



February 17, 2016

Senator Les Seiler
Chair, Judiciary Committee
Room 1113, State Capitol
Lincoln, NE 68509

Chairman Seiler and Members of the Judiciary Committee,

My name is Robert McEwen and I am a staff attorney in the Child Welfare Program at Nebraska Appleseed. Nebraska Appleseed is a nonprofit organization that fights for justice and opportunity for all Nebraskans.

We are testifying in opposition today to express our legal concerns about LB 975. We oppose LB 975 because it attempts to provide faith-based government contractors with protections that cannot exist under the Constitution of the United States. Specifically, we are concerned that some non-profit child welfare providers will rely on the protections contained in the bill to their legal and financial detriment. In addition, we are concerned that LB 975 will open the State of Nebraska to unnecessary liabilities and therefore costs to Nebraska's taxpayers.

We understand the goal of trying to ensure that Nebraska retains quality providers of child welfare services in our state. Many of the providers that LB 975 seeks to protect do outstanding work in our communities serving hundreds of at-risk children and families every day. In fact, as LB 975 correctly notes, the public-private partnership between the government and faith-based organizations to provide foster care services is so intrinsic to the implementation of this system, its roots can be traced to the beginning of organized child welfare services across the nation.ⁱ Nebraska, like many other states, currently contracts with a number of faith-based agencies to serve the most vulnerable children and families in our state.

The Federal government has also recognized the importance of faith-based partnerships and has provided explicit protection to faith-based providers of child welfare services.ⁱⁱ Executive Order 13279 signed by President George W. Bush in 2002 provides numerous protections for faith-based non-profits contracting with their state to provide, "protective services for children and adults," "services for children and adults in foster care," and "adoption services."ⁱⁱⁱ However, this same executive order also states that,

“(d) All organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief. Accordingly, organizations, in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities related to such services, *should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice;*^{iv}

The Nebraska Legislature likely does not have the authority to overturn President Bush’s executive order. Indeed, such an action would likely take an act of Congress or an amendment of this executive order.^v To the extent that LB 975 explicitly allows child welfare service provider to refuse to provide services or referrals to an individual that does not share their religious beliefs, LB 975 may be preempted by Executive Order 13279.^{vi}

Similarly, there are a number of federal statutes and regulations which prohibit many types of discrimination in the administration of foster care services.^{vii} In particular, under federal child welfare regulations, the Nebraska Department of Health and Human Services (DHHS), as a recipient of federal funds, is legally prohibited from, “*directly or through contractual or other arrangements, utiliz(ing) criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.*”^{viii} To the extent that LB 975 allows a contractor to refuse to serve individuals because of their race, color, or national origin, LB 975 could be found to be preempted in “as applied” legal challenges, creating potential legal liability for the state, and could also put DHHS in a position to lose significant federal funding for the administration of Nebraska’s foster care system.^{ix}

This loss of federal funding as described above is especially concerning because LB 975 gives providers an express cause of action against the State of Nebraska for attempting to comply with such laws. On one hand, the State would face legal liability from a provider, if the provider is reprimanded for actions that the provider claims are consistent with their sincerely held religious beliefs, on the other hand the State could risk the loss of federal funding if they do not take action against a provider for discriminating against certain classes of persons.^x

Furthermore, providers of child welfare services should note that while LB 975 seeks to insulate them from the adverse actions of DHHS, LB 975 does not, nor could not, insulate them from individual legal liability for the violation of an individual’s constitutional rights. Many of the providers protected by LB 975 could be considered “state actors” for purposes of 42 U.S.C. § 1983, especially agencies involved in the placement of foster children with foster families.^{xi} To state this plainly, when a contractor steps into the shoes of the government to discharge their core duties, such as the placement of children that are legally the responsibility of the state, the contractors have to play by the same constitutional rules that the government does.^{xii} While the religious freedom of private

organizations has been recognized by the U.S. Supreme Court under the Religious Freedom Restoration Act (RFRA), the calculus changes when a private organization chooses to contract with the state and accept public funding.^{xiii}

Thus, when a provider does something that the government is not permitted to do, such as violating an individual's clearly established Constitutional rights, that provider may be subject to legal liability.^{xiv} By imputing "state action" to contractors that are discharging core governmental duties, the government cannot contract around their legal obligation to not discriminate against classes of statutorily and constitutionally protected individuals or to violate or chill an individual's substantive due process rights.^{xv}

Sincerely,
NEBRASKA APPLESEED

Robert McEwen, J.D.
Staff Attorney
Child Welfare Program

ⁱ SYMPOSIUM: THE IMPLICATIONS OF WELFARE REFORM FOR CHILDREN: Welfare Reform and the Juvenile Courts: Protection, Privatization, and Profit in the Foster Care System, 60 Ohio St. L.J. 1295, 1306.

ⁱⁱ Executive Order 13279.

ⁱⁱⁱ *Id.* (specifically exempting faith-based social services contractors from compliance with certain employment decisions, prohibiting discrimination against faith-based contractors in the "administration or distribution of Federal financial assistance" and allowing the use of faith-based facilities to provide services without, "removing or altering religious art, icons, scriptures, or other symbols from the facilities.")

^{iv} *Id.*

^v See 114 H.R. 1299, The Child Welfare Provider Inclusion Act of 2015; 113 H.R. 1299, The Child Welfare Provider Inclusion Act of 2015 (both failing to move out of the House Committee of Ways and Means).

^{vi} *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 273 n.5, 94 S. Ct. 2770, 2776 (1974).

^{vii} 42 U.S.C. § 1996b; 42 U.S.C. § 2000d; Amend. XIV, U.S. Const.

^{viii} 45 C.F.R. 80.3(2).

^{ix} 45 C.F.R. 80.8(a).

^x *Id.*

^{xi} See *Donlan v. Ridge*, 58 F.Supp.2d 604, 610 (E.D. Pa. 1999); *Harris ex rel. Litz v. Lehigh County Office of Children & Youth Services*, 418 F.Supp.2d 643, 651 (E.D. Pa. 2005).

^{xii} *Id.*

^{xiii} *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

^{xiv} *Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972, 975-76 (8th Cir. 1993) (stating that a corporation acting under color of state law will only be held liable under § 1983 for its own unconstitutional policies.)

^{xv} Amend. XIV, U.S. Const.