

A Guide to Charitable Choice

The Rules of Section 104 of the 1996 Federal Welfare Law Governing State Cooperation with Faith-based Social-Service Providers

The "Charitable Choice" provision (Section 104) of the federal welfare reform law enacted in the summer of 1996 encourages states to involve community and faith-based organizations in providing federally funded welfare services to the poor and needy.

The Charitable Choice provision is designed to protect the religious character of faith-based organizations that choose to accept federal funds to help the poor. The provision is designed also to protect the religious liberty of beneficiaries of welfare services.

This guide will help faith-based organizations decide whether to participate in welfare services funded by the new federal welfare block grants. It will also assist state and local governmental authorities in deciding how to interpret and implement the Charitable Choice rules that accompany the federal welfare block grants.

Letter from United States Senator John Ashcroft, (R-MO)

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(From Public Law 104-193, the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," enacted August 22, 1996)

Printed copies of the Guide are available for \$5.00 each from the Center for Public Justice (send a check, payable to the Center for Public Justice, along with your name and address, and indicate you would like a copy of the Guide to Charitable Choice).

This Guide is published by
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P.O. Box 48368
Washington, DC 20002-0368
410-571-6300

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*This document is not legal advice nor intended to create any attorney-client professional relationship.
An attorney should be consulted for specific advice about how this legislation affects
a faith-based provider or how a state must implement it.*

Note to *Guide to Charitable Choice*

Since the *Guide* was published, Congress has extended coverage of the Charitable Choice provision beyond TANF to three additional funding streams:

1. The Welfare-to-Work program, adopted in 1997 as an amendment to PRWORA (on Charitable Choice's application to WtW, see the Congressional Research Service memo to Sen. John Ashcroft from Kathleen S. Swendiman, "Application to Charitable Choice Provisions to Part A of Title IV of the Social Security Act, " May 4, 1999).
2. The Community Services Block Grant program (when it was reauthorized in 1998: P.L. 105-285).
3. 2000 Drug Treatment Funds (SAMHSA Block Grant in Children's Health Act)

The Charitable Choice provision does permit states to require religious organizations to establish a separate organization to provide government-funded services. The statement to the contrary in the *Guide* (pp. 6-7) is mistaken.

(10/30/00)

A Letter from Senator John Ashcroft

United States Senate
Washington, DC 20510-2504

December 1996

Dear Friend:

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 presents an excellent opportunity for achieving real success in the war on poverty and dependence. A key feature of this landmark welfare reform law is the "charitable choice" provision (section 104), which encourages states to utilize charitable and faith-based organizations in serving the poor and needy.

In the past, many successful faith-based organizations have not participated in government programs for fear of having to compromise their religious integrity or being hobbled by excessive government regulation and intrusion. The confusing array of legal precedents has often led government officials to conclude mistakenly that constitutional law requires that faith-based organizations be excluded from the mix of private service providers, or that entities accepting government funds must forego their religious character.

One of my goals in proposing the charitable choice provision was to encourage faith-based organizations to expand their involvement in the welfare reform effort by providing assurances that their religious integrity would be protected. The charitable choice provision embodies U.S. Supreme Court case precedents to clarify what is constitutionally permissible when states and local governments cooperate with the religious and charitable sector of society. The provision protects the rights of faith-based providers as well as the religious liberty of the individuals they may serve.

Many states have already experienced positive results from partnering with charitable and faith-based organizations in working with the poor and less fortunate. These institutions have proven to be efficient and effective while serving the poor with dignity and compassion. Congress passed the charitable choice provision with the hope that such cooperative efforts between states and faith-based and private charities would flourish. The following materials are intended as a preliminary guide for utilizing this innovative principle for welfare cooperation. The materials are meant to: (1) assist state and local officials in implementing the principles of charitable choice; and (2) help faith-based organizations understand and act upon this opportunity for expanding their service to the public now that specific protections for their religious integrity and mission are anchored by law.

I invite and encourage both government officials and faith-based providers to use this guide to understand the overall design as well as the details of the charitable choice provision. We should all explore the potential for government and private and religious communities to cooperate more fully and fruitfully in serving the poor and needy to the maximum extent possible. The nation will benefit if we do.

Sincerely yours,
John Ashcroft
United States Senator

Introduction

A major feature of the new federal welfare legislation signed by President Clinton on August 22, 1996, is its encouragement of state cooperation with community and faith-based charities in serving needy families. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [PRWOR]¹ devolves welfare authority to the states within a framework comprised of several basic guidelines. A key guideline is the "charitable choice" provision of Section 104.

The Charitable Choice provision has three goals. First, it seeks to encourage states to expand the involvement of community and faith-based organizations in the public anti-poverty effort. Second, through a range of measures it protects the religious integrity and character of faith-based organizations that are willing to accept government funds to provide services to the needy. Third, it safeguards the religious freedom of beneficiaries, both those who are willing to receive services from religious organizations and those who object to receiving services from such organizations.

The Charitable Choice guidelines clarify and codify the constitutional requirements for governmental interaction with faith-based social-service providers. Too often constitutional law is misinterpreted as requiring that faith-based organizations be excluded from participation in governmental welfare programs or that their participation be conditioned on the removal of religious practices and symbols. Section 104 incorporates U.S. Supreme Court precedents for governmental neutrality between faith-based and secular providers of services, protection of the religious integrity of faith-based providers, and protection of the religious liberty of beneficiaries.

As state and local governmental authorities begin to implement PRWOR, and as faith-based charities consider if and how they will expand their involvement with governmental assistance programs, it is vital that the requirements and intent of Section 104 be understood and accurately applied. This guide is designed to foster an accurate understanding and full utilization of Charitable Choice. Following this Introduction, it includes a series of Questions and Answers on Section 104, followed by a detailed Overview of the Section.² The text of the Section is printed in the Appendix.

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Questions and Answers

General

Q/ What is the purpose of the Charitable Choice provision?

A/ The goal is to encourage states to involve community and faith-based organizations as providers of services funded under the new federal welfare law, while protecting the religious character of participating faith-based organizations and the religious freedom of beneficiaries.

Q/ How does Charitable Choice foster the involvement of faith-based providers in government welfare programs?

A/ Many faith-based organizations fear that they will have to compromise their religious character if they cooperate with government programs. Government officials too often have mistakenly thought that the Constitution requires providers to downplay their religious character or even that faith-based providers must be entirely excluded from participation. Charitable Choice affirms that faith-based organizations may not be discriminated against, and secures the religious autonomy and integrity of those that cooperate with government welfare programs.

Q/ What activates the Charitable Choice rules concerning faith-based providers?

A/ If a state chooses to use federal welfare funds to contract with, or to provide vouchers redeemable by, any nongovernmental social-service provider, then the state must comply with the Charitable Choice requirement not to discriminate against faith-based providers.

Q/ To what programs does Charitable Choice apply?

A/ The provision applies when states enter into purchase-of-service contracts or voucher arrangements with independent-sector organizations under the new Temporary Assistance for Needy Families program (the replacement for AFDC). Charitable Choice also applies to the Supplementary Security Income (SSI) program, and to the food stamps and Medicaid programs, to the extent that states administer these programs using contracts or vouchers with nongovernmental providers.

Q/ What kinds of services can faith-based organizations provide under Charitable Choice?

A/ The new federal welfare law aims to help beneficiaries become self-sufficient, rather than simply give them checks. A wide range of assistance services will be necessary, many of which can be effectively provided by faith-based organizations. Examples are job-search, job-readiness, and job-skills training programs; community service positions; GED and ESL programs; nutrition and food-budgeting advice; second-chance or maternity homes for expectant unmarried minors who cannot live with their own parents; abstinence education; drug-treatment services; and health clinics.

Q/ How does Charitable Choice protect the religious integrity of faith-based providers?

A/ Religious providers who accept government funds to help the poor retain their autonomy as independent organizations, in control of the practice and development of their religious mission, their organizational structure, and their choice of officers and directors. They have the right to maintain a religious environment by displaying religious art, scripture, religious apparel, and other symbols. They retain their right to use religious criteria in hiring, firing, and disciplining employees, while remaining subject to other anti-discrimination laws. They can limit the scope of fiscal audits by segregating federal funds into a separate account.

Q/ How does Charitable Choice protect the religious liberty of beneficiaries?

A/ A faith-based provider may not discriminate against a beneficiary on the basis of religion, a religious belief or the beneficiary's refusal to actively participate in a religious practice. A beneficiary who objects to receiving services from a faith-based provider has the right to obtain services from another organization.

Participation by Faith-based Providers

Q/ May a state refuse to enter into contract or voucher arrangements with faith-based providers?

A/ If a state elects to use federal welfare funds to provide services solely through its own governmental agencies, not utilizing any independent providers, then it has not violated the anti-discrimination requirement of Section 104 by not involving faith-based providers.

Q/ May a state ever refuse to enter into contract or voucher arrangements with a particular faith-based provider?

A/ A state that chooses to involve nongovernmental organizations may not discriminate against faith-based providers due to their religious character. However, having given such organizations the opportunity to compete, the state must then utilize its usual criteria in order to decide whether any particular organization will be awarded a contract or be allowed to redeem vouchers.

Q/ May a state exclude churches or other overtly religious organizations from eligibility?

A/ No. States may not rule any organization out of consideration simply on the basis of its religious character.

Q/ May a state exclude faith-based providers from participation if the state's constitution prohibits the flow of government funds to religious organizations?

A/ No. All federal welfare funds are subject to the Charitable Choice provision, and states choosing to involve nongovernmental providers must follow the provision's rules regarding non-discrimination against faith-based organizations. If necessary, a state may keep its own funds separate to expend them in accordance with its restrictive constitutional provision, while allowing federal funds to flow to religious organizations to serve the poor. The intent of Congress, however, in enacting Charitable Choice, is to maximize the involvement of faith-based organizations in the delivery of government-funded welfare services.

Protections for Faith-based Providers

Q/ May a state require that a faith-based organization attenuate or modify its religious convictions or its religious style of providing services as a condition of participation?

A/ No. The Charitable Choice provision explicitly provides that participating faith-based organizations retain their right to control "the definition, development, practice, and expression" of their religious convictions. However, faith-based organizations may not require beneficiaries to actively participate in religious activities in order to receive services. Further, faith-based providers may not use contract funds to pay for worship services, sectarian instruction, or proselytization, so as to avoid the appearance of governmental promotion of the provider's religious doctrines. No such restriction is necessary in the case of vouchers, where it is the beneficiary who selects the service provider, not the government.

Q/ May a faith-based organization use religious principles as part of contracted services?

A/ In counseling beneficiaries concerning the need for changes in behavior or attitudes, some organizations use principles originating in a religious tradition. Such principles may not be prohibited simply due to their religious roots. Many current laws, such as the prohibitions on murder and robbery, have their origins in religious

teachings. So long as a public purpose is served by the principles being taught, such as instilling the virtues of responsibility, self-control, care for dependents, and work, a faith-based organization may use principles rooted in its belief system.

Q/ May a state require a religious organization such as a church to create a separate nonprofit corporation to accept federally funded contracts or vouchers?

A/ A religious organization may choose to form a separate 501(c)(3) corporation to carry out federally funded programs. Separate incorporation may facilitate control of the use of federal funds and shield the main organization from some federal employment laws. Separate incorporation will also shield the main organization from fiscal audits of the use of the federal funds. (However, the Charitable Choice provision allows an organization to limit audits simply by establishing a separate account to receive and disburse the federal funds.) Nevertheless, some organizations may believe that forming a 501(c)(3) entity violates its own doctrines regarding internal governance. In such a case, a state may not require the religious organization to form a separate entity.

Q/ May a state or locality require that the governing board of a faith-based provider reflect the ethnic, gender, or cultural diversity of the community or beneficiaries?

A/ No. Such matters of internal governance are under the control of the faith-based organization.

Q/ May a state or locality require faith-based providers to hire employees without regard to their religion and to refrain from imposing religious behavioral codes on the employees?

A/ No. Participating faith-based organizations, notwithstanding their receipt of federal funds, retain their exemption under Title VII of the Civil Rights Act of 1964, which permits employment discrimination on the grounds of religion. (Organizations with fewer than 15 full-time employees are not subject to the nondiscrimination requirements of Title VII.) Providers remain subject to other federal anti-discrimination laws and to state and local anti-discrimination laws.

Q/ How can participating faith-based organizations legally secure their Charitable Choice rights?

A/ Faith-based providers that believe their Charitable Choice rights have been violated may sue the alleged governmental violator in state court, asking the court to order compliance with the law. No money damages can be claimed.

Protecting the Rights of Beneficiaries

Q/ How does Charitable Choice protect the religious liberty of beneficiaries who object to faith-based services?

A/ The chief protection for beneficiaries exists in their choice of providers. Beneficiaries who receive vouchers can make their own decision about which provider to utilize. In the case of contracts, states are required to ensure that there is an alternative for beneficiaries who object to receiving services from a faith-based provider. The state must ensure that a comparable service is available in a timely manner from another provider. States should ensure that potential beneficiaries are aware of the religious or non-religious character of each provider, of the choices available to them, and of their right to an alternative should they object to the religious character of a provider.

Q/ May faith-based providers require beneficiaries to take an active part in a religious practice or to convert to the organization's system of beliefs, as a condition of receiving service or as part of the assistance that is offered?

A/ No. Religious organizations may not compel beneficiaries to actively participate in a religious practice. However, beneficiaries may be expected not to disrupt or disturb such practices, as such behavior may interfere

with the faith-based provider's autonomy or its control of its mission. Beneficiaries have access to an alternative provider and may be deemed to have consented to the religious characteristics and practices of a provider from whom they accept service.

Q/ May a state contract with a faith-based organization to be the sole provider of services in an area of the state?

A/ Yes, under certain conditions. Nothing prohibits a state from choosing to contract with a faith-based organization to be the sole provider of services in a particular area. However, Charitable Choice does require that a state ensure that an alternative provider is available to a beneficiary who objects to the religious character of a provider. If there is such an objection, the state would have to ensure that it could provide an equivalent service itself or that an acceptable provider outside of the area can provide an equivalent and accessible service to the beneficiary in a timely manner.

Q/ If a state chooses to provide services by means of vouchers, is it required to ensure that at least one of the providers eligible to redeem the vouchers is not a faith-based provider?

A/ No, but it would be wise to do so. States are free to allow redemption of vouchers with any combination of eligible providers, whether faith-based or non-religious. However, the state is required to ensure that a beneficiary who objects to the religious character of a provider has access to another provider. Therefore, a state using a voucher program should consider including at least one non-religious provider in its list of eligible providers. Otherwise it must ensure that it could provide an equivalent service itself or that an acceptable provider outside of the area can provide an equivalent and accessible service to the beneficiary in a timely manner.

Q/ Is a state required to ensure that a beneficiary desiring faith-based services has access to a provider of the same religion?

A/ No. If the state chooses to provide services through nongovernmental providers, it must allow faith-based providers to compete for contracts or for eligibility to redeem vouchers. Further, the state is required to ensure that a beneficiary who objects to a faith-based provider has access to another provider. However, a beneficiary has no right to receive services from a faith-based provider that reflects his or her own religious beliefs. Charitable Choice intends to expand the participation of faith-based providers in government-funded welfare to fulfill the public purpose of more effectively serving the poor and needy. It is not a program to ensure that religious groups will receive government funds nor that beneficiaries will receive services guided by some particular religious faith.

Q/ How can beneficiaries legally secure their rights under Charitable Choice?

A/ Beneficiaries who believe their Charitable Choice rights have been violated may sue the alleged governmental violator in state court, asking the court to order compliance with the law. No money damages can be claimed.

Constitutional Issues

Q/ Does Charitable Choice violate the establishment clause of the First Amendment?

A/ No. There is no violation if government funds are expended for general public purposes, even if the provider of the services is a faith-based organization. Government here is not aiding religion. Rather, it is aiding beneficiaries by means of nongovernmental organizations, some of which may be faith-based. The U.S. Supreme Court has never ruled against a social-welfare program on the ground that some religious organizations participate in the program.

Q/ Does Charitable Choice violate the rights of taxpayers who disagree with the beliefs of faith-based organizations that receive federal funding to provide welfare services?

A/ No. The U.S. Supreme Court has held that there is no free-exercise right to object when general tax revenues are used to assist beneficiaries by means of programs that, among others, include faith-based providers.

Q/ Will Charitable Choice turn religious organizations into mere departments of government?

A/ No. Charitable Choice explicitly provides that participating faith-based organizations remain autonomous. To ensure this result, it incorporates specific protections for their autonomy and religious character with regard to their right to develop, maintain, and express their religious beliefs; to maintain their chosen form of internal governance; to operate their personnel policy in accordance with their religious convictions; to maintain a religious environment; and to confine external fiscal audits by segregating federal funds in separate accounts.

Q/ Will Charitable Choice cause the secularization of faith-based organizations that decide to participate?

A/ Each organization must make its own judgment about the risks and benefits of cooperating with government in the programs subject to Charitable Choice. Charitable Choice is designed to eliminate or minimize existing pressures to secularize by providing a range of legal and practical protections for the religious character and autonomy of organizations that choose to take part.

Q/ Will Charitable Choice make faith-based organizations dependent on government funds and thus creatures of government policy?

A/ Charitable Choice only expands the opportunity for such organizations to provide welfare services with government funding, while protecting their integrity and autonomy if they choose to do so. Each organization will have to make its own judgment about how to protect itself from a destructive dependency on government funding (or any other source of income).

Q/ Does Charitable Choice violate the religious freedom of beneficiaries by its intent to involve faith-based organizations in providing welfare services?

A/ No. Charitable Choice requires that states ensure that there is an alternative provider for beneficiaries who object to receiving services from a faith-based provider. It protects equally the religious freedom of beneficiaries who desire to receive services from a faith-based provider and beneficiaries who object to receiving services from such a provider.

Q/ Does the Constitution allow churches or other religious organizations to receive federal funds?

A/ Yes. When a variety of organizations, not limited to faith-based agencies, are equally eligible to take part in a federally funded program that has the valid public purpose of providing a social service, it is not a constitutional violation if a faith-based provider receives federal funds to provide such a service. Although the Supreme Court has disallowed certain federal funding for religious K-12 schools, it has not ruled social-welfare programs unconstitutional simply on the ground that faith-based organizations participate in them.

Q/ Does Charitable Choice require states to engage in unconstitutionally intrusive monitoring of the activities of faith-based providers to ensure compliance with its rules?

A/ No. In deciding which providers should receive contracts or be made eligible to redeem vouchers, a state should not inquire into the religion of a provider, but instead should focus on its record or prospects of successfully providing an authorized service. Just as with other providers, a state should determine whether a faith-based provider's program fulfills the valid public purpose of the contract or voucher. Further, a state may audit only government-provided funds, which shields both the faith-based organization and the state from unnecessary and unconstitutional monitoring of the other activities and aspects of the provider.

An Overview of Section 104

Responding to a Need

The goal of Section 104 of the 1996 federal welfare-reform legislation is to expand the involvement of the independent sector, including faith-based organizations, in the delivery of government-supported social services. A large proportion of nongovernmental providers of assistance to the needy are faith-based nonprofit organizations. Some are affiliated with churches, synagogues, mosques, or temples. Others, though self-standing, are inspired by religious beliefs and were established to carry out a religious mission of care for the poor and needy.

These religious charities are among the most effective providers of help and are typically willing to serve even the most distressed families and neighborhoods. They are flexible, take a personal approach, are deeply committed to the needy, and provide help that is guided by a moral code and evokes personal responsibility. Such assistance is particularly important when individuals, families, and communities are mired in long-term poverty and self-destructive patterns of behavior.¹

Many faith-based providers currently participate in government-funded programs. However, they have been subject to governmental pressures to downplay or discard their religious emphases. Many other faith-based organizations are wary about involvement with the government because they fear they might lose their religious character and independence.² Section 104 invites the increased involvement of religious organizations in the provision of social services while safeguarding their religious character, which is the very source of their genius and success.

General Principles

Four basic principles undergird the provisions of Section 104:

1. In seeking to help the needy, government may and should involve nongovernmental organizations. Government is not the only source of services for the public. Civil society is comprised of many independent organizations, including secular and religious nonprofit organizations, that serve public purposes. Today, as well as in the past, a large part of the independent sector consists of faith-based charities and congregations that operate programs of service to the poor. Government should support the efforts of such nongovernmental organizations, which are close to those needing help and able to provide assistance that is personal, morally grounded, efficient, and successful. As long as the nongovernmental organizations further public purposes of fighting poverty, government violates no constitutional rule by including faith-based providers in the mix of independent-sector organizations that collaborate with its programs.
2. When government arranges payment to nongovernmental organizations for the provision of services to the needy, such providers do not thereby become "beneficiaries" of "governmental assistance." Rather, it is the poor and needy whom they serve who are the beneficiaries of the governmental assistance. Government's intention, and its chief effect, in involving faith-based as well as nonreligious charities in its welfare programs, is to more effectively and efficiently help those in need.

3. Government is constitutionally required not to "establish" any church or faith. It must not take the side of any one of the many faiths of its citizens. However, the establishment clause of the First Amendment does not require, and has not been interpreted by the Supreme Court to mean, that faith-based social-service organizations must censor their religious expression or give up their religious identity in order to take part in government programs. Indeed, the First Amendment secures the right of religious expression, which may not be subjected to discriminatory treatment by government. Thus, so long as a welfare program has as its object the public purpose of society's betterment, and so long as the program is equally open to all providers, faith-based and nonreligious, then the constitutional requirement that the law be neutral is fully satisfied.
4. In addition to protecting the religious character of providers of services, the First Amendment protects the religious liberties of beneficiaries of such services. Beneficiaries may not be compelled to turn to faith-based providers in order to receive authorized services. To protect beneficiaries, the government should provide an alternative for those who object to faith-based providers.

Basic Rules

In order to fulfill these general guidelines for expanding the involvement of faith-based and nonreligious organizations in the provision of social services, Section 104 sets down four practical rules of law:

1. If a state elects to involve independent-sector providers in the delivery of social services, then it may not exclude providers because of their religious character.
2. If a faith-based organization is selected as a provider of government-financed social services, its religious expression and identity may not be censored or otherwise diminished on account of its participation in the welfare program.
3. A faith-based provider may not discriminate against a beneficiary on the basis of religion nor require the beneficiary to actively participate in religious practices.
4. If a beneficiary objects to receiving social services from a faith-based provider, then he or she has a right to obtain services from another provider.

Detailed Analysis

In this analysis, the eleven subsections of Section 104 are arranged under eight subject headings. References in brackets are to specific subsections of Section 104. The full text of Section 104 is printed in the Appendix.

1. Programs Covered

Section 104 applies most notably to state programs implemented under the Temporary Assistance for Needy Families (TANF) program, which is the replacement for Aid to Families with Dependent Children (AFDC) [see subsection (a)(2)(A)].³ TANF replaces AFDC with a framework in which states receive federal funds through block grants to design and operate their own welfare programs, consistent with certain federal rules, including Section 104. TANF involves more than just certifying eligibility for, and disbursing, welfare checks. The intent is that states will develop a range of programs to assist the poor and needy to become

self-sufficient. The goals of TANF are well suited to extensive involvement by nongovernmental organizations, including churches and other faith-based organizations, that have been successful in moving people from dependence to self-reliance. Section 104 also applies to the food stamp, Medicaid, and Supplemental Security Income (SSI) programs to the extent that these can be implemented by the states through purchase-or-service contracts or voucher arrangements with nongovernmental service providers.⁴ (Contracts and vouchers are discussed in the next part.)

Under the Charitable Choice provision, states may contract with, or develop a voucher system involving, both secular and faith-based organizations that provide a wide range of services, such as:

Work. Faith-based providers or neighborhood groups could provide subsidized jobs or community service positions, on-the-job training, job-search help, job-readiness preparation, job-skills training, vocational education training, or GED programs.

Food. Churches, synagogues, or other religious institutions could provide subsidized meals, operate food pantries, or offer nutrition, shopping, or food-budgeting help.

Maternity Homes. For unmarried minor mothers and expectant mothers who cannot remain with their parents, states may collaborate with nongovernmental groups to provide maternity homes, adult-supervised residential care, second-chance homes, or other suitable living arrangements.

Medical and Health Services. Faith-based providers and other nongovernmental organizations could provide abstinence education, drug- and alcohol-treatment programs, vocational rehabilitation services, or health clinics.

2. **Financial Arrangements with Service Providers**

Section 104 authorizes two types of governmental financial arrangements with independent providers [see subsection (a)(1)]. One is **purchase-of-service** contracts by which government pays providers to deliver specified services. Such contracts involve governmental provision of assistance to beneficiaries by means of the government dealing "directly" with providers. The other type of financial arrangement consists of government-provided **certificates, vouchers, or other forms of disbursement** which a needy person may redeem for services at whichever eligible provider he or she may choose. In this second case, government is providing assistance to beneficiaries by dealing "indirectly" with independent providers and directly with beneficiaries.

In the case of TANF, states are authorized to use both "direct" and "indirect" means of paying for services provided by independent organizations [subsection (a)(2)(A)]. For other programs subject to Section 104, the provisions of the respective programs determine whether states are authorized to use "direct," "indirect," or both forms of financial relations [subsection (a)(2)(B)].²

3. **Inclusion of Faith-based Providers**

Section 104 leaves it up to the states whether to involve independent-sector providers of social services or to provide all services through government agencies [subsection (a)(1)]. However, if a state elects to involve any independent-sector providers, then it may not exclude religious providers from consideration. Section 104 requires that in selecting providers the state may not discriminate on account of a potential provider's religious character [subsection (c)].

4. Rights of Faith-based Providers

A primary purpose of Section 104 is to permit states to involve faith-based providers of social services "on the same basis as any other nongovernmental provider" and "without impairing [their] religious character" [subsection (b)]. Section 104 also protects the religious freedom of beneficiaries, but does so in a manner that does not harm the religious character of faith-based organizations.

A series of specific protections are established for faith-based organizations:

- **Institutional Autonomy and Control of Mission.** Section 104 explicitly protects the autonomy of any faith-based provider carrying out programs funded under PRWOR by providing that it "retain[s] its independence from Federal, State, and local governments," including its "control over the definition, development, practice, and expression of its religious beliefs" [subsection (d)(1)]. This language emphasizes that a participating faith-based provider does not become a "state actor" nor relinquish its religious autonomy.
- **Control of Governance.** Faith-based providers may not be required to alter their form of internal governance to be eligible for participation [subsection (d)(2)]. The structural form of religious organizations is often dictated by religious doctrine, and ecclesiastical polity is here protected.⁵ Similarly, states may not require a faith-based provider to change its officers or directors on the grounds that they do not reflect a particular religious, ethnic, racial, or gender mix, nor may states exclude a faith-based provider from eligibility on such grounds.
- **Maintenance of Religious Environment.** No state may require a faith-based provider, in order to be eligible to participate, to remove from its property "religious art, icons, scripture, or other symbols" [subsection (d)(2)]. Participating faith-based providers need not strip their facilities of crosses, Stars of David, scriptural quotations, religious apparel, or other visual signs of religious commitment.
- **Control of Employment Policy.** Section 104 affirms the right of faith-based providers to utilize religious standards in the terms and conditions of their personnel policies [subsection (f)]. Title VII of the Civil Rights Act of 1964 established an exemption for religious organizations from the general ban against religious discrimination in hiring.⁶ That exemption is here explicitly affirmed for faith-based organizations participating in federally funded welfare programs covered under Section 104.

Faith-based organizations remain subject to other applicable nondiscrimination laws. The anti-discrimination requirements of federal civil-rights laws regarding age, sex, disability, race, color, and national origin remain in force.⁷ In addition, state and local anti-discrimination laws are still applicable and are unaffected by Section 104, unless they infringe the religious autonomy of providers secured by the Section.⁸

- **Limited Audits.** Section 104 further secures the autonomy of participating faith-based organizations by giving them the opportunity to limit the scope of fiscal audits. If they choose, they may establish separate accounts for the receipt of federal monies under these programs, segregating such funds from other income, especially nongovernmental funds. If they do so, then only the accounts that receive or disburse federal funds are subject to audit [subsection (h)]. It would be prudent for providers to take advantage of this option and not commingle private donations and grants with government funds.

5. Restrictions on Funding

a. Purchase-of-Service Contracts

One goal of Charitable Choice is to involve faith-based providers in delivering welfare services "without impairing the religious character of such organizations" [subsection (b)]. Section 104 explicitly provides that a participating faith-based organization shall retain its independence from Federal, State, and local governments," including maintaining its "control over the definition, development, practice, and expression of its religious beliefs" [subsection (d)(1)].

In enacting Section 104, the object of Congress was the public purpose of helping the poor and needy, not the advancement of religion. Section 104 anticipates and intends that states will contract with faith-based providers that manifest a distinct religious identity on an equal basis with other independent providers. However, what states are purchasing through contracts with faith-based providers are services which fulfill the public purpose of PRWOR to aid the needy in specific ways.

When a state makes a purchase-of-service contract with a faith-based provider, none of the federal funds transferred to the provider may be "expended for sectarian worship, instruction, or proselytization" [subsection (j)]. This prohibition reflects the constitutional requirement that government may not establish religion and ensures that federal funds are not used in a manner that suggests that the government is endorsing the religion of a faith-based organization. The prohibition should not be construed to require that a faith-based provider diminish or eliminate its religious character or its religiously inspired way of providing services. The key is that government funds the religious organization in order to provide services that satisfy the public secular purpose of PRWOR.

Charitable Choice implements the governmental neutrality mandated by the Constitution by requiring that a state treat equally all providers, faith-based or secular, if it decides to turn to the independent sector to provide services to the needy.⁹ It protects the religious liberty of beneficiaries, some of whom may object to receiving services from a faith-based provider, by ensuring that they have a choice of a different provider [subsection (e), discussed below].

In deciding whether to contract with a faith-based provider to deliver a service, a state should focus not on the religion of the provider but rather on its record or prospects of successfully providing the authorized welfare service. As with any other provider, the chief concern of the state is whether the program of the faith-based organization fulfills the public purpose of helping the poor and needy.¹⁰

b. Voucher Funds

PRWOR funds that are indirectly received by faith-based organizations by means of vouchers, certificates, and other redeemable disbursements are explicitly not subjected to the restriction against being expended for worship or proselytization [subsection (j)].

The key difference is that the flow of federal funds to a faith-based provider is direct in the case of contracts and indirect when it is due to a beneficiary's decision to redeem a voucher with such a provider.¹¹ An explicit prohibition on expending federal funds for sectarian religious activities is not needed with vouchers because there cannot be even the appearance of a government establishment of religion when it is the beneficiary who, free to choose among providers, decides to redeem a voucher at a faith-based provider.¹²

A state, of course, will only authorize a faith-based provider to redeem vouchers if that organization provides authorized services to the needy. The absence of the subsection (j) prohibition does not change the public purpose to be served by the use of vouchers provided to beneficiaries.

6. Rights of Beneficiaries

Section 104 secures the religious rights of beneficiaries primarily by ensuring a choice of providers. When a state enables a beneficiary to secure benefits by means of a voucher, certificate, or another form of indirect payment, then it is the disbursement mechanism itself that secures to beneficiaries the opportunity to choose between different service providers.

In the case of purchase-of-service contracts, Section 104 specifies that a beneficiary who objects to receiving social services from a religious provider has the right to receive services from another provider [subsection (e)].¹³ The state must ensure that the alternative assistance is of no lesser value, that it is available within a reasonable period of time, and that the alternative provider is accessible to the beneficiary. States should ensure that beneficiaries are aware of the range of providers and of their right to receive services from a non-religious provider.

Section 104 further protects the religious rights of beneficiaries by requiring that religious providers may not discriminate against beneficiaries "on the basis of religion, a religious belief, or refusal to actively participate in a religious practice" [subsection (g)]. This requirement applies to all faith-based providers, whether they redeem vouchers or have contracted to provide services. Thus, a provider may not exclude from its programs beneficiaries belonging to other denominations, churches, or religions. A provider cannot require a beneficiary to adopt a particular religious creed or tenet of faith. A provider cannot deny services to a beneficiary who refuses to participate in a treatment activity that is religious.

Beneficiaries who do not wish to participate in religious activities may not disrupt such activities, impede other beneficiaries from taking part in them, or demand that the faith-based organization refrain from engaging in such activities. Faith-based providers have the right to offer such activities. Disruption may be construed as an objection to the religious nature of the provider, and the beneficiary should be directed to an alternative source of services.

7. Preemption of State Law

All federal block-grant funds subject to Section 104 must be administered in accord with the principles of Charitable Choice. If a state commingles such federal funds with state funds, then all of the funds must be administered in accord with the principles of Section 104. This follows from the Supremacy Clause of the U.S. Constitution, which provides that rights granted by congressional action preempt any state or local laws to the contrary.

Section 104 includes an option for states with constitutions that restrict the expenditure of public funds at faith-based organizations [subsection (k)]. In such a case, state authorities have the option of segregating the federal funds from state funds, administering the former in accord with the requirements of Section 104 while administering the state monies in accord with the state's own more restrictive laws.¹⁴ However, Congress intended to discourage segregation of funds.¹⁵ The option exists only to accommodate states with restrictive constitutions. The intent is to maximize the equal opportunity for faith-based organizations to participate in federally funded welfare programs under PRWOR, and not to enable restrictive state rules to be used to disallow participation by religious providers.

8. **Legal Action to Secure Rights**

Both providers and beneficiaries who believe that their Section 104 rights have been violated may bring a civil lawsuit asking the court to order the alleged governmental violator to comply with the requirements of Section 104 [subsection (i)]. State courts have exclusive jurisdiction.¹⁶

Appendix

(From Public Law 104-193, the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," enacted August 22, 1996).

SEC. 104. SERVICES PROVIDED BY CHARITABLE, RELIGIOUS, OR PRIVATE ORGANIZATIONS.

(a) IN GENERAL.—

(1) STATE OPTIONS .—A State may—

(A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations; and

(B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (B)(ii) of paragraph (2) with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.

(2) PROGRAMS DESCRIBED.—The programs described in this paragraph are the following programs:

(A) A State program funded under part A of title W of the Social Security Act (as amended by section 103(a) of this Act).

(B) Any other program established or modified under title I or II of this Act, that—

(i) permits contracts with organizations; or

(ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

(b) RELIGIOUS ORGANIZATIONS.—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 in subsection(a)(2), 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.

(c) NONDISCRIMINATION AGAINST RELIGIOUS ORGANIZATIONS.—In the event a State exercises its authority under subsection (a), religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k), 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, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) RELIGIOUS CHARACTER AND FREEDOM.—

(1) RELIGIOUS ORGANIZATIONS. a religious organization with a contract described in subsection (a)(1)(A), or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B), 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.

(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 eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2).

(e) RIGHTS OF BENEFICIARIES OF ASSISTANCE.—

(1) IN GENERAL.—If an individual described in paragraph (2) 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 subsection (a)(2), the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of assistance which the individual would have received from such organization.

(2) INDIVIDUAL DESCRIBED.—An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance under a program described in subsection (a)(2).

(f) EMPLOYMENT PRACTICES—A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1a) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2).

(g) NONDISCRIMINATION AGAINST BENEFICIARIES.—Except as otherwise provided in law, a religious organization shall not discriminate against an individual in regard to rendering assistance funded under any program described in subsection (a)(2) on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

(h) FISCAL ACCOUNTABILITY.—

(1) IN GENERAL. except as provided in paragraph (2), any religious organization contracting to provide assistance funded under any program described in subsection (a)(2) shall be subject to the same regulations as other contractors to account in accord with generally accepted auditing principles for the use of such funds provided under such programs.

(2) LIMITED AUDIT.—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.

(i) COMPLIANCE.—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.

(j) LIMITATIONS TO USE OF FUNDS FOR CERTAIN PURPOSES.—No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship, instruction, or proselytization.

(k) PREEMPTION.—Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

Footnotes

Introduction

¹The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Congress, 2d Session, P.L. 104-193.

²The detailed explanation is based on a memorandum prepared by Carl H. Esbeck, Isabelle Wade & Paul C. Lyda Professor of Law, University of Missouri-Columbia (J.D., Cornell University, 1974). The staff of Sen. John Ashcroft (R-Missouri), the sponsor of Section 104, worked closely with Esbeck beginning in February, 1995, when Charitable Choice was just an idea. His university position is listed for identification only.

An Overview of Section 104

¹See Henry G. Cisneros, *Higher Ground: Faith Communities and Community Building* (Department of Housing and Urban Development, Feb.1996); Marvin Olasky, *The Tragedy of American Compassion* (Washington, DC: Regnery Gateway, 1992); Steven V. Monsma, "Overcoming Poverty: The Role of Religiously Based Nonprofit Organizations," in Stanley W. Carlson-Thies and James W. Skillen, eds., *Welfare in America: Christian Perspectives on a Policy in Crisis* (Grand Rapids, Mich.: Eerdmans, 1996); Ronald J. Sider and Heidi Rolland, "Correcting the Welfare Tragedy: Toward a New Model for Church/State Partnership," also in Carlson-Thies and Skillen, eds., *Welfare in America*.

²Stephen V. Monsma, *When Sacred And Secular Mix: Religious Nonprofit Organizations And Public Money* (Lanham, Maryland: Rowman & Littlefield, 1996); Carl H. Esbeck, *The Regulation of Religious Organizations As Recipients of Governmental Assistance* (Washington, DC: Center for Public Justice, 1996).

³TANF is codified in Title 1 of PRWOR, 42 U.S.C. section 601 *et seq.* AFDC was codified at 42 U.S.C. section 601 *et seq.* AFDC is repealed by section 103(a) of PRWOR.

⁴Subsection (a)(2)(B) extends the coverage of Section 104 beyond TANF to "[a]ny other program established or modified under title I or II" of PRWOR that permits contracts or vouchers. According to the analysis of the Congressional Research Service, these additional programs are the SSI program, and probably the food stamps and Medicaid programs. See CRS memo, "Questions Re Section 104 of P.L. 104-193 Concerning Services Provided by Charitable, Religious, or Private Organizations," Sept. 9, 1996 (from the American Law Division), and CRS memo, "Application of Section 104 of P.L. 104-193," Oct. 18, 1996 (by the Education and Public Welfare Division).

⁵However, faith-based providers may find it advantageous to form separate 501(c)(3) nonprofit corporations to administer purchase-of-service contracts. Such action incurs some legal and administrative costs, but it eases the keeping of separate accounts in order to limit audits, as permitted by subsection (h)(2), and it restricts the coverage of certain civil-rights laws (see footnote 7 on page 20).

⁶Title VII only applies to employers with fifteen or more employees. Under federal law, religious organizations with fewer employees are already free to hire only those of compatible religious belief.

⁷Four federal anti-discrimination statutes are triggered by the receipt of federal funds: Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the bases of race, color, and national origin); the Age Discrimination Act of 1975 (prohibiting discrimination on the basis of age); Section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination against otherwise qualified disabled individuals, including individuals with a contagious disease or an infection such as HIV); and Title IX of the Educational Amendments of 1972 (prohibiting discrimination in educational institutions on the bases of sex and visual impairment). Separate incorporation as a 501(c)(3) nonprofit can have the effect of removing the parent religious organization from coverage of these four civil-rights laws that are triggered by federal funding See Esbeck, *Regulation of Religious Organizations* 28-34.

⁸As federal legislation, Section 104's requirements preempt state and local laws that conflict with it. Supremacy Clause, U.S. Constitution, art. VI, cl. 2.

⁹The Constitution requires government neutrality between religions and between religion and secularism, not discrimination against religious activity, expression, or organizations. See *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 115 S. Ct. 2510(1995) (upholding aid in the form of equal access to government funding for printing of religious newspaper); *Capitol Sq. Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995) (upholding aid in the form of equal access to public property for purpose of religious expression). See also *Church on the Rock v. City of Albuquerque*, 84 F. 3d 1273 (10th Cir. 1996), cert. denied (Oct. 21, 1996), No.96-286. Following *Rosenberger* and *Pinette*, the appeals court in *Church on the Rock* struck down a congressional prohibition on private religious speech in senior-citizen centers funded by the federal government. The court ordered the senior centers to permit worship and other religious speech as a matter of neutrality.

¹⁰Because Section 104 is a new law untested in the courts and because the applicable constitutional law is developing, it is essential that faith-based providers consult legal counsel. It is prudent for such providers to maintain a separate account for the federal funds, as permitted by subsection (h), and to use careful accounting procedures to track how these funds are used. A very conservative approach is to create a separate corporation to receive and expend the government funds. It should be noted that the most restrictive reading of current constitutional law disqualifies from participation in government programs all "pervasively sectarian organizations-an undefined term. However, many legal authorities believe that providers whose programs fulfill a law's public purpose, albeit that they are infused with religious messages or aspects, are nevertheless eligible to participate in government programs. Participation under Section 104 by deeply religious provider relies on a legal interpretation that has not been fully tested in the Supreme Court. For further discussion see Carl H. Esbeck, "A Constitutional Case for Governmental Cooperation with Faith Based Social-Service Providers," 46 *Emory Law Journal* (forthcoming, Winter 1997).

¹¹The distinction is well-established in constitutional law. See *Zobrest v. Catalina Foothill Sch. Dist.*, 509 U.S. 1(1993) (providing special education services to a student attending Catholic high school not prohibited by establishment clause); *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983) (upholding a state income tax deduction for parents paying school tuition); *Witters v. Washington Dep't of Servs. for the Blind* 474 U.S. 481(1986)

(upholding a state vocational rehabilitation grant to disabled student choosing to use grant for training as cleric); *Everson v. Board of Educ.*, 330 U.S. 1(1947) (upholding state law providing reimbursement to parents for expense of transporting children by bus to school, including religious schools).

¹²In the case of vouchers or certificates, the chain of causation between government and a faith-based provider is broken, precluding any possible governmental endorsement of religion. In such indirect financial relations, how the funds are ultimately used is irrelevant for purposes of the establishment clause. As the Supreme Court said in *Corporation of Presiding Bishop v. Amos* 483 U.S. 327 (1987):

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon v. Kurtzman*, 403 U.S. 602 (1971)], it must be fair to say that the *government itself* has advanced religion through its own activities and influence.

Id. at 337 (emphasis in original). This is much the same as observing that once the voucher or certificate leaves the government's hands, what is done with its value is not "state action" for purposes of the First and Fourteenth Amendments.

¹³Subsection (e)(1) requires only that assistance be obtainable from an "alternative" provider. It is implicit in the structure of Charitable Choice, however, that a beneficiary who objects to a faith-based provider will have recourse to a non-religious provider. However, there is no requirement for a state to ensure that a beneficiary has access to a provider sharing his or her faith.

¹⁴Subsection (k) is a "saving" clause preventing federal preemption in a narrow circumstance, but one within the control of state authorities. The subsection provides:

Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of *State* funds in or by religious organizations [emphasis added].

The use of the word "State" to limit the scope of the word "funds" gives the subsection the narrow effect that Congress intended.

¹⁵Conference Report 430, accompanying H.R. 4, 104th Congress, 1st Session (Dec. 20, 1995)-the previously adopted welfare bill with the identical subsection (k)-provides the following explanation for the subsection:

It is the intent of Congress . . . to encourage States to involve religious organizations in the delivery of welfare services to the greatest extent possible. The conferees do not intend that this language be construed to require that funds provided by the Federal government . . . be segregated and expended under rules different than funds provided by the State for the same purposes; however, States may revise such laws, or segregate State and Federal funds, as necessary to allow full participation in these programs by religious organizations [p 361].

¹⁶Rights acknowledged outside of Section 104, such as those secured by the First Amendment, can be pursued by providers or beneficiaries in the appropriate court, federal or state.