

# House Bill 3859

## Testimony to the House Committee on State Affairs

Several bills have been filed this session that are intended to protect the conscience rights of child welfare service providers who have deeply held religious beliefs. Of those bills, HB 3859 has the most protections in place to assure children's rights will not be harmed in protecting providers. However, there are still a number of concerns that should be addressed in considering how this bill could be applied that could affect the rights or wellbeing of children in foster care. We recommend some changes to the sections regarding definitions and the effect on rights/construction of law to further protect children if the concerns raised about this bill arise in its implementation. Following the federal lawsuit, which held that many children in Texas' custody face an unreasonable risk of harm, the Legislature must ensure that it does not pass a bill that would impugn children's rights or allow children to be placed in harm's way.

### HB 3859 has 3 provisions aimed at ensuring children's rights are protected

#### **Sec. 45.005. Secondary Service Providers.**

This Section of HB 3859 provides a very important protection lacking in other similar bills filed this session. This section guarantees that the state or a state actor will ensure that a provider exists in their catchment area that will provide any services to children that another child welfare service provider may not be willing to provide and that the state will help coordinate those services.

#### **Sec. 45.007. Remedies.**

This Section of HB 3859 limits the remedies available to child welfare service providers under the new cause of action created by this bill. Other bills that have been filed to protect conscience rights allow for monetary damages. This bill only allows for declaratory or injunctive relief. This ensures that providers will not misuse the protection provided under this bill by pursuing frivolous claims to get a payout.

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Texans Care for Children is a statewide, non-profit, non-partisan, multi-issue children's policy organization. We drive policy change to improve the lives of Texas children today for a stronger Texas tomorrow. We envision a Texas in which all children grow up to be healthy, safe, successful, and on a path to fulfill their promise.

**Sec. 45.009 (g). Effect on Rights; Construction of law. "This chapter may not be construed to allow a child welfare services provider to deprive a minor of rights . . ."**

This Section is designed to assure that children's rights are protected as courts apply the protection of conscience rights. Essentially this protection is in place to ensure that the best interest of a child remains paramount. Here is how this should work: if a provider sues the state for violating its conscience rights and a court determines that the state made the decision to protect the child's rights, the provider should lose the lawsuit.

**However, we are concerned that HB 3859 could be interpreted to limit children's rights or hurt a child's wellbeing based on a provider's religious beliefs**

**Children rejected for religious reasons**

"No eject/no reject" is arguably the most important feature of Foster Care Redesign, which is now being called "community-based foster care." The no eject/no reject approach means that a contractor must take care of every single child assigned to them. The contractor cannot kick the child out of their care and make that child someone else's responsibility. Community-based foster care is the model Texas is moving toward when it comes to foster care. Under this model, non-profits with a mission focused on child welfare will contract with the state to manage a network of providers in a region. These contractors are called single source continuum contractors or "SSCCs". This means SSCCs will provide foster care and adoptive services to all families in their area of the state, and if the major child welfare bills pass this session, they will also eventually provide case management for children and families in their respective regions.

The no eject/no reject approach forces the contractors to build capacity to ensure quality placements for all foster children in need. More importantly, it forces them to build the right kind of capacity. For example in the current Redesign region (3b), the contractor noticed capacity gaps in the following areas: its most rural county, therapeutic treatment options; families willing to take sibling groups; families comfortable taking children with serious but manageable medical needs such as diabetes; families who can provide a supportive environment for gay, lesbian, bisexual, and transgender (LGBT) children; families prepared for a pregnant youth or teen mother; and families willing to engage in a co-parenting approach with biological families. As a result, they targeted their recruitment efforts to fill these gaps.

Unfortunately, courts could construe the protection of religious liberty included in HB 3859 in a way that would negate the whole idea of no eject/no reject in community-based foster care.

HB 3859 excludes "governmental entities" from being able to claim conscience rights protection, but oddly includes SSCCs under in the definition of a "governmental entity." Although SSCCs have contracts with the

state, they remain private organizations. Including SSCCs under the definition of governmental entity does not necessarily exclude them from being able to claim conscience rights protection under this bill. If you read the definition of “child welfare services,” SSCCs provide most of the delineated services. This is particularly true for prospective SSCCs that are not selected based on their deeply held religious beliefs. Although the author intended to exclude SSCCs from the definition of a “child welfare service provider” by including SSCCs in the definition of “governmental entities,” SSCCs, in fact, remain private providers and otherwise fit very well within the definition of a child welfare service provider under the bill. Under the current language, it is unclear whether SSCCs will be able to claim this conscience right protection. Under community-based foster care, eventually the state will no longer be providing child welfare services. The state will oversee SSCCs who manage all the casework for each individual child. If an SSCC refused to provide services to a particular group of children based on a deeply held religious belief and was protected by this bill, there would be no other entity in place to take care of those children. Because SSCCs will have the primary responsibility for coordinating care, treatment, and services for the foster children who are assigned to them, it is imperative that SSCCs do not receive the conscience rights protection laid out in this bill.

This clarification is particularly important because the bill directs courts to liberally construe the statute under Section 45.010. “Liberal construction” means a judge may consider many factors when deciding how to interpret statute, so when a judge makes a decision in a case and the statutory language is ambiguous, the direction to liberally construe the statute is intended to give the statute the broadest effect possible. Here are two hypothetical cases:

- An SSCC sues the state for violating its conscience rights by terminating its contract because the SSCC had a deeply held religious belief that prevented it from serving LGBT youth. Because the SSCC is a private provider that has lost a contract because of its belief system, the judge decides there has been a conscience rights violation and requires the state to renew its contract with the SSCC.
- A child welfare service provider who will only serves Muslim children bids on a Request for Proposal to become an SSCC. The state rejects the bid because the provider only serves a small number of children in the region. The provider could sue the state for violating its conscience rights by declining to enter into a contract with this provider because of its religious beliefs and win.

Both of the outcomes in these hypotheticals would allow SSCCs to reject children based on the SSCC’s religion, which is unacceptable.

### **LGBT youth**

It is not acceptable that LGBT youth could face discrimination or harassment based on their gender identity or sexual orientation based on a child welfare service provider’s deeply held religious beliefs.

### **Children’s and/or biological families’ religious beliefs**

It is not acceptable that children could be forced to practice a religion other than their own or forced not to practice their religion by a foster parent or other provider.

### **Harm to children based on a deeply held religious belief**

It is not acceptable that deeply held religious beliefs could be used to justify corporeal punishment, the application of Sharia Law, faith healing, or other practices that may cause harm to children who have a right to be free from a substantial risk of bodily harm while in state conservatorship.

## **We recommend 2 changes to ensure HB 3859 will not allow providers to discriminate against children for religious reasons**

We appreciate that Representative Frank is trying to help Texas develop a diverse provider base and has included a number of protections for children in HB 3859. However, the following changes would further assure that the rights and wellbeing of children in the Texas child welfare system are protected.

### **Ensure conscience protection does not apply to SSCCs and that courts can protect the rights of children by removing courts from the definition of a governmental entity, defining a single source continuum contractor in the bill, and specifically excluding single source continuum contractors and prospective single source continuum contractors from the definition of a child welfare service provider in Sec. 45.002.**

(3) "Child welfare services provider" means a person, other than a governmental entity, a single source continuum contractor, or a prospective single source continuum contractor that provides, seeks to provide, or applies for or receives a contract, subcontract, grant, subgrant, or cooperative agreement to provide child welfare services. The person is not required to be engaged exclusively in child welfare services to be a child welfare services provider.

(4) "Governmental entity" means:

(A) this state or a municipality or other political subdivision of this state; or

(B) any agency of this state or of a municipality or other political subdivision of this state, including a department, bureau, board, commission, office, agency, council, ~~court~~, and public institution of higher education, ~~or~~

~~(C) a single source continuum contractor in this state.~~

(5) "Single source continuum contractor" means a child welfare services provider who has contracted with the state to manage a catchment area under the community-based foster care system as described in Chapter 264 of the Family Code

(6) "Prospective single source continuum contractor" means a child welfare services provider who is bidding to become a single source continuum contractor who would otherwise have a cause of action under

this bill if the state did not select them as a single source continuum contractor based on their deeply held religious beliefs.

**Specifically include children’s right to receive appropriate care, to be free from discrimination, to practice the religion of their choosing, and to be reasonably safe from harm in Sec. 45.009, which establishes the effect on rights and construction of law for the bill.**

(g) This chapter may not be construed to allow a child welfare services provider to deprive a minor of rights, including:

(1) the right to receive the most appropriate care, treatment, and services;

(2) the right to be free from discrimination and harassment based on gender, gender identity, race, ethnicity, religion, national origin, disability, medical problems, or sexual orientation;

(3) the right to practice the religion of the child’s choice, including the choice not to practice a religion;

(4) the right to be reasonably safe from harm while in government custody; and

(5) All other rights provided by Chapters 32, 263, and 266, Family Code.