UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

FREEDOM FROM RELIGION FOUNDATION, INC.; PETER VIVIANO, ERNIE HIRSHMAN, SABINA HIRSHMAN, PAUL WEINBAUM, MARTIN J. BOYD, M.D., and JESSE V. CHAVEZ,,

Plaintiffs,

v.

Case No. CIV 05-1168-RLP/KBM

GOVERNOR BILL RICHARDSON, SECRETARY JOE R. WILLIAMS, HOMER GONZALES, BILL SNODGRAS, and CORRECTIONS CORPORATION OF AMERICA, INC.,

Defendants.

PLAINTIFFS' BRIEF OPPOSING MOTION FOR SUMMARY JUDGMENT BY CORRECTIONS CORPORATION OF AMERICA ON ISSUE OF ESTABLISHMENT CLAUSE VIOLATION

I. INTRODUCTION.

The defendant, Corrections Corporation of America ("CCA"), argues that direct public funding of religious indoctrination is consistent with the Establishment Clause in a prison setting, unless only religious programming is funded. Here, educational, vocational and mental health programming is made available to inmates at the New Mexico Women's Correctional Facility ("NMWCF") -- so the State of New Mexico allegedly can also provide inherently religious programming.

Particularly in a prison context, according to CCA, prison administrators should have unfettered discretion to sponsor religion as a behavior modification tool. Here, CCA offers only one

faith-based residential program to inmates, which customized program CCA designed in collaboration with the Institute for Basic Life Principles ("IBLP"), an evangelical religious organization. The program is characterized by CCA as a non-denominational Bible-based program that allegedly appeals to Hispanic women. As long as program participants are not coerced, however, State taxpayers supposedly have no legal basis to object to the State's direct funding of this intrinsically religious programming. The taxpayer's proverbial "three pence" can be used, according to CCA, to sponsor religion without recourse.

CCA is wrong. Its presumption to sponsor a prison religion to modify behavior supported with public funds is unprecedented, and it is unconstitutional. CCA does not cite a single case holding that prison officials can directly and deliberately fund religious indoctrination, even in the prison context, without violating the Establishment Clause. CCA, in fact, cites no case in which direct public funding of religious indoctrination has been allowed in any context. Public funding of religious indoctrination has only been recognized in programs of "true private choice," such as voucher systems, where public funds are directed to religious programs through the intervening decisions of many private individuals. In this case, public funds to operate the Life Principles/Crossings Program at the NMWCF are not allocated on the basis of individual prisoner choices. The decision to support the program with public funds, received from the State of New Mexico, is made by prison officials, rather than individual inmates.

The inclusion of woodworking and other such prisoner programming does not open the door to direct public support for religious indoctrination. CCA's argument, if accepted, would always allow public funding of religious indoctrination because virtually no public entity funds only religious instruction. Public schools teach math, science, social studies, reading, and writing, but that does not open the door to direct public funding of religious instruction. The Establishment

Clause prohibits any public sponsorship of religious indoctrination, not just where exclusive religious programming is funded.

Coerced participation in religious indoctrination also is not necessary in order for taxpayers to object. CCA incorrectly argues that the taxpayer plaintiffs in this case should shut up and allow the prison to transform the hearts of prison inmates, as long as program participants do not object. Willing acceptance of public money, however, does not foreclose taxpayers from objecting to the missionary uses of their taxes. CCA's argument would allow direct taxpayer support of churches, as long as the churches voluntarily accepted the money. This is not the law, nor is it even arguably supported by any authority cited by CCA.

The alleged appeal of the Life Principles/Crossings Program to Hispanic women also does not save the program from Constitutional infirmity. CCA's attempt to create a "designer" religion involves the State, and the judiciary, in excessive entanglement where public officials should not tread. CCA purports to have designed a non-denominational religious program that is appealing to many, or which at least does not offend Christians. Whether this is true or not is irrelevant because the State cannot determine and prescribe what religion is generally acceptable as a baseline. If prison officials purport to determine generally acceptable religious content for behavior modification programs, then courts will be asked to determine whether the prescribed religion really is generally acceptable. Neither prison officials nor courts can Constitutionally engage in this exercise without improper entanglement in religious doctrine. Even if the court could determine what constitutes a generally acceptable religion, the Establishment Clause would be violated. A civil religion based upon majoritarian principles is precisely an evil that the Establishment Clause prohibits.

Prison officials do not have a unique right to engage in religious indoctrination, including the design of behavior modification programs with explicit religious content. CCA incorrectly

argues that the Establishment Clause does not apply to prison officials, who have discretion in prison administration to assure security. This is not a free exercise case, where inmates are alleging that their Constitutional rights are being abridged by a prison regulation. This is a case where taxpayers object to State officials engaging in proselytization, which the Establishment Clause prohibits even in prisons. Prison officials cannot sponsor religion, even if they sincerely believe that religious people are less likely to commit crimes. Prison officials can promote values that may be consistent with religious values, but they may not promote religion as the source of such values. Religious indoctrination is not a legitimate penological objective.

The prohibition against the establishment of religion applies to prison officials precisely because such officials are Constitutionally prohibited from making the value judgment that religion makes better citizens. CCA's underlying value judgment about the value and utility of religion is prohibited by the Establishment Clause, just as the judiciary is prohibited from adjudicating such a premise. The Constitution does not include an exception authorizing the establishment of religion for ostensibly useful purposes. Such an exception would render the Establishment Clause ephemeral. The Constitution prohibits altogether the government's establishment of religion.

II. RESPONSES TO CCA'S PROPOSED STATEMENT OF FACTS WHICH PLAINTIFFS DISPUTE.

9. The State of New Mexico does not fund the faith-based unit at NMWCF. Exhibit C, Deposition of Assistant Warden Jerry Smith, at 19:15-22; Exhibit A, at ¶¶ 9-10.

Response: The faith-based unit at NMWCF is funded by the State of New Mexico from money received by CCA to operate the prison. (See Plaintiff's Statement of Facts, Numbers 9-21 and 92-110, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

11. CCA expends its own funds to house, feed and provide programming for the inmates at the NMWCF. Exhibit A, Cooper Affidavit, at ¶ 12.

Response: CCA pays for the costs to operate the NMWCF from funds received from the State of New Mexico. (See Plaintiff's Statement of Facts, Numbers 9-22, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

13. CCA determines how its funds are allocated in the operation of the NMWCF. Exhibit A, at ¶ 14.

Response: CCA's contract with the State of New Mexico includes religious programming, which is within the scope of CCA's contract with the Corrections Department. CCA's contract further obligates CCA to comply with Corrections Department policies, including Department policies relating to faith-based living units. Corrections Department regulations authorize faith-based living programs to be operated within prisons under the Department's jurisdiction, which Units must be approved by the Department. (See Plaintiff's Statement of Facts, Numbers 1-2, 7, and 13-14, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

15. The NMWCF offers various program opportunities, including education, mental health, recovery treatment, vocational, and faith-based. Smith Affidavit, at ¶¶ 8-13.

Response: The Life Principles/Crossings Program is the only faith-based residential program utilized by CCA. The program is an explicitly Christian Bible-based program. The Life Principles/Crossings Program is the only faith-based residential program at NMWCF -- and the residential feature is considered an integral and valuable part of the program. The residential aspect of the program provides a more secure environment than general prison living units. (See Plaintiff's Statement of Facts, Numbers 28-56, 70-84, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

19. Inmates seeking to effect behavior changes may also participate in the Therapeutic Community, a secular residential program directed toward addictions, which provides counseling, parenting classes, and addictions treatment including Twelve Steps AA and NA programs. This program employs a program coordinator and a full-time addictions treatment counselor, along with a counselor trainee, and provides programming for eighty women who live together in a residential program. Smith Affidavit, at ¶ 12; Deposition of Thelma Flowers, Addictions Treatment Counselor, at 3:15-21, 25:25-26:1, attached as Exhibit G.

Response: The Therapeutic Community is not a purely secular residential program. The program includes Twelve Steps AA and NA programs, which are religious programs based upon belief in a "higher authority." (Supp. Bolton Aff., Ex. 1, Gonzalez Dep. at 22-23.) The program includes religious content as judicially recognized. See Kerr v. Farrey, 95 F.3d 472, 479-80 (7th Cir. 1996).

23. The Life Principles Community/Crossings program has identified goals directed toward behavior change. The funds expended by CCA to develop the program were from CCA's profits, and were not treated ass operating expenses of any facility. Deposition of John Lanz, at 49:25-50:6, 54:13-23, 93:16-18, attached as Exhibit L; CCA Life Principles Executive Summary, attached as Exhibit M; *see also* Exhibit J, Compton Affidavit, at ¶ 11.

Response: The funds expended by CCA to operate the Life Principles/ Crossings Program at NMWCF are derived from the State of New Mexico tax appropriations. (See Plaintiff's Statement of Facts, Numbers 9-21 and 92-110, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

26. The faith-based living unit is identical in furnishing and amenities to all other living units of equivalent security levels. Compton Affidavit, at ¶ 5; Smith Affidavit, at ¶ 15.

Response: The residential feature of the Life Principles/Crossing Program provides a protective, insular and secure environment for participants distinct from the general prison living units. (See Plaintiff's Statement of Facts, Number 108, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

29. Participation by inmates in the Life Principles Community/Crossings program is entirely voluntary. There are no positive or negative institutional consequences specific to the program for entry into or departure from the program. Compton Affidavit, at ¶¶ 6-8; Smith Affidavit, at ¶¶ 16-17.

Response: The residential feature of the Life Principles/Crossing Program provides a protective, insular and secure environment for participants distinct from the general prison living units. (See Plaintiff's Statement of Facts, Number 108, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

30. Inmates are considered for eligibility for participation in the faith-based residential program without regard to their religious beliefs or lack thereof, and no religious services such as baptisms are performed within the program. Exhibit J, Compton Affidavit, at ¶ 9.

Response: Inmates must apply to the Prison Chaplain for admission to the Life Principles/Crossings Program, and they are expected to memorize Biblical passages before admission to the program. (See Plaintiff's Statement of Facts, Number 90, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

31. Inmates in the faith-based residential program may continue to follow their own religious practices whether those practices are Christian or non-Christian. This includes Native American sweat lodge ceremonies and Wiccan observances. Exhibit J, Compton Affidavit, at ¶ 10.

Response: The content of the Life Principles/Crossings Program that participants utilize is an intrinsically Christian Bible-based program. (See Plaintiff's Statement of Facts, Numbers 28-56, 75-84, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

32. Experts Elizabeth Dinsmore, Ph.D. and Victor Lofgreen, Ph.D., provided expert reports that the faith-based residential program at the NMWCF meets legitimate penological goals directed toward rehabilitation. Report of Dr. Lofgreen, attached as Exhibit N, and Report of Dr. Dinsmore, attached as Exhibit O.

Response: The effectiveness of faith-based programming in prisons is unsubstantiated, as admitted by CCA's own experts. The structured format of the program, moreover, rather than its substantive content, is the most attractive feature to participants. (See Plaintiff's Statement of Facts, Numbers 111-113, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

33. Prison officials observed that there were few misconduct reports coming from inmates in the Life Principles/Crossings program, and this has been a positive influence in the facility. Deposition of Eric Thompson, Exhibit P, at 18:21-19:9, 22:24-23:5; Deposition of Warden Bill Snodgrass, at 38:1-15, attached as Exhibit Q; Exhibit C, Deposition of Jerry Smith, at 5:4-12.

Response: The effectiveness of faith-based programming in prisons is unsubstantiated, as admitted by CCA's own experts. The structured format of the program, moreover, rather than its substantive content, is the most attractive feature to participants. (See Plaintiff's Statement of Facts, Numbers 111-113, included in Plaintiffs' Brief in Support of Motion for Partial Summary Judgment.)

III. PLAINTIFFS' STATEMENT OF PROPOSED FACTS IN OPPOSITION TO CCA'S MOTION FOR SUMMARY JUDGMENT.

The plaintiffs rely upon their Statement of Facts included in their Brief in Support of Motion for Partial Summary Judgment, previously filed.

IV. DIRECT PUBLIC FUNDING OF RELIGIOUS INDOCTRINATION IS PROHIBITED BY THE ESTABLISHMENT CLAUSE.

The Establishment Clause prohibits direct public funding of religious indoctrination under every recognized test.[1] Even public funding based upon a per capita basis is prohibited, in contrast to programs of true private choice, such as a vouchers, where funding for religious programming is allocated by individual choice. The court noted this distinction in Americans United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 931 (S. D. Ia. 2006):

> In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion.

In the present case, the Life Principles/Crossings Program is directly supported by funds received by CCA from the State of New Mexico to operate the NMWCF. CCA admits, moreover, that individual inmates do not make any allocation of State funding to specific programs, including the Life Principles/Crossings Program. CCA and the State of New Mexico have made the decision to sponsor the Life Principles/Crossings Program, in which inmates can participate, but as to which

---

[1] Plaintiffs also rely upon their Brief in Support of Motion for Partial Summary Judgment, in opposition to CCA's Motion.

they do not determine the allocation of funding. As a result, the use of public funds to support the Life Principles/Crossings Program constitutes direct public funding of religious indoctrination. Such direct funding of religious indoctrination has consistently been prohibited by the United States Supreme Court, as well as all other known courts.[2]

CCA unpersuasively tries to justify its support of inherently religious programming by reference to the test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971). CCA first argues that designing and implementing an inherently religious program fulfills a secular purpose, i.e., to cause inmate behavior modification. Attempts to achieve ultimate secular objectives, however, through inherently religious means, do not satisfy the Constitutional secular purpose requirement of Lemon. This argument has consistently been rejected, including in Holloman v. Harland, 370 F.3 1252 (11th Cir. 2004).

In Holloman, a public school teacher defended a daily moment of silent prayer by arguing that she intended to teach students compassion, pursuant to a character education plan mandated by the state. Id. at 1285. The Court concluded that this explanation did not constitute a valid secular purpose because the teacher's most basic intent unquestionably was to offer her students an opportunity to pray. "While she may also have had a higher-order ultimate goal of promoting compassion, we look not only to the ultimate goal or objective of the behavior, but also to the more immediate, tangible, or lower-order consequences a government actor intends to bring about." Id. The Court recognized that promoting compassion may be a valid secular purpose, but teaching

---

[2] CCA's reference to the decision in Freedom From Religion Foundation v. McCallum, 324 F.3d 880 (7th Cir. 2003), is misplaced because the program at issue in that case was one of true private choice, i.e., the State paid a specific amount to a faith-based service provider for each inmate that chose to participate in the program. The district court and the Court of Appeals likened the program, therefore, to a voucher program, which is distinguishable from the Life Principles/Crossings Program.

students that praying is necessarily helpful to promoting compassion is not. "The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests." Id. at 1286. The Court further concluded that "A person attempting to further an ostensibly secular purpose through avowedly religious means is considered to have a Constitutionally impermissible purpose." Id., citing Jager v. Douglas County School District, 862 F.2d 824, 830 (11th Cir. 1989) ("An intrinsically religious practice cannot meet the secular purpose prong of the Lemon test.").

Direct public funding of intrinsically religious programming also fails the "effects" test of Lemon, as the Court also recognized in Holloman, 370 F.3d at 1286. The Court noted that praying is the "quintessential religious practice" and to explicitly call for prayer requests, invoke a moment of silence with prayer with a phrase "let us pray," actually hold such a moment of silence, and sometimes conclude with "Amen," has the effect of both endorsing religious activity, as well as encouraging or facilitating its practice. Id. Similarly, in the present case, the Life Principles/Crossings Program, which involves prayer, Bible memorization, etc., is intrinsically religious so as to have the effect and appearance of endorsing religion. As the court noted in Americans United for Separation of Church and State, 432 F. Supp. at 922, the overtly religious content of the program "is not simply an overlay or a secondary effect of the program -- it is the program."

CCA's collaboration with IBLP to create a nondenominational Bible-based Christian program also involves an excessive entanglement with religion. Again, as the court recognized in Americans United for Separation of Church and State, 432 F. Supp. at 933, "for all practical purposes, the State has literally established an evangelical Christian Congregation within the walls of one of its penal institutions," giving the leaders of that Congregation authority to control the

spiritual, emotional and physical lives of participating inmates. In this situation, "there are no adequate safeguards present, nor could there be, to insure that state funds are not being directly spent to indoctrinate." The inability to separate any secular component of such a prison program further undermines any claims to Constitutionality:

> What separates this case [Americans United] from cases like Bowen and Roemer, is that the transformational model employed by InnerChange forecloses any possibility that secular and sectarian aspects of the program may be separated. The State, through its direct funding of InnerChange, hopes to cure recidivism through State-sponsored prayer and devotion. While such spiritual and emotional "rewiring" may be possible in the life of an individual, and lower the risk of committing other crimes, it cannot be permissible to force taxpayers to fund such an enterprise under the Establishment Clause. As the Supreme Court has repeatedly held, one of the few absolutes in Establishment Clause jurisprudence is the prohibition against government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith. Id. at 933.

Compelled taxpayer support of religious indoctrination, moreover, cannot be justified on the basis that participants are not coerced. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by programs which establish an official religion, whether those programs operate directly to coerce non-observing individuals or not. Engel v. Vitale, 370 U.S. 421, 430 (1962); Holloman, 370 F.3d at 1286; Newdow v. U.S. Congress, 292 F.3d 597, 607, n. 5 (9th Cir. 2002).

The constitutionality of the Life Principles/Crossings Program also cannot be justified on the basis of its alleged utility. A decision about whether the Establishment Clause is violated cannot entail a decision about the ultimate usefulness of religion; the sole question must be whether State aid can be squared with the dictates of the Constitution. Americans United, 432 F. Supp. 2d at 866. The court, in fact, can have no interest in engaging in comparative theology "in order to find an acceptable version of 'values-based' programming 'ecumenical enough to pass Establishment Clause

muster.'" Id. at 873. One can hardly "imagine a subject less amenable to the competence of the federal judiciary." Id., quoting Lee v. Weisman, 505 U.S. 577, 616 (1972) (Souter, J., concurring). Doctrinal entanglement involves government in religion's very spirit, in its core decisions on matters of belief. Duffy v. State Personnel Board, 232 Cal. App. 3d 1, 17 (Cal. App. 1991).

By all measures, public funding of the Life Principles/Crossings Program constitutes an impermissible direct support or establishment of religion. Whether participation is coerced, the program is clearly intended to and does promote an explicitly Christian religious philosophy, which taxpayers may not be compelled to support. The Program, moreover, cannot be saved by also offering woodworking or carpentry. The Program also cannot be saved by describing it as "non-denominational," because the State is undisputedly lending its imprimatur to a specific religious program, in contrast to any other religious program. Public funding cannot be used to support religion in general, nor can it be used to support a particular religious view. In short, the Life Principles/Crossings Program violates the Establishment Clause every which way one looks.

V. THE ESTABLISHMENT CLAUSE DOES NOT EXCEPT STATE-SPONSORED RELIGIOUS INDOCTRINATION IN PRISONS.

CCA argues that prison officials, at least, should be permitted to support religious indoctrination. CCA contends that religion promotes rehabilitation, and therefore, prison officials should be allowed to sponsor religious indoctrination.

CCA's "just us" argument is not supported by Turner v. Safley, 42 U.S. 78 (1987). CCA incorrectly relies on the premise that religious indoctrination is a legitimate penological objective. It is not. As the Court recognized in Owens v. Kelley, 681 F.2d 1362, 1365-66 (11th Cir. 1982), "there is a fine line between rehabilitation efforts which encourage lawful conduct by an appeal to morality and the benefits of moral conduct to the life of the probationer, and efforts which encourage lawfulness through adherence to religious belief. This is the line that must not be overstepped."

Courts consistently recognize a distinction between the accommodation of inmate free exercise rights and State-sponsored religious indoctrination. In Charles v. Verhagen, 348 F.3d 601, 611 (7th Cir. 2003), in considering whether the Religious Land Use and Institutionalized Persons Act ("RLUIPA") constituted an impermissible establishment of religion, the Court emphasized that "the statute does not promote religious indoctrination, nor does it guaranty prisoners unfettered religious rights." The Court also recognized that the enactment of RLUIPA does not "exalt belief over nonbelief." Id. See also Kaufman v. McCaughtry, 2004 U.S. Dist. LEXIS 1904, at 17 (W.D. Wis. 2004) (RLUIPA does not advance religion because the statute does not promote religious indoctrination); Madison v. Riter, 355 F.3d 310, 318 (4th Cir. 2003) (evidence of impermissible government advancement of religion includes sponsorship, financial support, and active involvement in religious activity; with respect to the RLUIPA, Congress did not sponsor religion or become involved in religious activity, and RLUIPA does not attempt to "indoctrinate prisoners in any particular believe or to advance religion in general in the prisons"). In Ramirez v. Pugh, 379 F.3d 122, 128-29 (3d Cir. 2004), the Court recognized that rehabilitation legitimately may include the promotion of "values," but rejected a broad definition of rehabilitation that would allow viewpoint discrimination in defining the texts used or prohibited.

Teaching moral values, and creating a comprehensive rehabilitation program focused on moral values and character development, does not require indoctrination into religious faith; moral education can be taught in government sponsored programs from a non-religious standpoint. See Americans United, 432 F. Supp. at 875. In the present case, however, CCA has implemented and operates a program of religious indoctrination, which the Establishment Clause prohibits. The prohibition against creating religious establishments has been interpreted by the Supreme Court "to

encompass any direct support by the government of religious activities." Laskowski v. Cook, 443 F.3d 930, 931 (7th Cir. 2006).

The Life Principles/Crossings Program cannot be justified as an accommodation of inmate free exercise rights. In the first place, CCA admits the program was not designed and implemented as an accommodation of free exercise rights. The program has been authorized, designed, implemented and operated for the alleged "penological objective" of modifying prisoner behavior through the inculcation of religion. Second, an appropriate accommodation eliminates burdens imposed on free exercise rights, rather than justifying public sponsorship and endorsement of particular religious programs.

A program has the forbidden effect of advancing religion if it is fair to say that the government itself has advanced religion through its own activities and influence. See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987). Under this test, "there is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 705 (1994). Recognizing the distinction between accommodation and active sponsorship, the Charles Court upheld the RLUIPA precisely because it "does not promote religious indoctrination." 348 F.3d at 610. By contrast, in the present case, the Life Principles/Crossings Program does not constitute a benign accommodation; the program is designed and operated by CCA for the purpose of modifying behavior through religious indoctrination. CCA's active sponsorship and operation of the Life Principles/Crossings Program cannot be defended under the Establishment Clause, therefore, as a mere accommodation of free exercise rights.

Finally, CCA has not justified its direct sponsorship of religious indoctrination even on the basis of alleged needs of prison administration. CCA's own experts deny that empirical studies substantiate the effectiveness of faith-based prison programs in comparison to secular programs. (See Plaintiffs' Statement of Facts, Number 111.) CCA's experts also are unwilling to conclude that the Life Principles/Crossings Program at the NMWCF is effective -- or more effective than other programming. (See Plaintiffs' Statement of Facts, Number 112.) Even prison officials at NMWCF identify the structured format of the program, rather than its substantive religious content, as the most attractive feature to participants. (See Plaintiffs' Statement of Facts, Number 113.)

The Establishment Clause, in short, does not recognize the presumptuous right of prison officials to sponsor religious indoctrination. Behavior modification through religious indoctrination is not a legitimate penological objective. Prisons are not missionary fields excepted from the ambit of the Establishment Clause's prohibition against taxpayer support of religious indoctrination.

VI. THE NEW MEXICO CORRECTIONS DEPARTMENT IS CONSTITUTIONALLY REQUIRED TO PROVIDE SAFEGUARDS TO PREVENT THE USE OF APPROPRIATIONS BY CCA FOR RELIGIOUS ACTIVITIES.

The New Mexico Corrections Department is required by the Establishment Clause to provide adequate safeguards to prevent CCA from using State appropriations for improper religious activities. See Laskowski v. Spellings, 443 F.3d 930, 937 (7th Cir. 2006); Bowen, 487 U.S. at 614-15; Freedom From Religion Foundation, Inc. v. Bugher, 249 F.3d 606, 612-13 (7th Cir. 2001); American Jewish Congress v. Corporation for National and Community Service, 399 F.3d 351, 358 (D.C. Cir. 2005); Columbia Union College v. Oliver, 354 F.3d 496, 506 (4th Cir. 2001); ACLU v. Foster, 2002 U.S. Dist. LEXIS, 13778 at 49 (E.D. La. 2002). The requirement of safeguards does not presume misuse by grantees, but the State cannot ignore the practical need for State institutional control.

The Supreme Court's decision in Agostini did not abolish the requirement for safeguards to prevent the diversion of public money from secular to sectarian activities. In that case, a federal program paid for public school teachers to be sent into parochial schools, as well as other private schools, to teach special education classes. The teachers were not chosen for this study on the basis of their religious beliefs or affiliations, and the Supreme Court thought that the risk they would smuggle religious instruction into their classes, merely because of the parochial-school setting, was remote. The Court refused to "presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees." 521 U.S. at 234.

Even where money is being given for a purpose with a secular component, "it is important that there be some mechanism for limiting the use of the money to the secular component." Laskowski, 443 F.3d at 938. Safeguards are required because "religion is an example of an activity that a grant of federal moneys may not be used to support." Id. The requirement of institutional control recognizes that the government cannot turn a blind eye on the uses made of public appropriations by grantees, such as CCA.

In the present case, the New Mexico Corrections Department undisputedly has no institutional controls to prevent CCA from using public money for religious indoctrination. On the contrary, New Mexico's contract with CCA makes religious programming a required item within CCA's scope of work. The State also has administratively authorized the use of public money for

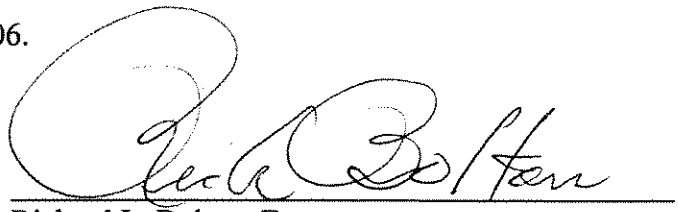
residential faith-based programming. New Mexico is aware of and supports CCA's use of State funding for the purpose of conducting the Life Principles/Crossings Program.

The New Mexico Corrections Department is violating the Establishment Clause by not providing institutional controls to prevent CCA's use of State money for inculcating religion. The State cannot make direct payments of money to CCA to operate the NMWCF without safeguards to prevent precisely the use to which the State proceeds are being put.

CONCLUSION

CCA's use of public funds to support the Life Principles/Crossings Program violates the Establishment Clause. The use of public funds to support religious indoctrination is the most basic principle of Establishment Clause jurisprudence. The Establishment Clause, moreover, prohibits the support of religious indoctrination in all respects; State-sponsored religious indoctrination is not permitted just because reading, writing, and arithmetic may also be provided. The prohibitions of the Establishment Clause, moreover, do not recognize religious indoctrination as a legitimate penological objective. CCA's arguments to the contrary are unprecedented. CCA is using public money for that which the Establishment Clause prohibits.

Dated this 6th day of November, 2006.



Attorney Adam S. Baker
Maestas & Baker
6138 NDCBU
Taos, NM 87571
Telephone: (505) 737-0509
Facsimile: (505) 737-0510

Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
P. O. Box 927
Madison, WI 53701-0927
Telephone: (608) 257-9521
Facsimile: (608) 283-1709
Attorneys for Plaintiffs

@PFDesktop\::ODMA/WORLDOX/F:/DOCS/wd/26318/6/A0497975.WPD