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OPINION COMMITTEE

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

ALBERT HAWKINS  
EXECUTIVE COMMISSIONER

September 7, 2005

FILE # ML-44389-05  
I.D. # 44389

The Honorable Greg Abbott  
Attorney General of Texas  
209 W. 14<sup>th</sup> Street  
Austin, Texas 78701

RQ-D392-GA

Attention: Opinion Committee

Re: Applicability of Section 533.035(e) Through (g) of the Texas Health and Safety Code  
to the Provision of Mental Health Services

Dear General Abbott:

The Health and Human Services Commission (HHSC) requests your opinion concerning the effect of subsections (e) through (g) of section 533.035 of the Health and Safety Code, as amended by the 78<sup>th</sup> Texas Legislature, on the delivery of mental health services by a local mental health and mental retardation authority ("a local authority"). *See* Acts 2003, ch. 198, § 2.74, at 676 (H.B. 2292). Specifically, we request your opinion whether a local authority is required under subsection (e) of the statute to serve as the provider of last resort for both mental health services and mental retardation services, or whether subsection (e) is limited to the services affected by subsection (g).

State law generally recognizes the delivery of health care services to persons with mental illness or mental retardation at two levels—(1) the statewide level, through state agencies delegated specific authority, and (2) the local level, through legislatively recognized regional authorities that receive delegated authority from the state agencies:

It is the policy of this state that the board<sup>1</sup> serves as the state's mental health and mental retardation authority and is responsible for the planning, policy development, and resource development and allocation for and oversight of mental health and mental retardation services in this state. It is the policy of this state that,

<sup>1</sup> The term "board" refers to the former Board of Mental Health and Mental Retardation, the governing body of the former Texas Department of Mental Health and Mental Retardation (TDMHMR). TDMHMR was abolished by House Bill 2292 of the 78<sup>th</sup> Regular Legislative Session. *See* Acts 2003, ch. 198, §1.26, at 641.

when appropriate and feasible, the board may delegate the board's authority to a single entity in each region of the state that may function as the local mental health or mental retardation authority for one or more service areas in the region.

Health and Safety Code §533.001(h).

Health and Safety Code section 533.035 authorizes "the commissioner"<sup>2</sup> to designate a local mental health and mental retardation authority to provide "for and [conduct] oversight of mental health and mental retardation services in the most appropriate and available setting to meet individual needs in that service area." The local authority may receive state and federal funds from the department to spend in the local service area for "community mental health and mental retardation services" and "chemical dependency services for persons who are dually diagnosed as having both chemical dependency and mental illness or mental retardation." *Id.* §533.035(b)(1) and (2).

A local authority must use funds it receives from the department to—

[E]nsure mental health, mental retardation, and chemical dependency services are provided in the local service area. The local authority shall consider public input, ultimate cost-benefit, and client care issues to ensure consumer choice and the best use of public money in:

- (1) assembling a network of service providers; and
- (2) making recommendations relating to the most appropriate and available treatment alternatives for individuals in need of mental health or mental retardation services.

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<sup>2</sup> The term "commissioner" in section 533.035 originally referred to the commissioner of TDMHMR. The functions of the TDMHMR were reassigned to the newly-created Department of State Health Services (DSHS) and Department of Aging and Disability Services (DADS), and the Health and Human Services Commission (HHSC). The mental health functions described in section 533.035 were assumed by DSHS. The mental retardation duties and functions of TDMHMR were assumed by DADS. Accordingly, the reference to "commissioner" in section 533.035 refers to both the commissioner of DSHS and DADS with regard to mental health services and mental retardation services, respectively.

*Id.* §533.035(c).

Before 2003, a local authority was authorized to both arrange for the delivery of and to directly provide mental health and mental retardation services to persons within a local service area. H.B. 2292, however, altered this authority.

- (e) In assembling a network of service providers, *a local mental health and mental retardation authority may serve as a provider of services only as a provider of last resort* and only if the authority demonstrates to the department that:
  - (1) the authority has made every reasonable attempt to solicit the development of an available and appropriate provider base that is sufficient to meet the needs of consumers in its service area; and
  - (2) there is not a willing provider of the relevant services in the authority's service area or in the county where the provision of the services is needed.

*Id.* §533.035(e) (emphasis added).

Subsection (e) regulates a local authority's development of a network of providers. The provision requires the local authority to "serve as the provider of services only as a provider of last resort" and only if the two conditions expressed in the subsection are satisfied. Health and Safety Code §533.035(e)(1) and (2). The statute does not, however, define the scope of the term "services" in this subsection.

In addition, H.B. 2292 directed the department to develop and implement a plan to privatize certain services provided by a local authority:

The department, together with local mental health and mental retardation authorities and other interested persons, shall develop and implement a plan to privatize *all services by intermediate facilities for persons with mental retardation and all related waiver services programs operated by an authority. . . .*

*Id.* §533.035(g) (emphasis added).<sup>3</sup> An intermediate care facility for persons with mental retardation provides, pursuant to department rules, “mental retardation services” to eligible persons.<sup>4</sup>

An intermediate care facility for persons with mental retardation (“ICF/MR”) is a health care facility licensed pursuant to chapter 247, Health and Safety Code, and under applicable administrative rules—

[P]rovides food, shelter, and treatment or services to four or more persons who are unrelated to the owner; is primarily for the diagnosis, treatment, or rehabilitation of persons with mental retardation or related conditions; and provides in a protected setting continuous evaluation, planning, 24-hour supervision, coordination and integration of health or rehabilitative services to help each resident function at the resident’s greatest ability.

40 T.A.C. §90.2(b). An ICF/MR may be operated by a private or public entity, including a local authority.

A “person with mental retardation” is—

a person, other than a person with a mental disorder, whose mental deficit requires the person to have special training, education, supervision, treatment, care, or control in the person’s home or community or in a state school.

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<sup>3</sup> Subsection (g) additionally provides that—

The transfer of services to private providers may not occur on or before August 31, 2006. The plan must provide criteria that:

- (1) promote the transition of services to private providers in a manner that causes the least disruption practicable to the consumers of those services;
- (2) ensure the continuation of services at the same level of service provided before the transfer;
- (3) provide for consumer choice as appropriate and as required by rule; and
- (4) require local mental health and mental retardation authorities to implement the privatization of services in a fiscally responsible manner.

<sup>4</sup> ‘Mental retardation services’ includes all services concerned with research, prevention, and detection of mental retardation, and all services related to the education, training, habilitation, care, treatment, supervision, and control of persons with mental retardation, but does not include the education of school-age persons that the public educational system is authorized to provide. [Health and Safety Code §531.002(13)]

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Health and Safety Code §531.002(14). A person who receives treatment at an ICF/MR must have a primary diagnosis of mental retardation or a "related condition," which includes a severe and chronic disability that satisfies certain requirements specified by agency rule. 40 T.A.C. §90.2(b)(1) and (2).

The phrase "related waiver services" in the statute is not defined; however, it would appear to refer to programs or demonstrations conducted in accordance with federal law as part of the state Medicaid program, and which are related to the ICF/MR program. See, e.g., Gov't Code §531.060 (supplying a definition of "waiver services" for purposes of establishment of a family-based alternatives program for children). Such waivers are granted pursuant to various provisions of the federal Social Security Act, most notably section 1915c of the Act (42 U.S.C. §1396n(c)). Several Medicaid waiver services for persons with mental retardation and related conditions are provided by local authorities and other providers. See, e.g., 40 T.A.C. ch. 9, subchs. D and N (Home and Community-Based Waiver program and Texas Home Living Program, respectively).

As noted above, subsection (e) of section 533.035 does not define the scope of the phrase "provider of services as a provider of last resort." The simultaneous enactment of subsection (g), which relates to the privatization of ICF/MR and related services, has resulted in some disagreement regarding the scope of subsection (e). We request your assistance in arriving at the appropriate interpretation of subsection (e) of the statute.

Please let me know if you have any questions or need additional information. Steve Aragón, Chief Counsel, is serving as the lead staff on this matter and can be reached at (512) 424-6578 or by e-mail at

Sincerely,

A handwritten signature in black ink, appearing to read "Albert Hawkins", with a long horizontal flourish extending to the right.

Albert Hawkins