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Opinion No. 04-067

Assessment of House Bill 2633 / Senate Bill 2594

QUESTIONS

1. Is House Bill 2633 / Senate Bill 2594 constitutional?

2. Does the bill violate federal law or regulations?

3. Could the bill result in a loss of federal funding?

4. If the bill does violate federal law, would this result in increased potential liability to the state?

OPINIONS

1. House Bill 2633 / Senate Bill 2594 is constitutional on its face. However, state contracts with religiously affiliated organizations authorized by the bill must be implemented carefully to avoid violating the Establishment Clause of the First Amendment of the United States Constitution.

2. The bill does not violate any federal law or regulation that we have discovered.

3. It is unlikely that the bill would result in loss of federal funding.

4. The bill could result in increased litigation and, therefore, increased potential liability.

ANALYSIS

1. You have asked this Office to assess House Bill 2633 / Senate Bill 2594 (hereinafter HB 2633) which is currently pending before the legislature. This bill provides that state and local governments shall contract for goods and services provided through the state Departments of Human

Services, Children's Services, and Health without discrimination against religious organizations and shall contract with religious organizations on the same basis as any other non-governmental providers without impairing the religious character of the organizations. All programs must be implemented consistent with the First Amendment of the United States Constitution. The bill further provides that a religious organization that contracts with the state retains its independence from the government and that the government cannot require the organization to alter its form of governance or remove religious art, icons, scripture or other symbols. The bill contains a method through which a recipient of the public assistance may object to the religious character of the organization and receive assistance through an alternate provider. Under the bill a religious organization's exemption from the Civil Rights Act of 1964 would be unaffected, and the organization may not discriminate against an aid recipient on the basis of religion, race, age, color, sex or national origin. Finally, the bill requires the organization to account for government funds in the same manner as other contractors, provides for an appeals process to the Commissioner of the Department of Finance and Administration, and prohibits funds provided to religious organizations from being used for sectarian worship, instruction or proselytization.

HB 2633 mirrors 42 U.S.C. § 604a, also known as the Charitable Choice provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. While the original federal legislation pertained only to Title I (Grants to States for Old Age Assistance), Title II (Federal Old Age, Survivors and Disability Insurance Benefits) and Title IV-A (Temporary Assistance to Needy Families) of the Social Security Act, it has been expanded through further legislation and executive order to apply to other federal programs. *See* 42 U.S.C. § 300x-65 (substance abuse programs); Exec. Order No. 13199, 66 Fed. Reg. 8499 (2001) (public education activities, *inter alia*); Exec. Order No. 13279, 67 Fed. Reg. 77141 (2002) (child care programs, job training programs, and health support services, *inter alia*). HB 2633, by applying to the Departments of Children's Services, Human Services, and Health, which administer programs far beyond those covered by the federal provisions, will potentially cover a broader range of programs. While there has been little litigation regarding the federal provisions, there is abundant legal commentary analyzing these provisions. *See, e.g.,* William Dolan, *No Child Left Behind's Faith-Based Initiative Provision and the Establishment Clause,* 33 J.L. & Educ. 1, 6 (2004); Daniel P. Hart, Note, *God's Work, Caesar's Wallet: Solving the Constitutional Conundrum of Government Aid to Faith-Based Charities,* 37 Ga. L. Rev. 1089, 1091-1093 (2003); David J. Freedman, *Wielding the Ax of Neutrality: The Constitutional Status of Charitable Choice in the Wake of Mitchell v. Helms,* 35 U. Rich. L. Rev. 313, 342-360 (2001).

The single legal challenge to the Charitable Choice provisions to date arose in a Wisconsin case in which taxpayers alleged that the state violated the Establishment Clause by providing a faith-based drug and alcohol addiction treatment program with a grant through the state Department of Workforce Development and a contract through the state Department of Correction. *Freedom from Religion Foundation, Inc. v. McCallum,* 179 F.Supp.2d 950 (W.D. Wisc. 2002), *aff'd,* 324 F.3d 880 (7th Cir. 2003). The district court agreed that the grant through the Department of Workforce Development violated the Establishment Clause, but disagreed that the Department of Correction contract was a violation. *Freedom from Religion Foundation, Inc. v. McCallum,* 214 F.Supp.2d 905,

907, 920 (W.D. Wisc. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003). The court further decided that the case did not present a challenge to the constitutionality of 42 U.S.C. § 604a because the statute contains a provision requiring that programs be implemented consistent with the Establishment Clause. *McCallum,* 179 F.Supp.2d at 982. Because the program through the Department of Workforce Development had not been implemented consistent with the Establishment Clause, it was not authorized by the Charitable Choice statute. *McCallum,* 179 F.Supp.2d at 982.

HB 2633, like the federal act, provides that programs authorized by the legislation must be administered consistent with the First Amendment of the United States Constitution. This provision essentially insulates the bill from a facial constitutional challenge by removing any program that is implemented unconstitutionally from the bill's scope. However, departments implementing programs through religiously affiliated organizations must be careful to comply with Establishment Clause jurisprudence since state officials may be sued directly for violations of the Establishment Clause.[1]

For example, the Department of Children's Services (DCS) is in a substantially different position from other departments since DCS directly places children with foster care providers. This will affect how DCS implements programs with faith-based organizations. DCS by statute directs the placement of children to specific foster care placements. Tenn. Code Ann. § 37-1-129 (e). Recent Establishment Clause jurisprudence places significant importance on whether the government aid is directed by the beneficiary to a secular institution, after having a choice among both secular and sectarian organizations. *See Zelman v. Simmons-Harris,* 536 U.S. 639, 649, 662-663, 122 S. Ct. 2460, 153 L.Ed.2d 604 (2002). In a situation where the state, through DCS, sends a child to a religiously affiliated organization, there is no independent, private choice by the beneficiary. Therefore, it may violate the Establishment Clause to place a child with a religious organization, without that organization having to remove any religious iconography or change its program in any way. *See Pedreira v. Kentucky Baptist Homes for Children,* 186 F.Supp.2d 757 (W.D. Ky. 2001) (denying motion to dismiss where plaintiffs had adequately stated a claim that federal funds were being used for religious activities by foster care provider). In order for the statute to retain a constitutional construction, the provision requiring programs to be implemented consistent with the First Amendment would have to trump any potentially conflicting provision.

Thus, we conclude that HB 2633 would likely be found by a court to be constitutional on its face but that departments implementing specific programs with religiously affiliated organizations

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[1]The United States Supreme Court currently analyzes potential Establishment Clause violations using the *Lemon-Agostini* test. *See Lemon v. Kurtzman,* 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); *Agostini v. Felton,* 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). However, the current members of the Court are deeply divided on this issue, and their jurisprudence on this subject has changed substantially in the past thirty years. *See* Steven Fitzgerald, *Expansion of Charitable Choice, the Faith-Based Initiative, and the Supreme Court's Establishment Clause Jurisprudence,* 42 Cath. Law. 211 (for brief review of history of case law and current state of the analysis). The Tennessee Supreme Court has consistently analyzed the freedom of religion provisions of the Tennessee Constitution using the same framework as the United States Supreme Court. *State of Tennessee, Commissioner of Transportation v. Medicine Bird Black Bear White Eagle,* 63 S.W.3d 734, 761-762 (Tenn. Ct. App. 2001).

must take care to design programs that do not violate the Establishment Clause.

2. While there are volumes of federal statutes and regulations covering the programs administered by the Departments of Children's Services, Human Services and Health, we have not discovered any that the bill would violate. In addition, because the bill is based on a federal statute, it is unlikely, though not impossible, that inconsistent federal provisions exist.

3. Because the bill is based on federal law, it is unlikely that its enactment would result in loss of federal funding. This is particularly true given the current administration's emphasis on collaboration with faith-based organizations. *See* Steven Fitzgerald, Note, *Expansion of Charitable Choice, the Faith-Based Initiative, and the Supreme Court's Establishment Clause Jurisprudence*, 42 Cath. Law. 211 (2002) (summarizing the Bush administration's efforts in this area and noting that the original Charitable Choice provision was sponsored by then Senator John Ashcroft).

4. Although we have uncovered no direct violation of federal law, any program that presents a potential violation of the Establishment Clause could lead to litigation. Any time there is increased litigation, there is a potential for increased liability.

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