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OFFICE OF THE ATTORNEY GENERAL
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2772

April 12, 2002

OPINION COMMITTEE

The Honorable John Cornyn
Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-42567-D2

I.D. # 42567

Re: The Requirements of the FY2001 Interagency Council on Early Childhood Intervention Contract.

Dear General Cornyn:

I am requesting an Attorney General's opinion concerning both the basis for and the parameters of the authority of the Interagency Council on Early Childhood Intervention ("ICECI"), a Texas state agency, to demand through contractual provisions that third party independent contractors provide personally identifiable information about clients, family members of clients, and staff of the third parties, to the ICECI to maintain in a database. Without any intention to limit the analysis, the primary issues appear to include the ICECI's legal authority to demand such information be provided, and the federal and state laws providing rights of the affected clients and individuals and entities to object to such information being disclosed. Since the ICECI has declined at least one party's request that the agency obtain an Attorney General's opinion, I am making this formal request for an opinion.

Since state agencies may only exercise such powers as those expressly delegated by the Legislature, what is the express legal authority that permits the ICECI to request the provision of such customer specific and individually specific and identifiable data in the manner and forms requested by virtue of the contract, such information being requested from clients, their parties, and the individuals on the staff of the third parties providing the services? What is the Texas statutory authority for the ICECI to demand that third party private entities collect and provide such information to the state agency for the state agency to maintain in a database, when the affected individuals would apparently have

no guarantee of privacy/confidentiality and also no remedy against the state agency for any harm caused by either inadvertent or intentional improper disclosures of such information?

The legal classification, as health, medical, and/or educational, of the nature of the services that third parties provide to children pursuant to the contract appears relevant to determining the applicable federal and state laws. Although ICECI may be exempt from certain federal laws and regulations regarding the ability to require certain information be provided, the third party entities are not. Even if federal regulations such as those under the Health Insurance Portability Act of 1996 ["HIPAA"] do not apply directly to ICECI, HIPAA does impose restrictions on what data third parties may disclose, absent voluntary and informed consent by a patient and its employees.

What steps and practices has ICECI put in place to safeguard the confidentiality and dissemination of any such data if and when provided? What, if any, are the potential ramifications to the ICECI or its staff if any of the data is inadvertently or intentionally disclosed or used in any inappropriate manner? Will ICECI have any liability for any harm caused in any such instance?

Since these contract provisions are already applied or will be applied to various third parties, the appropriateness of these requirements and their implementation impact the ICECI, the third party providers, the employees and volunteers who work with the providers, and, most importantly, the individual clients and their families. All such interested parties would benefit from a well-reasoned legal opinion with proper references to the statutory and regulatory provisions that provide the authority for such requirements, as well as an explanation addressing the implications and potential conflicts with other constitutional, statutory, and regulatory provisions that protect, limit, or control the disclosure and/or reporting of any such information.

Reasonable alternatives exist and are currently used regarding disclosure of client specific, individually identifiable, or confidential proprietary information. These alternatives include disclosure of such information in an aggregate format and/or some manner that is not capable of identification of specific individuals or entities. The more specific records remain subject to inspection and auditing for basic compliance matters, as legally required and within the applicable laws, but in such manners that the specific information and records would be maintained in the most secure and confidential manner.

The above issues may be summarized as follows (the need to address each subsequent issue is mostly contingent upon the analysis of the preceding issue) :

1. What legal authority allows the ICECI agency to contractually demand that third parties collect and disclose such individually identifiable information to the agency?
2. If ICECI does have legal authority to demand such disclosure, do any federal or state constitutional provisions or laws prohibit or limit the scope of such demands?
3. To the extent, if at all, such demands are permissible, what substantive form of consent must be obtained from which affected individuals, and how often must the consent be obtained?
4. To the extent any such confidential and private information is collected and maintained by the ICECI, what legal and procedural safeguards must the agency follow to reduce the likelihood of any improper disclosure of the information?
5. What remedies, if any, would any of the affected individuals have against the state agency or the state for any improper disclosures by the agency, whether inadvertent or intentional, and what remedy would be available for any resulting harm?
6. What remedies, including the ability to seek indemnification from the ICECI, would any of the third party providers have against the state agency or the state for any improper disclosures, whether inadvertent or intentional, and what remedy would be available for any resulting harm?
7. What liabilities would the third party providers have to the affected individuals for any improper disclosures of such information by the agency, whether inadvertent or intentional?

Thank you in advance for your time and attention to this matter.

Very truly yours,



Senator Jane Nelson