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No. 21-002

SUBJECT: Whether LB 429 violates the separation of powers clause in Neb. Const. art. II, § 1, by prohibiting the Department of Health and Human Services from implementing any "substantial changes" to the facilities or programs under the jurisdiction of the Office of Juvenile Services "until the conclusion of the earliest regular session of the Legislature in which there has been a reasonable opportunity for legislative consideration of such proposed changes."

REQUESTED BY: Senator John Arch
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Leslie S. Donley, Assistant Attorney General

You have requested an opinion from this office with respect to the constitutionality of LB 429, as amended by AM103. This legislation would amend Neb. Rev. Stat. § 43-404 (Cum. Supp. 2020), to prohibit the Department of Health and Human Services ("DHHS") from implementing any "substantial changes" to the facilities or programs of the youth rehabilitation and treatment centers ("YRTCs") "until the conclusion of the earliest regular session of the Legislature in which there has been a reasonable opportunity for legislative consideration of such proposed changes." In your opinion request letter, you state that

> [t]his provision was closely modeled on existing statute, Neb. Rev. Stat. § 68-912(4), which similarly prohibits certain Medicaid rules and regulations from becoming effective until there has been opportunity for Legislative consideration. I have had discussions with the Governor's Policy Research Office regarding this

provision, and they have asked me to request your opinion on whether the Legislative consideration provision in LB 429, as amended by AM 103, violates the separation of powers clause in Article II, section 1 of the Nebraska Constitution.

You further indicate that the legislation is based on recommendations from the Youth Rehabilitation and Treatment Center Special Oversight Committee, and introduced by the Health and Human Services Committee, which hopes to prioritize LB 429 as part of a legislative package relating to YRTCs. Accordingly, you have requested our timely guidance on whether the proposed legislation violates the separation of powers clause. Our response to your opinion request is set out below.

PROPOSED LEGISLATION

As amended, LB 429 would add the following language to Neb. Rev. Stat. § 43-404 (Cum. Supp. 2020):

(2)(a) Prior to implementing any substantial changes to the facilities or programs under the jurisdiction of the Office of Juvenile Services, the Department of Health and Human Services shall notify the Legislature of such intended substantial changes. The notification shall be submitted electronically. The notification shall include a detailed summary of the proposed changes. No such substantial changes shall be implemented until the conclusion of the earliest regular session of the Legislature in which there has been a reasonable opportunity for legislative consideration of such proposed changes. Legislative consideration includes the introduction of a legislative bill, a legislative resolution, or an amendment to pending legislation relating to such facilities or programs.

(b) For purposes of this subsection, substantial changes are defined as:

(i) The establishment of a new youth rehabilitation and treatment center;

(ii) The relocation of a youth rehabilitation and treatment program to another state-operated or private facility;

(iii) The establishment of a youth rehabilitation and treatment program at another state-operated or private facility; or

(iv) The closure or termination of a youth rehabilitation and treatment center, program, or facility.

ANALYSIS

I. Separation of Powers Clause.

The Nebraska Constitution declares that

> [t]he powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution.

Neb. Const. art. II, § 1(1). "The purpose of the clause is to establish the permanent framework of our system of government and to assign to the three departments their respective powers and duties, and to establish certain fixed principles upon which our government is to be conducted." *State v. Phillips*, 246 Neb. 610, 614, 521 N.W.2d 913, 916 (1994). "The language of article II prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives." *State ex rel. Spire v. Conway*, 238 Neb. 766, 773, 472 N.W.2d 403, 408 (1991). "Our constitution, unlike the federal Constitution and those of several other states, contains an express separation of powers clause. So we have been less willing to find overlapping responsibilities among the three branches of government." *In re Nebraska Community Corr. Council*, 274 Neb. 225, 229, 738 N.W.2d 850, 854 (2007).

II. Neb. Rev. Stat. § 68-912(4) (2018).

The statutory provision used as the basis for LB 429—Neb. Rev. Stat. § 68-912(4) (2018)—is part of the Medical Assistance Act, Neb. Rev. Stat. §§ 68-901 to 68-9,100 (2018, Cum. Supp. 2020). This act "requires DHHS to 'administer the [Medicaid] program' and empowers it to 'adopt and promulgate rules and regulations.'" *J.S. v. Nebraska Dept. of Health and Human Services*, 306 Neb. 20, 28, 944 N.W.2d 266, 274 (2020).

Section 68-912(4) was enacted by the Legislature in 2006 as part of its ongoing Medicaid reform. 2006 Neb. Laws LB 1248, § 12. Specifically, subsection (4) states that

> [e]xcept as otherwise provided in this subsection, proposed rules and regulations under this section relating to the establishment of premiums, copayments, or deductibles for eligible recipients or limits on the amount, duration, or scope of covered services for eligible recipients shall not become effective until the conclusion of the earliest regular session of the Legislature in which there has been a reasonable opportunity for legislative consideration of such rules and regulations. This subsection does not apply to rules and regulations that are (a) required by federal or state law, (b) related to a waiver in which recipient participation is voluntary, or (c) proposed due to a loss of federal matching funds relating to a

> particular covered service or eligibility category. Legislative consideration includes, but is not limited to, the introduction of a legislative bill, a legislative resolution, or an amendment to pending legislation relating to such rules and regulations.

"The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment." *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 445, 771 N.W.2d 103, 118 (2009). "[T]o ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Goolsby v. Anderson*, 250 Neb. 306, 309, 549 N.W.2d 153, 156 (1996). Our review of the legislative history of LB 1248 indicated a general concern among many of the testifiers over the bill's shift in decision making from the Legislature to DHHS and the purported removal in the bill of legislative oversight and input. Senators Beutler and Chambers voiced concerns about ceding policymaking authority to the department during debate on general file. Senator Jensen, chair of the Health and Human Services Committee, subsequently offered an amendment that would become § 68-912(4). He described the amendment, in pertinent part, as follows:

> [I]t only applies to the rules and regulations related to the establishment of premiums, copays, deductibles, or limits on the amount, duration, and scope of covered services. This is really the same as current law in Section 68-1019, subsection (4) and subsection (5). Under the amendment those rules and regulations could not become effective until the conclusion of the earliest regular session of the Legislature in which there has been a reasonable opportunity for legislative consideration of those rules and regulations. Legislative consideration means introduction of a legislative bill, legislative resolution, or amendment to pending legislation. Certain rules and regulations are excluded . . . . <u>The purpose is to guarantee that the Legislature has an opportunity to respond to pending rules and regulations that may propose a public policy with which the Legislature disagrees. It preserves the Legislature's policymaking prerogative, does not violate separate of powers, because it only provides for a reasonable delay in implementation of certain rules and regulations, with reasonable expectation, and is more flexible than current law.</u>

<u>Floor Debate on LB 1248</u>, 99th Neb. Leg., 2nd Sess. 12938 (April 10, 2006) (Statement of Sen. Jensen) (emphasis added).

The obvious intent of § 68-912(4) is to impose a mandatory stay on proposed rules and regulations dealing with "premiums, copayments, or deductibles" or which seek to limit the covered services for eligible recipients. Certain exceptions enumerated in the statute apply. Under this provision, rules and regulations do not become effective until members of the Legislature have had an opportunity during the next legislative session to introduce a bill, resolution, or an amendment to pending legislation to address any purported issue. Under the plain language of the statute, the stay lasts until the end of

the legislation session regardless of whether any legislation is pursued, or any introduced legislation is enacted.

Our research has disclosed no Nebraska cases that have construed § 68-912(4), nor are there previous opinions of this office which offer any guidance in this area. However, courts in other jurisdictions have considered the constitutionality of legislative provisions which attempt to interfere with executive rules and regulations. *E.g.*, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981) (Legislative rulemaking review committee with veto power over otherwise validly promulgated rules and regulations found to violate the state's separation of powers clause.); *General Assembly of the State of New Jersey v. Byrne*, 90 N.J. 376, 378, 448 A.2d 438, 439 (1982) (Legislative veto provision violates separation of powers clause "by excessively interfering with the functions of the executive branch."); *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 687 P.2d 622 (1984) (Provisions that allow the Legislature to reject, modify or revoke administrative rules and regulations by concurrent resolution violated separation of powers principles and constitutional presentment requirement.); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980) (Provisions authorizing legislature to annul regulations by concurrent resolution violated constitutional requirements for formal legislative action.). *But see Barker*, 167 W. Va. at 175, 279 S.E.2d at 634 ("This is not to say that we believe all legislative review of rule-making to be void. Legislative rule-making review has purpose and merit and may be beneficially exercised and employed when contained within its proper and constitutional sphere.").

"A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. . . . Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution." *State ex rel. Shepherd v. Nebraska Equal Opportunity Comm.*, 251 Neb. 517, 520, 557 N.W.2d 684, 688 (1997). While we have serious concerns regarding § 68-912(4), particularly in regard to its deviation from the general rulemaking process in the Administrative Procedure Act,[1] we cannot say that it is clearly unconstitutional. Unlike the cases set out above, where courts held that vetoes of administrative rules by legislative committees or resolutions violated the separation of powers clause, the presentment clause, and constitutional requirements relating to formal legislative action, § 68-912(4) does not go that far. The provision *delays* the rulemaking process to allow members of the Legislature to enact legislation to remedy whatever policy shortcomings it has identified in the proposed rules and regulations. "[T]he Legislature exercises a power constitutionally committed to it by enacting statutes to declare what is the law and public policy." *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 598, 894 N.W.2d 788, 800 (2017). "The Legislature may enact statutes to set forth the law, and it may authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, but the limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated in the

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[1] Neb. Rev. Stat. §§ 84-901 to 84-920 (2014, Cum. Supp. 2020).

authorizing act. Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available." *Davio v. Dept. of Health and Human Services*, 280 Neb. 263, 274, 786 N.W.2d 655, 665 (2010). It appears to us that so long as the Legislature passes a *bill* in accordance with constitutional requirements, any potential constitutional infirmities relating to § 68-912(4) are likely averted.

III. Constitutionality of § 68-912(4) Language in LB 429.

We will now address your specific question as to whether the proposal violates the separation of powers clause in art II, § 1. The proposal requires a mandatory stay whenever DHHS seeks to make "substantial changes" with respect to YRTCs, including establishing a new YRTC, establishing or relocating a YRTC program to another state-operated or private facility, or closing or terminating a YRTC, program or facility. The stay would give members of the Legislature an opportunity during the next legislative session to introduce a bill, resolution, or an amendment to pending legislation relating to the proposed changes.[2] As in § 68-912(4), the stay would last until the end of the session.

"The legislative authority of the state shall be vested in a Legislature consisting of one chamber." Neb. Const. art. III, § 1. "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered." Neb. Const. art. IV, § 6. "Thus, the core power of the legislative branch is to declare policy through enacting legislation, and the core power of the executive branch is to carry out those legislative policies with a certain degree of executive discretion." *Opinion of the Justices*, 892 So. 2d 332, 335 (Ala. 2004).

We have found no Nebraska case or cases in other jurisdictions that serve as precedent for the situation raised in your request. However, in *State ex rel. Shepherd v. Nebraska Equal Opportunity Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997), the Nebraska Supreme Court considered whether provisions in the Whistleblower Act violated art. II, § 1, by encroaching on the executive branch's duty to remove its employees. The court held that the act's requirement to follow the findings of the

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[2] By way of background, this office recently issued Op. Att'y Gen. No. 20-010 (September 18, 2020), in which we addressed several questions posed by Senator Howard and others relating to the extent of DHHS's control over facilities and programs under the jurisdiction of OJS, including the YRTCs. We concluded, among other things, that no legislative amendments to Neb. Rev. Stat. § 83-305 (2014) were necessary in order for DHHS to implement its "YRTC & Youth Facilities Initial Transition Plan"; and that the proposed transfer of the Juvenile Chemical Drug Program ("JCDP") to Whitehall could proceed as scheduled, but that DHHS was prohibited from establishing a new YRTC or establishing or moving a YRTC to a new or existing state or private facility until March 30, 2021, following the completion of the planning requirements in Neb. Rev. Stat. § 43-427 (Cum. Supp. 2020).

Ombudsman, a legislative employee, impermissibly encroached on the executive branch's duties and prerogatives. "In short, § 81-2707(1) places the legislative branch in a position to dictate to the executive branch how the latter will treat certain executive branch employees until an evidentiary hearing is held. Thus, the Legislature not only is empowered to declare what the law is, but, through § 81-2707(1), attempts to reserve to itself the power and authority to administer and enforce the law as well. This we determine is impermissible under the Nebraska Constitution." *Id.* at 532-533, 557 N.W.2d at 695.

Courts in other jurisdictions have addressed challenges where legislative action purports to encroach on the duties and prerogatives of the executive department. *E.g.*, *Opinion of the Justices*, 162 N.H. 160, 168, 27 A.3d 859, 867 (2011) ("The grant of power in Part II, Article 41, making the Governor the 'supreme executive magistrate,' is 'something more than a verbal adornment of the office.' . . . It 'implies such power as will secure an efficient execution of the laws.'"); *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 233 (1997) ("The legislature 'may . . . attempt to control the executive branch by passing amendatory or supplemental legislation and presenting such legislation to the governor for signature or veto, or, by the power of appropriation.' But under our constitution, the legislature may not control, supervise or manage the execution of a law except by the language contained in the law itself."); *Colorado General Assembly v. Owens*, 136 P.3d 262, 270 (Colo. 2006) ("While the legislature certainly maintains the power to appropriate and attach various purposes and conditions to an appropriation, it cannot interfere with the administration of the funds either explicitly or implicitly by using creative language and mechanisms in the long bill that would thwart the exercise of legitimate executive authority."); *In re Opinion of the Justices to the Governor*, 369 Mass. 990, 994, 341 N.E.2d 254, 257 (1976) ("Thus to entrust the executive power of expenditure to legislative officers is to violate [the separation of powers clause] by authorizing the legislative department to exercise executive powers."); *Chaffin v. Arkansas Game and Fish Comm.*, 296 Ark. 431, 444, 757 S.W.2d 950, 957 (1988) ("An unconstitutional encroachment may not always take the form of outright invasion. A subtle coercion exercised by a powerful branch of government can effectively tie the hands of a coordinate branch. The executive authority should be free, not only from blatant usurpation of its powers, but from paralyzing interference as well. The legislature cannot hold the executive branch hostage to its will. While it can and should hold hearings and investigate at length the performance of state agencies, it cannot intrude on the prerogatives of the executive branch of government."); *Fent v. Contingency Review Board*, 163 P.3d 512, 522 (Okla. 2007) ("The power over a bill, once enacted, stands transferred by operation of law to the executive branch for spending the funds in accordance with the legislative direction. The Legislature can exercise no supervision, either **directly or indirectly**, over the manner in which appropriated funds are to be used. . . . Any extra-constitutional method by which the Legislature extends its tentacles of control over an appropriation measure beyond the time when the measure stands transformed into enacted law offends the constitutional concept of separated powers and becomes a usurpation of power." (Emphasis in original.)).

This office has previously considered the propriety of legislation that purports to interfere with or exercise power properly belonging to the executive branch. In Opinion No. 22 (February 26, 1963) (1963-64 Rep. Att'y Gen. No. 22 at 37), we considered the constitutionality of legislation that would require state agencies to obtain legislative approval and authorization prior to any construction, building and land purchases or expenditures from the State Institutional and Military Department Building Fund, and obtain legislative consent for the acquisition of real property by the Game, Forestation and Parks Commission. Here, we stated that

> [w]hile the Legislature has the power and authority to decide all of these matters **before** making any appropriation, or **before** granting any authority, yet if it seeks to retain control by inserting in its laws and bills the requirement that no action be taken or money spent until subsequent approval of the Legislature be granted, then it is in effect, both making the law and administering it, appropriating the money and spending it, and the constitutional system of separation of powers would be destroyed.

Id. at 38 (emphasis in original).

In Op. Att'y Gen. No. 53 (March 24, 1977) (1977-78 Rep. Att'y Gen. No. 53 at 77), we concluded that legislation that would require the Game and Parks Commission to obtain the approval of the Appropriations Committee for any planned expenditures from the Nebraska Outdoor Recreation Development Cash Fund was constitutionally suspect to the extent it gave the committee veto power over executive decisions. "If the construction suggested above were adopted, it would be an attempt to administer an executive function by a committee of the Legislature. . . . While the Legislature is fully authorized to limit executive choices by appropriate restrictions through enactment of statutes, once a statute is enacted or an appropriation made the Legislature has no further authority." *Id.* at 77.

In Op. Att'y Gen. No. 87114 (December 9, 1987), the Attorney General considered the propriety of a proposed plan for the disbursement of money from the Nebraska Energy Settlement Fund. The legislation required the governor to develop a plan in accordance with the court order awarding the funds, applicable federal guidelines, and legislative guidelines contained in the bill, and submit the plan to the Legislature. The Appropriations Committee was then required to hold a public hearing and consider appropriations based on the plan. No money could be disbursed or expended from the fund without a legislative appropriation and only when in compliance with the legislative guidelines.

We concluded that the proposed disbursement procedure violated art. II, § 1. "The Legislature is, in essence, requiring legislative approval before expenditure of the funds. The fact that the bill is written in terms of legislative approval for the appropriation does not alter the clear intent of the act requiring legislative approval for the expenditure. The Legislature is in effect attempting to both make the law and administer it; appropriate money, and spend it." *Id.* at 3.

In Op. Att'y Gen. No. 92054 (April 1, 1992), we considered proposed legislation that would require the state building administrator to submit a detailed report to the Executive Board analyzing the estimated costs to renovate an office building at the Norfolk Regional Center. The language required the Executive Board to determine whether the project should be completed in the event the estimated costs exceeded the appropriation provided in the bill. Relying on previous opinions of this office, we concluded that the proposed amendment was constitutionally suspect: "[The amendment] would appropriate money for renovation of the . . . [b]uilding. However, after the appropriation, the Executive Board . . . would still retain some control over completion of the project. In our view, this continued control impermissibly involves the Legislature in functions of the Executive branch of government. Any decision as to whether the renovation project should be completed if its costs overrun the appropriation should be left to the executive agency involved, since the determination if other funds are available or if there are other means to complete the project is really an executive function." *Id.* at 3.

Finally, in Op. Att'y Gen. No. 20-004 (February 26, 2020), we considered proposed legislation that would require the Department of Economic Development director to obtain approval of the Executive Board to increase the base authority necessary to administer certain provisions of the ImagiNE Nebraska Act. We concluded there that "the continued presence and control of the Legislature in the administration of the Act constitutes an impermissible encroachment into executive power" in violation of art. II, § 1. *Id.* at 7.

The statute at issue in LB 429, Neb. Rev. Stat. § 43-404, currently provides, in pertinent part, that "[t]here is created within the Department of Health and Human Services the Office of Juvenile Services. The office shall have oversight and control of the youth rehabilitation and treatment centers. The Administrator of the Office of Juvenile Services . . . shall be responsible for the administration of the facilities and programs of the office." (Emphasis added.) We have carefully considered whether the language in your proposal, which imposes a mandatory stay on any "substantial changes" to be made to the YRTCs, programs or facilities through the conclusion of the earliest legislative session, constitutes a violation of the separation of powers clause. In light of the authorities cited above, we believe the proposal presents a serious question as to its constitutionality. If it is the Legislature's intent to set a comprehensive public policy for the YRTCs, it must do so in substantive law, and not create a scenario where the agency is prohibited from taking any significant action with respect to these facilities and programs, presumably even in emergency situations.

CONCLUSION

Based on the foregoing, we conclude a serious question exists as to whether LB 429, as amended, violates the separation of powers clause in Neb. Const. art. II, § 1.

Sincerely,

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Approved by:

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