



Senate Fiscal Agency
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BILL ANALYSIS



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House Bill 4188 (Substitute H-2 as reported without amendment)
House Bills 4189 and 4190 (as reported without amendment)
Sponsor: Representative Andrea LaFontaine (H.B. 4188)
Representative Harvey Santana (H.B. 4189)
Representative Eric Leutheuser (H.B. 4190)
House Committee: Families, Children, and Seniors
Senate Committee: Families, Seniors and Human Services

Date Completed: 5-12-15

RATIONALE

In Michigan, both the Department of Health and Human Services (which contains the former Department of Human Services) and State-licensed private agencies place children in foster care or adoptive homes. The Department enters into contracts with these child placing agencies, which include agencies that have a religious affiliation. In addition, through its Faith-Based Initiative, the Department collaborates with religious communities, which recruit foster and adoptive parents and provide support services. Although the collaboration between the State and the private agencies is long-standing, concerns have been raised about the ability of faith-based agencies to decline to provide services that would conflict with their beliefs. According to the Michigan Catholic Conference and other sources, agencies in several other jurisdictions have had to choose between complying with governmental regulations and adhering to their belief systems, and have chosen to discontinue providing child placement services. To prevent this from occurring in Michigan, it has been suggested that the law should allow child placing agencies to decline to provide services that would conflict with their religious beliefs.

CONTENT

House Bill 4188 (H-2) would add Sections 14e and 14f to Public Act 116 of 1973, which provides for the licensure of child care facilities, to do the following:

- Specify that a child placing agency would not be required to provide any services that would conflict with, or provide any services under circumstances that would conflict with, the agency's sincerely held religious beliefs.
- Allow a child placing agency to decline a referral for foster care case management or adoption services if the services would conflict with the agency's sincerely held religious beliefs.
- Prohibit the State or a local unit of government from taking an adverse action against a child placing agency that declined to provide services or accept a referral under those provisions.
- Require a child placing agency to take certain actions if it declined to provide services.
- Allow a child placing agency to assert a defense in an administrative or judicial proceeding based on proposed Section 14e or 14f.
- State legislative findings and declarations.

House Bill 4189 would amend the Michigan Adoption Code to provide that a child placing agency could not be required to provide adoption services that would conflict with, or to provide adoption services under circumstances that would conflict with, its sincerely held religious beliefs; and prohibit the State or a local unit from taking an adverse action against the child placing agency.

House Bill 4190 would amend the Social Welfare Act to prohibit the Department of Health and Human Services (DHHS) from taking an adverse action against a child placing agency that declined to provide services that would conflict with, or to provide services under circumstances that would conflict with, its sincerely held religious beliefs.

All of the bills would refer to an agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the agency.

House Bills 4188 (H-2) and 4190 state the following: "It is the intent of the legislature to protect child placing agencies' free exercise of religion protected by the United States constitution and the state constitution of 1963. This amendatory act is not intended to limit or deny any person's right to adopt a child or participate in foster care." House Bill 4189 contains the same statement, without the reference to foster care.

All of the bills are tie-barred and each would take effect 90 days after the date it was enacted.

House Bill 4188 (H-2)

Proposed Section 14e: Declining to Provide Services

To the fullest extent permitted by State and Federal law, a child placing agency could not be required to provide any services if those services conflicted with, or provide any services under circumstances that conflicted with, the agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the agency.

To the fullest extent permitted by State and Federal law, the State or a local unit of government would be prohibited from taking an adverse action against a child placing agency on the basis that it had declined or would decline to provide any services that conflicted with, or provide any services under circumstances that conflicted with, the agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the agency.

If a child placing agency declined to provide any services under these provisions, it would have to do one of the following:

- Promptly refer the applicant to another child placing agency that was willing and able to provide the declined services.
- Promptly refer the applicant to the webpage on the DHHS's website that identified other licensed child placing agencies.

If a child placing agency declined to provide services, that decision would not limit the ability of another child placing agency to provide those services.

"Services" would include any service that a child placing agency provides, except foster care case management and adoption services provided under a contract with the Department.

(Public Act 116 defines "child placing agency" as a governmental organization or an agency organized under the Nonprofit Corporation Act for the purpose of receiving children for placement in private family homes for foster care or adoption. The function of a child placing agency may include investigating and certifying foster family homes and foster family group homes as provided in the Act. The function of an agency also may include supervising children who are at least 16 but less than 21 years old and who are living in unlicensed residences.)

Proposed Section 14f: Declining Referral

If the DHHS made a referral to a child placing agency for foster care case management or adoption services under a contract with the agency, the agency could decide not to accept the referral if the services would conflict with the agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the agency. Before accepting a referral

for services under a contract with the Department, the agency would have the sole discretion to decide whether to engage in activities and perform services related to that referral. The DHHS could not control the agency's decision.

For this purpose, a child placing agency would accept a referral by doing either of the following:

- Submitting to the DHHS a written agreement to perform the services related to the particular child or particular individuals whom the Department referred to the agency.
- Engaging in any other activity that resulted in the Department's being obligated to pay the agency for services related to the particular child or particular individuals whom the DHHS referred to the agency.

The State or a local unit of government could not take an adverse action against a child placing agency on the basis that it had decided to accept or not accept a referral.

A child placing agency's decision not to accept a referral could not be a factor in determining whether a placement in connection with the referral was in the best interest of the child.

Adverse Action

For purposes of Sections 14e and 14f, "adverse action" would include, but not be limited to, denying a child placing agency's application for funding, refusing to renew the agency's funding, canceling the agency's funding, declining to enter into a contract with the agency, refusing to renew a contract with the agency, canceling a contract with the agency, declining to issue a license to the agency, refusing to renew the agency's license, canceling the agency's license, taking an enforcement action against the agency, discriminating against the agency in regard to participation in a government program, and taking any action that materially altered the terms and conditions of the agency's funding, contract, or license.

House Bill 4189

The bill would add Section 23g to the Michigan Adoption Code to provide that, in accordance with Sections 14e and 14f of Public Act 116 of 1973, a child placing agency could not be required to provide adoption services if those services conflicted with, or provide adoption services under circumstances that conflicted with, the agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the agency.

Also, in accordance with Sections 14e and 14f of Public Act 116, the State or a local unit of government would be prohibited from taking an adverse action against a child placing agency on the basis that it had declined or would decline to provide adoption services that conflicted with, or provide adoption services under circumstances that conflicted with, the agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the agency.

(The Adoption Code defines "child placing agency" as a private organization licensed under Public Act 116 of 1973 to place children for adoption.)

House Bill 4190

The bill would amend the Social Welfare Act to prohibit the Department of Health and Human Services, in accordance with Section 23g of the Michigan Adoption Code and Sections 14e and 14f of Public Act 116 of 1973, from taking an adverse action against a child placing agency on the basis that it had declined or would decline to provide services that conflicted with, or provide services under circumstances that conflicted with, the agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the agency.

Proposed MCL 722.124e & 722.124f (H.B. 4188)

Proposed MCL 710.23g (H.B. 4189)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

In recent years, legislative action and judicial rulings in other jurisdictions have sought to prevent faith-based child placement agencies from operating according to their religious tradition. Sexual orientation laws, along with the redefinition of marriage or the recognition of same-sex civil unions, are undermining the freedom of private foster care and adoption providers to place children only in homes that they consider suitable. An agency's religious beliefs, for example, might allow placements only with heterosexual married couples. Evidently, agencies in Illinois, Massachusetts, Washington, D.C., and San Francisco have been forced to end their foster care and adoption programs, or discontinue collaborating with the state or local government, rather than comply with governmental dictates that violate their beliefs. This outcome harms the children and families who otherwise would be served by these agencies.

The bills would prevent the same thing from happening in Michigan, by giving child placing agencies statutory authority to decline to provide services that would conflict with their sincerely held religious beliefs, and providing them with a defense in an administrative or judicial proceeding. By enabling faith-based agencies to continue to partner with the DHHS, the bills would promote diversity among child placing agencies. Reportedly, at any given time in this State, approximately 13,000 children are in foster care. At present, almost 2,200 of them are available for adoption; of those children, approximately 280 are listed with the Michigan Adoption Resource Exchange, which means that no likely or potential home (such as permanent placement with a relative) has been identified for them. None of these children can afford to lose any agencies that can place them in a stable, safe, and nurturing home--or a "forever home" in the case of adoption. Prospective foster and adoptive parents also cannot afford to lose the assistance of agencies that not only will help them find a child but also provide an array of support services before and after placement.

Rather than making a dramatic change in the law, the legislation essentially would codify existing practice, according to the bills' supporters. At the same time, the bills would give the agencies a legal defense and prohibit State and local government from taking action against an agency that exercised its rights under the bills. An agency could not simply refuse to provide services, however, but would be required to refer an applicant to another agency that would meet his or her needs, or direct the applicant to the DHHS website that identifies other licensed agencies. The applicant at least would know that the agency was recusing itself, and would have the opportunity to explore other foster care or adoption agencies. One agency's decision not to provide services would not prevent another agency from doing so.

Response: Requiring agencies *not* to discriminate may actually increase children's opportunities to be placed in foster care or adopted. Reportedly, a 2006 Maryland study found that adoption rates in "gay friendly" states tend to be higher than in "anti-gay" or "neutral" states.¹ While this study focused on sexual identity, it stands to reason that placements will be increased if the pool of prospective parents is as large and diverse as possible.

Opposing Argument

The bills seek to legalize discrimination based on private agencies' religious beliefs, putting the interests of the agencies above the welfare of children in need of homes. Under Michigan law, the placement of a child must be based on his or her best interests. The bills would conflict with that policy, however, by allowing an agency to reject a prospective foster or adoptive home, even if the placement would be in a child's best interests. Rather than promoting diversity, the bills would narrow the pool of qualified, available applicants who wish to take in a homeless child. Children in need of a home have been either rejected by their biological parents or removed from an unsafe environment, or both. Many have physical or mental disabilities, emotional impairments, or

¹ Oosting, Jonathan, "What's best for kids? Michigan adoption bills would protect faith-based adoptions, limit LGBT options", MLive, 3-17-15.

behavioral issues, or a combination of these characteristics, and may be difficult to place. If there is any qualified applicant willing to take in such a child--regardless of the applicant's marital status or sexual orientation--the child should not be deprived of a safe home and loving parent because the placement would offend the agency's religious beliefs.

While the bills' supporters claim that the legislation simply would give agencies a choice to "recuse and refer", the children who would be affected have no choice; they cannot choose the agency that supervises their placement, and they did not choose to be in foster care.

Opposing Argument

The bills would violate the Equal Protection Clause of the 14th Amendment to the United States Constitution, as well as Article I, Section 2 of the State Constitution, which also guarantees equal protection and prohibits discrimination on the basis of religion, race, color, or national origin. Offering adoption and foster care services to the public is a secular function, not a religious act. Agencies that provide child placement services must be licensed by the State, children in the foster care system are the responsibility of the State, and no adoption can be finalized without the approval of the State and a court order. When agencies are licensed to place children in foster care and facilitate adoptions, and are under contract with the State, the agencies are acting as agents of the State. Just as the State cannot deny any citizen the equal protection of the laws, neither can its agents.

In addition, the bills would violate the First Amendment to the U.S. Constitution, which prohibits government from establishing religion, as well as Article I, Section 4 of the State Constitution, which prohibits any person from being compelled to contribute to the support of any place of religious worship and states, "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society...". Section 4 also states, "The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief." These provisions not only guarantee the free exercise of religion but also prohibit the government from using public funds to support religion.

It would be unconstitutional for the State to use taxpayer dollars to contract with faith-based agencies that discriminated on the basis of religious beliefs. If faith-based agencies wish to discriminate, they should not accept money from the State. If the government wishes to contract with faith-based agencies, it should ensure that they treat all members of society equally, regardless of whether doing so conflicts with the agencies' religious beliefs. The bills would do just the opposite, however, by prohibiting the State or a local unit from taking any action that would adversely affect the funding or contract of an agency that refused to provide services based on its religious beliefs. Not only would the government be prohibited from refusing to enter into a contract with such an agency, it also would be prevented from canceling a contract with an agency that failed to carry out its contractual responsibilities because of a religious objection.

Furthermore, public money comes from the pockets of all taxpayers, regardless of their marital status, religion, or sexual orientation. Money taken from members of the public in the form of taxes should not be used to discriminate against them. According to DHHS figures, child placing agencies receive roughly \$20.0 million in State and Federal funds each year. Although the Department does not identify which agencies are faith-based, more than half of this funding goes to agencies whose name reflects a religious affiliation.

The bills also would conflict with the State's Civil Rights Act, which prohibits the denial of public services based on religion, race, color, national origin, age, sex, or marital status.

If the legislation actually would codify current practices, as the supporters have said, those practices should be changed, rather than legitimized. No State funding should go to an agency that discriminates on the basis of religion, race, ethnicity, gender, marital status, contraceptive practices, sexual orientation, or gender identity, nor should such an agency receive preferred tax status.

Response: It is not clear whether the DHHS would be prevented from canceling a contract with an agency that failed to carry out its contractual responsibilities because of a

religious conflict. Although the proposed definition of "adverse action" includes canceling a contract, the proposed definition of "services" excludes foster care case management and adoption services provided under a contract with the Department.

Opposing Argument

The bills would erect barriers to placement not only for children but also for the individuals who might give them a home. These prospective parents already encounter many difficulties when trying to navigate a system that can be complex and challenging; legalized discrimination should not be another obstacle. While not all faith-based agencies would discriminate, the potential is significant, considering the proportion of child placing agencies that are religiously affiliated. As of February 25, 2015, 106 private agencies were under contract with the DHHS to provide foster care or adoption placement, or both; while the Department does not identify faith-based agencies, the names of 43 agencies on that list indicate a religious affiliation. In addition, of the 2,361 adoptions finalized in fiscal year 2012-13, 1,084 were handled by agencies that had a clear religious identity.

Opposing Argument

The bills would threaten the religious freedom of the general public by allowing people of one religious view to impose their beliefs on others, through the denial of publicly funded services, and would do so in the name of protecting the religious freedom of faith-based child placing agencies. Religious adherents already are free to practice their beliefs in their personal lives and houses of worship. No law is needed to protect internal religious liberty of this kind. The bills, however, would protect the external practices of religiously affiliated agencies in the delivery of services to the general public.

Although much of the discussion has focused on potential discrimination against gays and transgender individuals, the bills would allow an agency to refuse services to virtually anyone who does not conform to its religious view, including nonreligious people, religious people who practice a different faith, parents who have been divorced, single individuals, and unmarried heterosexual couples. Rather than protecting the religious freedom of private agencies, this would violate citizens' fundamental right to be free *from* State-sanctioned religion.

Opposing Argument

The bills would present practical concerns for Michigan's probate courts, which seek to ensure that children who enter the foster care system find permanency as expediently as possible, whether through reunification with their parents, placement with relatives, or adoption. The probate courts rely on foster care and adoption agencies to find safe and loving homes for children in foster care, and depend on these agencies to provide the most thorough assessments possible in exploring all potential placements for a child, without reservation. In some parts of the State, faith-based organizations are the only nearby agencies available to the courts. If such an agency declined a referral due to its religious beliefs, a court might have a difficult time locating a non-faith-based organization, and the case would be unnecessarily prolonged. Also, not knowing what an agency's "sincerely held religious beliefs" might be is of some concern.

Opposing Argument

The definition of "services" in House Bill 4188 (H-2) might appear to prevent discrimination in the placement of children referred to an agency, because the proposed definition makes an exception for "foster care case management and adoption provided under a contract with the department". At best, this provision is ambiguous. According to the DHHS, it has a "master" contract with each agency for adoption or foster care management services, and executes an individual contract for each referral of services for a child. The breadth of the term "services", or of the exception, could depend on which contract was in question. At any rate, however, the discrimination occurs not when these services are provided, but when an agency decides that a prospective parent is unfit according to the agency's religious beliefs.

Although an applicant is free to sign up with an agency of his or her choice, someone might be on an agency's waiting list for years, not knowing its policies and unaware that the agency will never place a child with him or her. Not all faith-based agencies discriminate, so an applicant will not be

on notice of an agency's policies simply because the name of the agency indicates a religious affiliation.

Opposing Argument

The bills would conflict with the professional responsibilities of social workers employed by faith-based child placing agencies, if those agencies chose not to provide services based on religious views. These professionals would be forced to violate their ethical standards, and risk losing their licensure, or to find work elsewhere. This could harm the children who rely on the services of unbiased social workers. If social workers refused to work at faith-based agencies that discriminated, the quality of care available to children in foster care could be compromised, or there simply would not be enough workers available.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The Department does not anticipate any fiscal impact on State or local government.

Fiscal Analyst: Frances Carley

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.