

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC.,
ANNE NICOL GAYLOR, ANNIE LAURIE GAYLOR,
and DAN BAKER
Plaintiffs,

MEMORANDUM AND ORDER 04-C-381-S

v.

JIM TOWEY, PATRICK PURTILL, BRENT
ORRELL, BOBBY POLITO, RYAN STREETER,
JOHN PORTER, JULIETE McCARTHY, LINDA
SHOVLAIN, DAVID CAPRARA, ELAINE CHAO,
TOMMY THOMPSON, ROD PAIGE, JOHN ASHCROFT,
and DR. JULIE GERBERDING
Defendants.

Plaintiffs Freedom from Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Baker commenced this civil rights action in their capacity as taxpayers alleging violations of the Establishment Clause of the First Amendment and seeking declaratory and injunctive relief against defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara, Elaine Chao, Tommy Thompson, Rod Paige, John Ashcroft, and Dr. Julie Gerberding. Jurisdiction is based on 28 U.S.C. § 1331. By Memorandum and Order dated November 15, 2004 the Court granted defendants' partial motion to dismiss defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara and Rod Paige for lack of standing. Thereafter plaintiffs voluntarily dismissed all but two claims relating to programs administered by defendant Thompson. The matter is presently before the Court on plaintiffs' motion for partial summary judgment and defendants' motions to dismiss and for summary judgment. The following facts are not disputed.

BACKGROUND

Plaintiff Freedom from Religion Foundation, Inc. (FFRF) is a Wisconsin non-stock corporation with its principal place of business in Madison, Wisconsin. FFRF has more than 5,000 members who oppose government endorsement of religion in violation of the Establishment Clause, U.S. Const. amend. I. Plaintiffs Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Baker are federal taxpayers and members of FFRF.

Defendant Tommy Thompson is Secretary of the Department of Health and Human Services (HHS). The Administration for Children and Families (ACF) is a federal agency located within HHS that administers the Compassion Capital Fund (CCF) program. The CCF program was created to increase the effectiveness of faith-based and community organizations (CFBOs) and enhance their ability to provide social services to those most in need. Social services contemplated by the CCF program include the "promotion treatment and prevention services related to primary health care, substance abuse treatment, mental health treatment, HIV/AIDS and related aspects of public health services directed to low-income families and individuals." HHS Prog. Announcement No. 2002-14, 67 Fed. Reg. 39,561 (June 7, 2002). The CCF program

provides funding to intermediary organizations that work to increase the capabilities of small CFBOs by providing training, technical assistance, and capacity-building sub-awards. ACF invites applications for CCF grants

from a wide variety of types of organizations or entities that can demonstrate knowledge and experience in the provision of the types of technical assistance described herein to a diverse group faith-based and community-based organizations representing different organizational or religious affiliations Further AC encourages applications from applicants that propose to work with and have experience working with faith- and community-based organizations that historically have not been well served or supported by governmental funds and have the greatest needs.

Nongovernmental organizations, non-profit agencies, including faith-based organizations, public agencies, State and local governments, colleges and universities, and for-profit entities may submit applications under this announcement.

Id. at 39,5654.

An independent panel of experts in the field reviews eligible CCF grant applications based on specific evaluation criteria designed to assess the proposed project's quality and likelihood of success: (1) the proposed program approach, including technical assistance strategy and plan for issuing sub-awards to diverse FBCOs; (2) the discussion of specific goals of the proposed project and expected benefits; (3) the description of staff that will be involved in implementing the project and staff members' experience with providing similar support; (4) the needs of FBCOs in the applicant's geographic area and how the proposed project could meet those needs through technical assistance; (5) the description of the geographic area to be served, including whether the area is precisely defined and reasonable; and (6) the proposed budget and justification for the budget. The review panel's assessment is a primary factor in ACF's funding decisions, although ACF is allowed to consider other factors such as geographic diversity and the types of applicant organizations. Id. at 39,567-569.

In September 2002 ACF awarded a three-year CCF grant to the Interfaith Health Program within the Rollins School of Public Health at Emory University. Emory uses the CCF grant to fund its Strong Partners Initiative.

The Strong Partners Initiative creates a partnership between Emory and eight or nine "Strong Partner Foundations" (SPFs). These foundations work with Emory to provide technical assistance and sub-awards to small FBCOs with limited resources. Emory described the origin of these SPFs in a "Sub-Award and Sub-Sub-Award Plan" that it submitted to ACF as follows:

These foundations were formed when non-profit, usually religious sponsored, hospitals or other health care assets were sold to for-profit buyers. Substantial portions of the proceeds of these transactions were used by the original sponsors to set up foundations which continue the original missions of the religious sponsors-usually a local variation on the theme of enhancing the health of the community.

Emory explained in its grant application that it believes these foundations to be "uniquely positioned" to assist it in advancing the goals of the CCF program:

The Interfaith Health Strong Partners project draws upon the experience and

strategic location of nine of these foundations with which we are familiar. Their grantmaking experience with local FBOs/CBOs allows this project, through the cooperation of the participating foundations, to select a diverse set of FBOs/CBOs which already have a reputation for best practices and sound stewardship.

These foundations also provide a substantial source of matching funds for federal funds -- a hard match of real private dollars flowing to the same set of FBOs which will be served by federal matching funds, and which serve the same set of health and human services as does the [Compassion Capital Fund].

Emory also provides three levels of technical assistance to SPFs and sub-awardees: it helps FBCOs to address specific "internal plumbing" issues within their organization (e.g., bookkeeping and strategic planning), develop evaluative and collaborative skills, and establish events for organizations sharing topics of concern.

Emory instructs SPFs to balance the following factors in selecting FBCOs to receive sub-awards: (1) the FBCO should not be totally dependent on the federal matching sub-award for survival; (2) it should be at a developmental stage where the combination of SPF funding, technical assistance, and federal matching sub-award will significantly build its organizational capacity; (3) it should have a demonstrated ability to collaborate with other FBCOs and community partners; (4) it should have developed a strategic plan; (5) "The selected set ('handful') of [FBCOs] in your service area should reflect diversity of ethnicities and religious traditions. We expect this to increase in years two and three. We prefer [FBCOs] which serve the poor and disenfranchised; which have links to local congregations; and which attempt to engage body/mind/spirit.

In response to a query from Emory's CCF program officer regarding how its selection process is open and competitive, it stated that "each foundation conducts its own open, competitive grant application and selection process." Later in this document, Emory states that "[w]hile some of the foundations exercise a preference in their private grant making for competent applications which reflect their own religious heritage, none of them exclude applications from agencies representing other religious traditions or from non-religious [community-based organizations]." Later still, it described its process as follows:

Interfaith Health Program staff consult with each foundation on their selection of federal sub-awardees, and thus have been able to reach agreement with the eight participating foundations on selections for federal sub-awards. Our considerations include:

- 1) Do the selections taken as a whole -- some 30+ sub awardee [FBCOs] per year -- represent diverse ethnic communities served; serve both urban and rural areas; address the full spectrum of HHS priorities; preferably attack some public health disparity; and cover a broad spectrum of religious and non-religious traditions?
- 2) Are there clusters of interest around which various sub-sets fo [sic] [FBCOs] can be organized to provide [technical assistance] to several organizations wrestling with common issues?
- 3) Are the selected [FBCO] leaders willing to work in collaborative fashion in the target community or on the focal social service/public health issue?

In the first budget period of the grant, SPFs made sub-awards to 19 faith-based organizations and 4 community-based organizations. In the second year, SPFs made sub-awards to 26 faith-based organizations and 5 community-based organizations.

Through the Family and Youth Services Bureau, ACF/HHS also administers the Mentoring Children of Prisoners grant program, which Congress established in the Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133. Congress created the Mentoring Children of Prisoners program to provide support for children who face the negative present and future effects of having a parent who is incarcerated. Citing empirical findings that "mentoring is a potent force for improving children's behavior across all risk behaviors affecting health," Congress authorized the Secretary of HHS to make competitive grants to government, tribal, faith-based, and community organizations to facilitate mentoring relationships. Id. The program announcement for Mentoring Children of Prisoners grants includes the following statement regarding eligibility for grants:

Those eligible to apply for funding under this grant competition include faith and community-based organizations, tribal governments or consortia, and state or local governments where substantial numbers of children of prisoners live. Applicants must apply to establish new programs or to expand existing programs utilizing a network of public and private community entities to provide mentoring services for children of prisoners. Collaboration among eligible entities is strongly encouraged. All eligible organizations, including faith-based organizations, are eligible to compete on equal footing for Federal financial assistance used to support social service programs. Faith-based organizations are eligible to complete for Federal financial assistance while retaining their identity, mission, religious references, and governance. However, faith-based organizations that receive funding may not use Federal financial assistance, including funds, to meet any cost-sharing requirements, to support inherently religious activities, such as worship, religious instruction, or prayer. In addition, any participation in these activities by beneficiaries must be voluntary.

HHS Prog. Announcement No. ACYF/FYSB 2003-02, 68 Fed. Reg. 26,622-01, 26,624 (May 16, 2003).

MentorKids USA¹ is a mentoring organization located in Phoenix, Arizona. MentorKids applied for and received a three-year Mentoring Children of Prisoners grant in 2003.

MentorKids' articles of incorporation state that it was created for specific purposes that include:

To exalt the Lord Jesus Christ as the Son of God, the Savior of the World and the head of his church. (Matthew 16:13-18; Romans 10:8-11; Ephesians 5:23| Col. 1:15-19;

. . . . [and]

To propagate the gospel of the Lord Jesus Christ, as outlined in the Bible, at home and abroad, by way of operating and maintaining missions, parsonages, and Christian educational institutions which may offer both religious and secular subjects, Christian camps, and Christian recreational facilities;

MentorKids recruits and hires only Christians as mentors. The MentorKids mentor application requires an essay entitled "Personal Testimony," which "should include your life before Christ, your conversion, and what your life is like now. Your life now should include who Jesus is for you, and how He affects your daily life." The essay also inquires: "Briefly describe how you might be able to share your Christian faith with a youth." Potential mentors receive a "fact sheet"

stating that "mentors introduce children to the gospel of Jesus Christ, allowing them to build their lives on the solid foundation of God's love."

MentorKids requires its mentors to adhere to a Christian Statement of Faith and Code of Conduct. The current MentorKids training manual discusses issues including "Understanding the Love of God," "Understanding the Grace of God," and "Understanding God and Jesus as a Man for All People." The manual advises mentors to "pray for your mentee;" "if you are going to help your mentee understand who God is and His love, you first must know who He is and understand His love;" "share your experience regarding God's grace in your life;" "read, act out or talk about Biblical examples of where Jesus showed grace to people;" "introduce your mentee to the scriptures and point out that John 3:16 states that Jesus is God's redemption plan for everyone." Later, the manual advises mentors to "pray and look for opportunities to share your faith. Be bold in speaking the truth of the gospel and sensitive to your mentee's response."

Mentors are required to provide monthly reports to their coordinator that assess whether their mentee "seems to be progressing in relationship with God." The monthly report also asks mentors to address whether their mentee has "discussed God;" "participated in Bible Study;" "Attended Church;" or "accepted Christ this month."

In a 2003 memo to case managers, MentorKids' President John Gibson labeled the year as the "year of intentionality." Gibson described MentorKids' mission for the year as follows:

As the ministry moves forward to a new era of excellence we plan to be much more intentional about introducing the kids in the program to Christ and nurturing their growth and foundation in Him. Note the Miniseries [sic] new Mission Statement: Our mission is to locate, train and empower mentors to be the presence of Christ to kids facing tough life challenges through one-on-one relationships. We pledge to provide the tools for you and your mentors to be equipped to maximize the possibility of the child developing an authentic lifechanging relationship with Christ, through relevant bible disciplining interphased with life skills. The mentor relationship will only last a season -- the relationship between the child and their Savior will guide and comfort them every day, and last for eternity."

Similar references permeate MentorKids' website, board meeting minutes (e.g., MentorKids' "number one priority" is "to share the gospel of Jesus Christ with MatchKids so that they have an opportunity to know him"), and newsletters (e.g., "we want to be an intentional ministry; intentionally bringing kids into healthy maturity and a relationship with Jesus Christ").

The Fall 2003 newsletter describes a camp experience provided by MentorKids:

Camp is designed to forge a lasting bond between our mentors and their kids, explains Program Director Bill Brittain. "In providing a sense of adventure and fun, we break down walls -- between mentors and kids and between kids and Jesus. Everything we do during those three days creates an atmosphere which invites spiritual growth and an increased awareness of choices we have in our lives. Our goal is to see every young adult choose Christ -either through a first-time commitment or a deeper ongoing relationship with Him. This year, we had six young adults choose Christ for the first time in their lives. That makes the whole camp worth it."

At his deposition, Gibson recognized that mentors are encouraged to expose their faith to mentees and that mentees regularly come to faith in Jesus Christ. He believes that kids who

accept Jesus may be more successful in the program; a belief in God make it more likely that kids will stay out of trouble.

Confronted with this evidence, HHS has now suspended MentorKids' grant. The suspension will not be lifted unless ACF's further review determines that MentorKids program is in full compliance with all relevant federal rules, regulations, and policies.

MEMORANDUM

Defendants have moved for summary judgment on plaintiffs' claim that the HHS grant to Emory University violates the Establishment Clause. Plaintiffs have moved for summary judgment that the HHS grant to MentorKids violates the Establishment Clause. Defendants initially filed a cross-motion relating to the MentorKids grant but then retracted it, suspended the grant, and moved to dismiss citing both Article III and prudential concerns relating to mootness and ripeness. Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c).

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

p> Compassion Capital Fund Grant to Emory University

Plaintiffs do not raise a facial challenge to the constitutionality of the CCF program. Instead, they argue that the grant program is applied to Emory University's Strong Partners Initiative violates the Establishment Clause because Emory University and its SPF intermediaries give preferential treatment to religious organizations in their selection of organizations for sub-awards under the grant.

As a preliminary matter, defendants argue that plaintiffs lack standing to pursue their challenge to the Emory University CCF grant. This argument is unpersuasive. Pursuant to Bowen v. Kendrick, 487 U.S. 589 (1988), plaintiffs have standing as taxpayers to challenge the disbursement of federal funds to Emory University by HHS in the administration of the CCF program. The Establishment Clause operates as a specific constitutional limitation upon Congress's exercise of its taxing and spending power. Flast v. Cohen, 392 U.S. 83, 104 (1968). At its heart, the CCF program is a program of disbursement of funds pursuant to Congress's taxing and spending powers and plaintiffs' claim calls into question how the funds authorized by Congress are being disbursed pursuant to the program's statutory mandate. Kendrick, 487 U.S. at 620; see also Freedom from Religion Foundation Inc. v. Bugher, 249 F.3d 606, 610 (7th Cir. 2001).

Religious freedom is basic to this nation. Many of those who formed this nation or immigrated to it left their homelands to escape religious persecution seeking the right to worship without government interference. The First Amendment to the United States Constitution guarantees this right to worship without government interference by providing that "Congress shall make no law respecting an establishment of religion." Though there have been a variety of approaches to

defining when state action violates the Establishment Clause the heart of the clause is that government, state or federal, should not prefer one religion to another or religion to irreligion. Freedom From Religion Foundation, Inc. v. Thompson, 920 F. Supp. 969, 972 (W.D. Wis. 1996) (citing Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994)).

In Lemon v. Kurtzman, the United States Supreme Court developed a three-pronged test to determine whether a statute or program complies with the Establishment Clause. 403 U.S. 602 (1971). Under this test, a program does not violate the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion. Id. at 612-13. In Agostini v. Felton, the Supreme Court modified the Lemon test, emphasizing the continuing importance of the first two prongs but determining that entanglement could be considered an aspect of the second prong's "effect" inquiry. 521 U.S. 203, 222-23 (1997).

In Agostini, the Court used "three primary criteria" in evaluating whether government aid has the primary effect of advancing religion: whether the statute or program in question "result [s] in governmental indoctrination; define [s] its recipients by reference to religion; or create[s] an excessive entanglement." Id. at 234.

Plaintiffs argue that Emory University and its SPF intermediaries define recipients of sub-awards under the CCF grant by reference to religion, giving preferential treatment to religious organizations. Plaintiffs allege that this preference occurs at two levels. First, plaintiffs allege that Emory selected its SPFs because they were religious organizations. Second, plaintiffs allege that the SPFs give preferential consideration to religious organizations when awarding sub-grants.

Defendants do not dispute for the purposes of summary judgment that the exercise of such a preference would violate the Establishment Clause, as well as HHS regulations:

Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government and other intermediate organizations receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, "program" refers to activities supported by discretionary grants under which recipients are selected through a competitive process. As used in this section, the term "recipient" means an organization receiving financial assistance from an HHS awarding agency to carry out a project or program and includes the term "grantee" as used in 45 CFR Parts 74, 92, and 96.

45 C.F.R. § 87.1(b). Defendants argue that plaintiffs have failed to produce any evidence of this alleged preferential treatment. Plaintiffs rely entirely upon the grant record produced by defendants to satisfy their Rule 56(e) obligation to set forth specific facts showing that there is a genuine issue for trial. Plaintiffs have produced no responses to interrogatories, affidavits, or depositions of individuals with personal knowledge of Emory's or its SPFs' alleged exercise of religious preference in awarding sub-grants.

First, plaintiffs allege that Emory selected its SPFs because they were religious organizations. Plaintiffs rely solely on the fact that each of the SPFs selected by Emory is a faith-based organization to prove this allegation. Plaintiffs have produced no evidence that Emory relied on religion as a criterion in selecting its SPFs. The grant application provides the only evidence of

the criteria relied on by Emory in selecting SPFs:

The Interfaith Health Strong Partners project draws upon the experience and strategic location of nine of these foundations with which we are familiar. Their grantmaking experience with local FBOs/CBOs allows this project, through the cooperation of the participating foundations, to select a diverse set of FBOs/CBOs which already have a reputation for best practices and sound stewardship.

These foundations also provide a substantial source of matching funds for federal funds -- a hard match of real private dollars flowing to the same set of FBOs which will be served by federal matching funds, and which serve the same set of health and human services as does the [Compassion Capital Fund].

Nothing within this statement or otherwise suggests that Emory selected its SPFs because they were religious organizations.

Second, plaintiffs allege that the SPFs give preferential consideration to religious organizations in their awarding of sub-grants. To prove the existence of this preference, plaintiffs rely on the fact that many (about 80%) of the organizations that received sub-grants from Emory and its SPFs are faith-based organizations. Plaintiffs characterize this as "disproportionate," but they fail to explain why or to provide any evidence that would permit evaluation of this claim. For example, there is no evidence how many faith-based and non-faith-based organizations applied for sub-awards. Moreover, the United States Supreme Court has suggested that Courts decline to engage in the type of analysis that plaintiffs' argument would require:

We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled--under a facially neutral statute--should be of little importance in determining the constitutionality of the statute permitting such relief.

Mueller v. Allen, 463 U.S. 388, 401 (1983).

Plaintiffs also highlight isolated words and phrases used by Emory in its grant application to describe the type of FBOs to which it hoped to make sub-awards. These words and phrases (like "holistic" and "body/mind/spirit") cannot be understood reasonably to have any inherently religious content, and plaintiffs have presented no evidence that Emory intended to impart them with religious content.

Finally, plaintiffs focus on one sentence that appears in a document which Emory submitted to HHS when asked to confirm that its selection process is open and competitive. After stating that of its SPFs "conducts its own open, competitive grant application and selection process," Emory stated that "[w]hile some of the foundations exercise a preference in their private grant making for competent applications which reflect their own religious heritage, none of them exclude applications from agencies representing other religious traditions or from non-religious [community-based organizations]." Plaintiffs rely on the first clause of this sentence to show that there is a genuine issue for trial.

Plaintiffs' speculative interpretation of this one general, ambiguous clause is insufficient to

survive summary judgment. Plaintiffs do not dispute that the grant application lists specific criteria which Emory expected SFSs to apply in making sub-awards. Emory instructs SPFs to balance the following factors in selecting FBCOs to receive sub-awards: (1) the FBCO should not be totally dependent on the federal matching sub-award for survival; (2) it should be at a developmental stage where the combination of SPF funding, technical assistance, and federal matching sub-award will significantly build its organizational capacity; (3) it should have a demonstrated ability with collaborate other FBCOs and to community partners; (4) it should have developed a strategic plan; (5) "The selected set ('handful') of [FBCOs] in your service area should reflect diversity of ethnicities and religious traditions. We expect this to increase in years two and three. We prefer [FBCOs] which serve the poor and disenfranchised; which have links to local congregations; which and attempt to engage body/mind/spirit." Within the same document as plaintiffs' "smoking gun" clause, Emory specifically describes its process as follows:

Interfaith Health Program staff consult with each foundation on their selection of federal sub-awardees, and thus have been able to reach agreement with the eight participating foundations on selections for federal sub-awards. Our considerations include:

- 1) Do the selections taken as a whole -- some 30+ sub awardee [FBCOs] per year -- represent diverse ethnic communities served; serve both urban and rural areas; address the full spectrum of HHS priorities; preferably attack some public health disparity; and cover a broad spectrum of religious and non-religious traditions?
- 2) Are there clusters of interest around which various sub-sets fo [sic] [FBCOs] can be organized to provide [technical assistance] to several organizations wrestling with common issues?
- 3) Are the selected [FBCO] leaders willing to work in collaborative fashion in the target community or on the focal social service/public health issue?

Confronted with these neutral selection criteria, plaintiffs have failed to produce any evidence to corroborate their interpretation of the ambiguous sentence upon which they rely. This one ambiguous sentence, plucked from four hundred pages of grant application records, and plaintiffs' wholly unsubstantiated speculation as to the proper interpretation thereof, are insufficient to demonstrate the existence of a genuine issue of material fact.

Plaintiffs have failed to demonstrate the existence of a genuine issue of material fact as to Emory University's CCF grant. Accordingly, defendants are entitled to judgment as a matter of law. Defendants' motion for summary judgment will be granted.

Mentoring Children of Prisoners Grant to MentorKids USA

Plaintiffs move for summary judgment that HHS's Mentoring Children of Prisoners Grant to MentorKids USA violates the Establishment Clause. Plaintiffs argue that the MentorKids program is using the grant to promote religion.

Confronted with the evidence produced by plaintiffs in their motion for summary judgment, defendants acted on December 16, 2004 to suspend further funding of MentorKids' Mentoring Children of Prisoners Grant. Defendants represent that this suspension will not be lifted unless ACF's further review determines that MentorKids program is in full compliance with all relevant federal rules, regulations, and policies including 45 CFR § 87.1(c):

Organizations that receive direct financial assistance from the Department under any Department program may not engage in inherently religious activities, such as

worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

Consequently, defendants raise jurisdictional and prudential mootness and ripeness concerns and ask the Court to dismiss plaintiffs' claim relating to the suspended grant.

In general, a defendant's voluntary cessation of a challenged practice does not deprive a federal court of the power to determine the legality of the practice. City of Mesquite v. Aladdin's Castle, Inc. 455 U.S. 283, 289 (1981). Defendants must bear the heavy burden to prove that there is no reasonable expectation that the wrong will be repeated. Id. Defendants have failed to meet this burden, having failed to provide sufficient assurances that the grant will not be reinstated.

Effectively conceding that federal funds have been used by the MentorKids program to advance religion in violation of the Establishment Clause, defendants do not attempt to set forth specific facts to show that there is a genuine issue for trial.

Accordingly, plaintiffs are entitled to judgment as a matter of law.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiffs against defendants declaring that the Mentoring Children of Prisoners grant to MentorKids USA is VACATED and further funding is DENIED as it relates to its present structure.

IT IS FURTHER ORDERED that defendants' motion to dismiss is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as it relates to the Department of Health and Human Service's Compassion Capital Fund Grant to Emory University and is in all other respects DENIED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiffs AFFIRMING the Department of Health and Human Service's Compassion Capital Fund Grant to Emory University.

Entered this 11th day of January, 2005.

BY THE COURT:
JOHN C. SHABAZ
District Judge

¹ Formerly known as MatchPoint of Arizona. Hereinafter, "MentorKids" will be used to refer to both MentorKids and its predecessor MatchPoint.