IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FREEDOM FROM RELIGION FOUNDATION, INC., PAUL WEINBAUM, MARTIN J. BOYD, M.D. AND JESSE V.CHAVEZ,

Plaintiffs,

vs. **Civil No. CIV-05-1168 RLP/KBM**

SECRETARY JOE R. WILLIAMS, HOMER GONZALES, BILL SNODGRASS, in their official capacities, and CORRECTIONS CORPORATION OF AMERICA, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT FOR LACK OF STANDING

THIS MATTER comes before the court on Defendants' Motions for Summary Judgment for lack of standing. [Doc. Nos. 57, 59]. Also pending are cross motions for Summary Judgment on the merits of Plaintiffs' Claims that Defendants have Violated the Establishment Clause of the First Amendment. [Doc. Nos. 55, 57, 59, 63]. This court has jurisdiction under 28 U.S.C. §1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.).

I. Undisputed Facts

The following facts are not disputed:

The individual plaintiffs are taxpayers of the State of New Mexico and members of the organizational Plaintiff, Freedom From Religion Foundation, Inc. [FFR herein]. Plaintiffs are opposed to the use of state taxpayer appropriations to advance, endorse and/or promote religion, and on this

basis seek to have a residential faith-based program offered at the New Mexico Women 's Correctional Facility [NMWCF herein] declared in violation of the First Amendment to the United States Constitution and 42 U.S.C. §1983. Plaintiffs seek to enjoin defendants from promoting, operating, managing, funding and directing any faith based programs within the correctional system. The sole basis for federal jurisdiction is the status of the individual plaintiffs as state taxpayers.

Defendants are officials of the New Mexico Department of Corrections [Williams and Gonzales], the former warden of the NMWCF [Snodgrass] and Corrections Corporation of America, ["CCA" herein] a corporation which owns the NMWCF, and operates it under a contract with the State of New Mexico.

The NMWCF houses between 595-600 female inmates. The facility is owned by CCA which has contracted with the State of New Mexico to feed, house and provide educational and vocational programming for the inmates. CCA receives a flat *per diem* payment for each inmate housed at NMWCF. Inmate participation in any program, or lack thereof, does not affect the *per diem* payment. No other payments are received by CCA from the State of New Mexico or its Department of Corrections.

The NMWCF offers numerous programs to inmates[1], but only two "residential" programs.

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[1] Non-residential programs include:

--Educational programs (GED, Adult Basic Education Programs through a two-year associates degree and additional college courses taken on-line). The education department at NMWCF employs nine teachers and has approximately 329 inmate participants at a time.

-- Moral Recognition Therapy, a once weekly secular course directed to altering criminogenic thinking.

--SOAR (Success Outside After Release) which teaches post-release life skills;

--A twelve week carpentry-certification program serving approximately 12 inmates at a time offered four times per year. One instructor is employed by CCA to teach this program, and CCA purchases the tools and materials used in the program;

--Work programs in telemarketing, tourism information and document scanning;

The residential programs are

- "Therapeutic Community Unit" serving approximately 80 inmates at a time, which addresses addictions, provides counseling, parenting classes and addiction treatment including the Twelve Step programs of Alcoholics Anonymous and Narcotics Anonymous. This program employs a program coordinator, a full-time addictions treatment counselor, and a counselor-trainee, and
- "Life Principles Community/Crossings", a Bible-based program which serves approximately 38 inmates at a time.

The Life Principles Community/Crossing Program is the focus of Plaintiffs' complaint.[2]

The living unit dedicated to housing the inmates enrolled in the Life Principles Community/Crossings program is identical to all other living units of equivalent security level in terms of furnishings and amenities.

Although Plaintiffs contend that this unit differs from others by providing a protective, insular and secure environment distinct from the general prison living units,[3] no evidence has been presented that this "environment" comes at any additional cost to the taxpayer.

The Life Principles Community/Crossing Program is overseen by the NMWCF Chaplain, who

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--Mental Health services provided by a third-party provider offering classes in stress and mood management, anger management, medication relaxation techniques. The mental health program has eight clinicians, a mental health director and a clinical supervisor who provide therapy and counseling, clinical assessments, group treatment, individual treatment, crisis intervention and outpatient substance abuse treatment, and coordinates group addiction treatment utilizing a cognitive-based treatment approach

[2]Plaintiffs inferentially challenge the Therapeutic Community Unit to the extent it incorporates the twelve step programs of Alcoholics Anonymous and Narcotics Anonymous. The validity or invalidity of that program has not been addressed directly by the parties and is not considered in this opinion.

[3](Docket No. No. 58, ¶ 39; (Docket No. 73. p. 12).

is employed by CCA to administer to the religious and/or spiritual needs of the entire inmate population.

Program materials, purchased with funds from the prison operating budget, are provided to the participants in the Life Principles Community/Crossing Program. (See Docket No. 63, ¶109). Defendants do not dispute that some portion of the program materials are purchased from the prison operating budget[4], but object to this statement of fact only on the grounds that it is incomplete because some (program) materials can be purchased by inmates on their own." (Docket No. 69, p. 9, ¶109; Docket No. 70, p. 19, ¶ 109).

II. Requirements for Taxpayer Standing.

Standing is "the threshold question in every federal case." Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Defendants contend that Plaintiffs do not have standing as taxpayers to bring this action, because they have not and can not demonstrate that a measurable state expenditure has been disbursed to fund the faith-based living unit at NMWCF, apart from other, non-challenged expenditures. Plaintiffs contend that all funds used by CCA to run the NMWCF can be traced to funds received from the state and therefore they have standing.

The Supreme Court's decision in Doremus v. Board of Education, 342 U.S. 429, 72 S.Ct.

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[4]Exhibit 1 to the Bolson Affidavit (Docket No. 65) is the *CCA Life Principles Community Manual*. On page 47, it gives the address from which to order the faith-based program curriculum and describes other supplies that are necessary. Regarding supplies, it states "Funds for these supplies are normally provided by the correctional institution. However, there may be churches near the correctional facility that would be willing to contribute to the chaplaincy fund in order to provide these program supplies." The supplies listed include a Bible for each participant, composition notebooks for a specific program course, pencils, a dictionary, a Concordance, and a thesaurus. In addition, the unit must have a television and VCR or video projector, a TV cart with power strip, a videocassette recorder, a compact disc player, chairs, tables a teaching podium, a writing board, a pencil sharpener and extension cord. *Id.* at 47-48. The exhibit states the costs of the program : $250/inmate for training seminars; $35/inmate for ongoing curriculum; $295/facility for Resource Library. *Id.* at 49.

394, 96 L.Ed. 475 (1952) controls the issue of standing presented here. Doremus requires that a state taxpayer bringing an Establishment Clause challenge must allege a"good-faith pocketbook" injury, i.e., that there was a "financial interest that is, or is threatened to be, injured by the unconstitutional conduct." Id. at 433-35, 72 S.Ct. 394. Therefore, the question now before this Court is whether Plaintiffs have presented evidence of the requisite financial interest.

III. Analysis.

In running the NMWCF, CCA is providing a function traditionally and exclusively reserved to the state. As such, it is a state actor. West v. Atkins, 487 U.S. 42, 54-55 (1988).

> [T]he government function doctrine applies in New Mexico when the state delegates the running of a prison to a private contractor. If a state government must satisfy certain constitutional obligations when carrying out its functions, it cannot avoid those obligations and deprive individuals of their constitutionally protected rights by delegating governmental functions to the private sector. *See Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). The delegation of the function must carry with it a delegation of constitutional responsibilities.

Giron v. Corrections Corporation of America, 14 F. Supp. 2d 1245, 1250 (D.N.M. 1998). Accordingly, CCA must use the *per diem* payments received from the state/Department of Corrections in a manner which does not offend the Constitution. Defendants' contention that the money expended is not state money must be rejected.

In *Doremus*, New Jersey taxpayers challenged a state law authorizing the reading of Old Testament verses at the opening of each public school day. The case came up to the Supreme Court on virtually no record. The plaintiffs' sole status was as taxpayers[5]. The Supreme Court noted that there was

[5]One plaintiff had a daughter in the schools who had graduated, thus mooting non-taxpayer standing. The sole basis for standing of the other plaintiff was as a taxpayer.

> "no allegation that [Bible reading was] supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the costs of conducting the school.. . . there is no averment that the Bible reading increases any tax [plaintiffs] do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it."

Doremus, 342 U.S. at 433.

Citing to and distinguishing Everson v. Board of Education, 330 U.S. 1 (1947)[6], the Supreme Court indicated that standing would be found if there was "a measurable appropriation or disbursement of [funds] occasioned solely by the activities complained of." Id. 434. The Court termed this a "good-faith pocketbook action." Id. at 434-435.

The parties in the instant case spend the bulk of their efforts arguing the relevance of the separate living unit utilized by inmates enrolled in the Life Principles Community/Crossing Program, and the role of the Prison Chaplain in administering that program. All inmates at NMWCF must be housed, and no evidence has been presented that housing provided in the separate living unit results in the appropriation or disbursement of any funds solely because the participants are enrolled in the activity to which Plaintiffs object, the Life Principles Community/Crossing Program. See Altman v. Bedford Central School Dist., 245 F.3d 49, 73 (2nd Cir. 2001), cert. denied 534 U.S. 827 (2001) (Parent-taxpayers seeking to enjoin certain activities at elementary and middle schools, which were allegedly inimical to their religious beliefs, could not establish standing because they could not demonstrate that school supplies used in connection with challenged activities were purchased solely for use in those activities). Likewise, no evidence has been presented that any additional taxpayer

[6]In Everson, the Court permitted a district taxpayer to challenge, on Establishment grounds, a state statute which authorized district boards of education to reimburse parents for fares paid to transport their children to both public and Catholic schools. The Court ultimately held that no Establishment Clause violation was involved.

dollars are spent by virtue of the fact that the Prison Chaplain oversees the Life Principles Community/Crossing Program in addition to her other duties and responsibilities.

Undisputed evidence has been presented, however, that discrete and measurable taxpayer funds are spent to pay for religious program materials (see n. 4, supra), which would not be spent but for that program. Minnesota Fed'n of Teachers v. Randall, 891 F.2d 1354, 1356-1357 (8th Cir. 1989); Doe v. Madison School Dist. No. 321, 177 F.3d 789, 793-796 (9th Cir. 1999) (en banc). Use of taxpayer funds to purchase these materials is a concrete, imminent and particularized injury that can be redressed through court-ordered remedies. Accordingly, Plaintiffs have taxpayer standing to challenge the Faith-based residential program offered at NMWCF.

IV. Conclusion

It is hereby **ORDERED** that Defendants' Motions for Summary Judgment to Dismiss for Lack of Taxpayer Standing [Docket No. 59, and Standing issues contained in Docket No. 57] are **Denied.**

Richard L. Puglisi
United States Magistrate Judge
(sitting by designation)