CHURCH STATE GUIDELINES

When Faith-Based Human Service Programs Are Funded by California Taxpayers

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In recent years, a great deal of attention has focused on Charitable Choice—a provision in Congress's 1996 welfare reform legislation that allows faith-based organizations to compete for federally-funded human service contracts and that provides church-state rules for these contracts. Through a series of Executive Orders, President Bush has applied Charitable Choice ules to a wide variety of federally-financed human services.

In interviews conducted by researchers at USC's Center for Religion and Civic Culture, religious leaders and state officials in California have occasionally asked whether or not Charitable Choice rules could also be applied to state-funded programs, such as First 5. If Charitable Choice rules are constitutionally defensible for federally-funded programs, they ask, why can't state-funded programs simply adopt those same rules?

Public officials should be very careful in considering the appropriateness of Charitable Choice rules for contracts that are funded by California tax funds. California's laws, of course, do not exist in isolation from federal laws, and the California Supreme Court has often argued that it wants its church-state decisions to be consistent with ones that are issued by the United States Supreme Court.

Nevertheless, when faith-based programs are supported by California taxes, and when these state funds are not commingled in federal block grants with federal funds, Charitable Choice rules do not apply. A 2004 U.S. Supreme Court decision, issued in *Locke v. Davey*, reinforces this conclusion. It affirms the authority of states to apply their own constitutional/legislative church-state rules in these circumstances.

Fortunately, when California public officials attempt to formulate church-state rules for public/private partnerships that involve faith-based organizations, they can take lessons from California's Employment Development Department (EDD). In late 2001, the department developed church-state rules for the California Community and Faith-Based Initiative—a program that had been supported entirely by California State General Funds. Administrators at EDD have received positive reviews for their efforts. Their rules have brought peace to an arena that had previously been marked by controversy (and even by a lawsuit).

The following questions and answers take into account the conclusions reached by the Employment Development Department.

Our proposed answers, of course, should not be interpreted as legal advice. All church-state guidelines and rules that are developed for use by California departments, agencies, and commissions should be reviewed by legal counsel.

When California agencies, departments, and commissions solicit proposals from nonprofit corporations for state-funded human service programs, can faith-based organizations compete for these contracts?

Yes. When California departments, agencies, and commissions direct Requests for Proposals to nonprofit corporations and for-profit corporations for state-funded human service contracts, eligible faith-based organizations may compete for those contracts.

Which faith-based organizations are eligible to compete for state-funded human service contracts?

An eligible faith based organization may assume several institutional forms. It may, for example, be an organization whose mission is solely to offer one or more human services. It may be a coalition or a partnership.

A straightforward reading of the California Constitution suggests that state-funded human

service contracts may be awarded only to faith-based organizations that are not owned or operated as pervasively sectarian institutions.[1]

California's Constitution prohibits any form of state financial support for religious congregations and denominations.[2]

Can public agencies require faith-based organizations, as conditions of their eligibility to compete for state-funded contracts, to conform to prescribed standards of belief and religious practice?

California's Constitution includes a declaration of rights, which declares: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed (Cal. Const., art I, Sections 4, 24)."

Thus, state agencies, departments, and commissions may not set eligibility standards that take into account the belief systems of faith-based organizations or the beliefs and religious practices of sponsoring faith communities. Public officials cannot discriminate against organizations that have ties to faith communities that may be regarded as outside the mainstream of American religious life.

State agencies can, however, require that eligible faith-based organizations be able to demonstrate that their organizational culture and practices are not pervasively sectarian.

The California Constitution allows for grants and contracts only to faith-based organizations, incorporated as freestanding nonprofits, for services that do not advance religion.

When California agencies, departments and commissions turn to the private sector to secure "contracted out" human services, are they allowed to show a preference for faith-based organizations?

No. Requests for Proposals should not express any preference for faith-based applicants. Awards panels should not use criteria that have the effect of routinely channeling contracts to faith-based organizations, thereby diminishing opportunities for other private sector organizations to receive these contracts. Likewise, awards panels should not use criteria that have the effect of eliminating eligible faith-based organizations from competition for these contracts.

Can faith-based organizations use religious criteria in the selection of clients (or participants) to be served within state-funded contracts?

Services that are offered within state-funded contracts must be available to all eligible clients on a non-discriminatory basis.

Can faith-based organizations offer religious activities as part of their state-contracted services?

Public dollars cannot be used to advance religion. Thus, within programs that are funded by the State of California, faith-based organizations cannot offer religious instruction and/or worship services. They cannot attempt to proselytize clients.

Can faith-based organizations invite clients within their state-funded programs to participate voluntarily in privately-funded religious activities?

Faith-based organizations should clarify for clients that they are not required to participate in religious activities as a condition for receiving state-funded services.

They can, however, extend non-coercive invitations to clients to participate voluntarily in privately funded activities within which religious activities are included.

Voluntary religious activities should be scheduled at times and/or places that are clearly separated from state-funded program activities. Clients should be fully informed concerning the religious content of these voluntary activities.

Should clients be informed concerning the faith-based character of organizations that offer state-supported human services?

Yes. Clients should be provided with the information they need in order to make reasonable choices. Some clients may prefer to secure services in programs offered by faith-based organizations. Others may prefer alternative options.

Can faith-based organizations utilize religious criteria in the employment of staff members who serve state-funded programs?

The California Code of Regulations (Title 2, Section 8107) prohibits state-funded contractors from discriminating against any employee or applicant for employment on the basis of race,

religion, color, national origin, ancestry, physical handicap, mental disability, medical condition, marital status, age or sex.

The California Government Code (Section 12990) requires that every state contract and subcontract for public works or for goods and services shall contain a nondiscrimination clause.

During recent decades, federal and state courts have considered a series of cases involving the use of religious criteria in the employment practices of faith-based organizations that receive public financial assistance.[3] This fact, and the character of the decisions rendered in these cases, should remind us that the matter is not yet closed.

Must faith-based organizations remove all religious symbols from premises in which state-financed human services are offered?

State-financed human services are often offered in facilities that are also used for sectarian activities at various times of the week. California codes do not require that religious symbols be removed from these facilities when state-funded human services are being offered.

Should faith-based organizations maintain separate contract-related financial records?

Yes. The Employment Development Department, for example, requires that faith-based organizations maintain separate financial records for contracts awarded by the California Community and Faith-Based Initiative. Most other programs take the same route. This requirement has wide support among public officials and religious leaders. It enhances the ability of faith-based organization to demonstrate accountability in their use of public funds. It eliminates dangers created by the commingling of public and private funds.

What happens to California's church-state rules when state funds are commingled with federal funds within programs that are affected by Charitable Choice?

Rules dealing with the commingling of state and federal funds in programs that are affected by Charitable Choice are not defined by federal codes and regulations. Rather, they are defined by federal administrative policy.

Here are guidelines drawn from a Health and Human Services publication, Helping Families Achieve Self-Sufficiency. They were drafted to guide state officials in their expenditure of State Maintenance-of-Effort (MOE) funds—state expenditures that are mandated by TANF.

(1) When state funds are commingled with federal funds, all TANF requirements and rules (including church-state rules) apply to the expenditure of state funds.

(2) When state funds are segregated from federal funds but are spent on TANF programs, many of the general TANF requirements and rules apply to the expenditure of state funds. Helping Families Achieve Self-Sufficiency does not specify whether Charitable Choice rules are included among those federal requirements that apply to state funds in this situation. The Office of Faith-Based and Community Initiatives in the Department of Health and Human Services, however, says that Charitable Choice rules do apply.

(3) When state funds are used for separate state programs outside of TANF, only state rules and regulations apply. State officials should consult with officials in federal departments that are implementing "Charitable Choice programs" to clarify commingling policies.

Can state agencies, commissions, and departments establish state-funded voucher programs, which allow eligible clients to carry certificates of reimbursement to faith-based organizations (including sectarian organizations) to secure services?

There are good grounds to assume that state agencies, commissions, and departments are permitted—under California law—to establish voucher programs as strategies for assisting eligible clients to secure needed services. There are good grounds, also, to assume that clients may carry these vouchers to faith-based organizations, even to sectarian organizations.

Decisions that have been issued in a number of state and federal court cases have allowed for this kind of "indirect funding." A number of state-funded programs have used voucher programs in which faith-based (including sectarian) organizations have been designated as eligible providers.

The law in this area, however, is still murky.

Although the U.S. Supreme Court has opened the way for vouchers to be carried by families to sectarian schools, the Court's recent decision in *Locke v. Davey* seems to allow state agencies, based on provisions in their own state constitutions, to exclude sectarian providers from their voucher programs.

State program administrators should consult with legal counsel before they create voucher programs of any type, especially programs that potentially involve pervasively-sectarian institutions.

FOOTNOTES

1. The Employment Development Department (EDD) defines "pervasively sectarian" in the following way:

   An organization in which religion is so pervasive that a substantial portion of the organization's function is subsumed in the religious mission such that government funding of the organization will have a primary effect of advancing religion in violation of the Establishment Clause of the First Amendment.

   A pervasively sectarian religious organization is one in which secular and religious activities are so inextricably intertwined that the secular activities cannot be separated from the sectarian ones. Typically, pervasively sectarian organizations have several of the following characteristics: worship, religious symbols and religious activities abound in the facility, the operation of the organization is considered as an integral part of the sponsoring faith's religious mission, participants in the program are required to attend religious devotions, and religious discrimination is practiced in the servicing of clients or the hiring of staff.

2. A series of Supreme Court decisions (e.g., *Bowen v. Kendrick* and *Mitchell v. Helms*) suggest that federal and state agencies, departments, and commissions may award human service contracts to congregations and denominations for publicly-funded human service services when these contracts have secular purposes, when public funds do not advance or burden religion, when contracts are awarded on grounds that do not favor religious institutions, and when the contracted programs do not create excessive entanglements of religion and the state.

   The Supreme Court has not concluded, however, that, when public agencies turn to the private sector for contracted human services, congregations and denominations must in each and every case be eligible to compete for these contracts. Thus, California's constitutional prohibition against state-funded awards to pervasively sectarian institutions appears to settle issues related to the eligibility of congregations and denominations in California.

   A number of constitutional scholars assert that the Supreme Court, using "neutralism" tests, might in the future conclude that religious organizations must be treated the same as other private sector organizations in competing for publicly-financed contracts.

3. State and federal courts have often concluded that faith-based nonprofits, even when they are recipients of public funds, do not lose their permission to employ religious criteria in their employment practices-a permission that has been granted by Title VII of the Civil Rights Act of 1964 and, in California, by the Fair Employment and Housing Act.

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