of assistance received by the beneficiary or the actual direct and indirect costs incurred by such organization is deleted. The entire subsection which provided that individuals eligible for or receiving benefits under PRWORA who had an objection to the religious character of the organization providing said benefits would be provided an equivalent level of assistance from an alternative, accessible provider is edited out of this bill.