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STATE OF NEBRASKA
OFFICIAL
MAR 28 1990
DEPT. OF JUSTICE

DATE: March 28, 1990

SUBJECT: The Constitutionality of Amendement 2294 to Legislative Bill 662: Restraint on Protected Speech in Violation of Nebraska Constitution, Art. 1, Section 5.

REQUESTED BY: Senator Arlene Nelson
District #35

WRITTEN BY: Robert M. Spire, Attorney General
Royce N. Harper, Senior Assistant Attorney General

SUMMARY OF ANSWERS TO QUESTIONS ASKED BY SENATOR NELSON

The legal questions here relate to AM 2294 of LB 662 which was adopted March 1, 1990. LB 662 to be known as the Family Services Incentive Act for Communities, provides for the creation of an incentive grant program to encourage and assist communities in the development and implementation of family-centered, community based services for children and families. Eligible applicants shall include school, committees, school districts, political subdivisions, public or private nonprofit agencies, or federally recognized or state-recognized Indian tribes. The Director of Social Services, upon the recommendation of the Commission and the Commissioner of Education, the Director of Health and the Director of Public Institutions shall award start-up grants to eligible applicants. The Act provides for an array of family oriented services.

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In your letter, you expressed concern about the constitutionality of AM 2294 which states that services eligible for funding shall not include performance of or counseling or referral for abortion or distribution of or counseling or referral for contraceptives. You asked whether or not that provisions violates Section 5 of Art. I, of the Nebraska Constitution which states that, "Every person may freely speak, write and publish on all subjects. . . "

The effect of AM 2294 is to deny state start-up funding for abortion and contraceptive counseling and referral, and for the performance of abortion and the distribution of contraceptives. Abortion and contraceptive counseling and referral are constitutionally protected speech. Clearly, the United States Constitution and the Nebraska Constitution prohibit unreasonable interference with the right of potential grantees under LB 662 to engage in these protected speech activities. The State may not penalize persons for exercising their constitutional right to free speech, nor may it deny a benefit to a person on a basis that infringes on constitutionally protected speech.

However, the United States Supreme Court has unequivocally affirmed that a State has no constitutional obligation to fund or promote abortion or contraception and can establish a policy in favor of normal childbirth.

Whether AM 2294 could be determined to be unconstitutional depends upon whether it is construed as an impermissible interference in a constitutionally protected speech activity, or whether it is state activity to control the use of its funds, and to encourage natural birth control and normal childbirth as consonant with legislative policy.

It is our opinion that AM 2294 is constitutionally suspect due to its overbreadth and vagueness, and arguably, impermissible interference in constitutionally protected speech activities.

Detailed Analysis and Response to Questions Asked By Senator Nelson

QUESTION 1: Is the section in LB 662 constitutionally suspect which provides that funding of public entities and private non-profit agencies for family

services shall not include performance of or counseling or referral for abortion or distribution of or counseling or referral for contraceptives.

CONCLUSION: Yes. The prohibition on "counseling or referral" would make the bill constitutionally suspect."

We are aware of no Nebraska Case addressing the issue of whether abortion and contraceptive counseling and referral services are constitutionally protected speech under Act. I, Section 5 of the Nebraska Constitution. Nor are we aware of any Nebraska case addressing the issue of whether the State's denial of funding to abortion and contraceptive counseling and referral services would violate Act. I, Section 5.

Absent Nebraska case law, we turn to the United States Supreme Court and other federal courts that have addressed this question under the First Amendment of the United States Constitution, which prohibits infringement of free speech, and is made applicable to the States through the Fourteenth Amendment. These cases direct our answers, since the constitutional guarantees of freedom of speech are the same under both the Nebraska and United States Constitution. State v. Simants, 194 Neb. 783, 236 N.W.2d 794, 799 (1975).

The question asked requires analysis of two lines of cases: 1) those cases protecting abortion and contraceptive counseling and referral as free speech, Bigelow v. Virginia, 421 U.S. 809 (1975); and 2) those cases upholding a State's prerogative to adopt a policy favoring normal child birth to abortion and contraception, with no constitutional obligation to fund or promote abortion or contraceptive. Harris v. McRae, 448 U.S. 297 (1980); Maker v. Roe, 432 U.S. 464 (1977).

AM 2294 to LB 662 implicates both constitutionally protected speech rights, and the rights of a State to adopt a policy favoring normal childbirth. Determination of AM 2294's constitutionality revolves on whether it is construed as an impermissible interference with constitutionally protected speech activity, or whether it is State encouragement of

activity consonant with State legislative policy favoring normal childbirth and natural family planning. See Makee at 475.

The Ninth Circuit in Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983), appeal after remand, 789 F.2d 1348 (1986), affirmed, sub nom. Babbitt v. Planned Parenthood, 479 U.S. 925 (1986), considered the footnote to an Arizona appropriation bill that forbade expenditure of State social services funds to non-governmental organization that perform abortions and engage in abortion-related activities. As to the first paragraph of the Arizona statute prohibiting State funds for abortion-related services, the court concluded that "Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities, but the State needs not support, monetarily or otherwise, those activities." Id. at 944. However, on appeal after remand, the court found that the second paragraph of the statute prohibiting use of State funds by organization that offer abortion-related services, even if State funds are not used for abortion-related services, to be unconstitutional. 789 F.2d at 1351.

The court stated that the "State's constitutional purpose of promoting childbirth over abortion 'may not be achieved by means which are unnecessarily broad and thereby invade the area of protected freedom.'" 718 F.2d at 944. (citations omitted). The court found the second paragraph to be unconstitutional because the statute was not drawn "as narrowly as possible to permit the State to control use of its funds while infringing minimally on exercise of constitutional rights." Id. at 945.

It is not clear from AM 2294 whether it would deny funding only for the excluded abortion or contraceptive services, or whether it would deny funding totally to applicants providing these services, but with other than State funds, within the prevention, early identifications and intervention services eligible for funding. If the amendment would require the State to deny funding to an applicant whose prevention, early identification, and intervention services include abortion or contraceptive services, even though the

applicant is not requesting funding for the abortion and contraceptive services, the statute most likely would be found to be unconstitutionally overbroad as was the Arizona statutes.

In Webster v. Reproductive Health Servs., 109 S.Ct. 3040 (1989), rev'g, 851 F.2d 1071 (8th Cir. 1988), the Eighth Circuit at the appellate level held the Missouri statute prohibiting "encouraging or counseling for an abortion" was unconstitutionally vague. 851 F.2d at 1079. The court said the word "counsel" was "fraught with ambiguity; its range . . . [is] incapable of objective measurement. In such circumstance, the threat to the exercise of constitutionally protected rights to tangible, possible targets of the statute are chilled into avoiding even speech that is normally afforded the utmost protection under the constitution." Id. at 1078.

This question was not considered by the Supreme Court in Webster because it was rendered moot by appellees withdrawal of its claim. However, the court said the "threshold question is whether this provision reaches primary conduct, or whether it is simply an instruction to the State's fiscal affairs not to allocate funds for abortion counseling. In Webster, Missouri claimed that the Statute was "'not directed at the conduct of any physician or health care providers, . . . ' but . . directed solely at those persons responsible for expending public funds."'

In a note, the court said that although the court of appeals did not address this issue, the district court found the definition of public funds "'broad enough to make encouraging or counseling' unlawful for anyone who is paid from' public funds" defined in the statute. 109 S.Ct. 3053 N. 11.

AM 2294 appears to be vulnerable to constitutional attack in several respects. It implicates both constitutionally protected speech rights and the right of a State to adopt a policy favoring normal childbirth over abortion. Because the First Amendment is involved, the statute will be subject to a strict scrutiny analysis, requiring a compelling State interest to interfere with protected speech activities. Elrod v. Burns, 427 U.S. 347, 362 (1976). Although the State is not required to show a compelling State interest for its

policy choice to favor normal childbirth, AM 2294 may be viewed as constitutionally vague and overbroad, and, therefore, be found to exert direct state interference with protected speech activity, rather than constitutionally permitted State encouragement of a procreative and childbirthing preference. Clearly, the State is permitted refusal to fund performance of abortion and distribution of contraceptives. Harris v. McRae; Maker v. Roe. The constitutionally protected speech activities of counseling and referral however, require narrow statutory construction to permit the State to control the use of its funds with minimal infringement on the exercise of constitutionally protected rights. Planned Parenthood at 945.

The Ninth Circuit in Planned Parenthood suggested that a more narrowly drawn statute would simply forbid entities receiving State funds from using those funds for abortions and the related specified activities. Id.

However, the State would be allowed to show that withdrawal of all funds would be the only way to insure that no funds were being expended for the ineligible activities. Id. at 946. More troublesome with AM 2294 however is the ambiguity of the words counseling and refusal. The statute is unclear as to what "counseling and referral for" means. Can abortion or contraceptive be mentioned at all? Can questions by a client about abortion or contraception be answered? Can no referral be made to any agency providing abortion or contraceptive counseling when the grantee program does not provide these services?

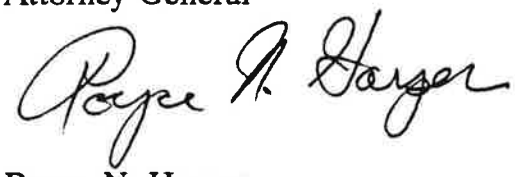
The statute's failure to make clear the answer to these questions, in our opinion, causes the statute to be unconstitutionally vague as to its meaning and applications. It

fails to give fair notice of proscribed activity and encourages arbitrary and erratic behavior on the part of those who must enforce the statute. Id. at 947 (citation omitted).

Our analysis directs us to answer that AM 2294 is constitutionally suspect.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General



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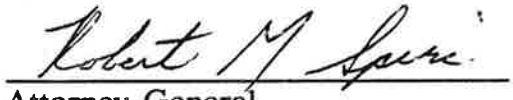

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cc: Patrick J. O'Donnell
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