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OPINION COMMITTEE

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I.D. # 44740

The Honorable Gregg Abbott
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

Certified Mail Return-Receipt Requested

Attention: Opinion Committee

Re: 1) Whether under sections 264.106 and 264.1063 of the Texas Family Code and Chapter 45 of the Texas Human Resources Code, the Texas Department of Family and Protective Services ("TDFPS") can contract with a governmental entity to provide substitute care and case management services; 2) whether an independent administrator can contract with a governmental entity to provide substitute care and case management services; and, 3) whether a governmental entity can provide community services if such services are considered to be substitute care and case management services.

Dear General Abbott:

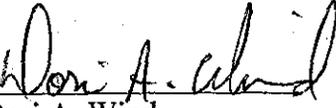
On behalf of Harris County Protective Services for Children and Adults ("HCPSCA"), we submit these questions to you regarding sections 264.106 and 264.1063 of the Texas Family Code, and Chapter 45 of the Texas Human Resources Code, which codifies an Act of June 6, 2005, S.B. 6, §§ 1.46, 1.47, and 1.123, 79th Leg., R.S., and was effective September 1, 2005. For a number of years, HCPSCA has been providing substitute care and case management services for children in Harris County by contracting with the Texas Department of Family and Protective Services ("TDFPS"). Harris County initiated a project called the Children's Crisis Care Center ("4Cs") that provides an initial psychological assessment of every child coming into foster care. The County also established a health care clinic so that foster children could receive care in an expeditious manner, runs an emergency shelter where foster children can live 24/7, and provides other services. See TEX. FAM. CODE ANN. § 264.005 (Vernon Supp. 2005) and also TEX. HUM. RES. CODE ANN. § 152.1073 (Vernon 2001), providing authority for Harris County to provide services for children.

Chapter 45 of the Texas Human Resources Code, in conjunction with Section 264.106 of the Texas Family Code mandates privatization of case management and substitute care services for foster children. Section 45.001(10) of the Texas Human Resources Code defines "privatization as contracting with a private entity to provide certain governmental services." Both statutes appear to implement a legislative plan for

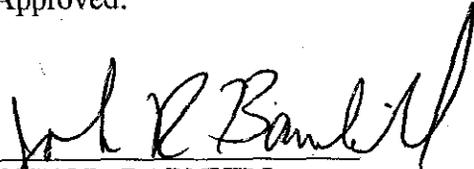
privatization either through TDFPS, or an independent administrator, contracting with private entities to deliver substitute care and case management services. The law also appears to implement a plan for determining whether private entities have the capacity to provide these services in a cost effective manner. We request your expedited attention to these questions.

Sincerely,

Harris County Attorney
MIKE STAFFORD

By 
Dori A. Wind
Senior Assistant County Attorney

Approved:


JOHN R. BARNHILL
First Assistant County Attorney

MEMORANDUM BRIEF

Harris County has a local child welfare board appointed by Harris County Commissioners Court as provided in section 264.005 of the Texas Family Code and section 152.1073 of the Texas Human Resources Code. See TEX. FAM. CODE ANN. § 264.005 (Vernon Supp. 2005). See also TEX. HUM. RES. CODE ANN. § 152.1073 (Vernon 2001). These sections state that a child welfare board can receive and use funds, grants, and assistance available to carry out programs to help children in the county, and to also carry out programs of TDFPS (formerly Department of Protective and Regulatory Services). Pursuant to section 264.005(d) of the Texas Family Code, a child welfare board is described as “an entity of the department for purposes of providing coordinated state and local public welfare services for children and their families . . .” Section 264.106 of the Family Code, as amended by S.B. 6, § 1.46, provides in pertinent part as follows:

(b) The department shall, in accordance with Section 45.004, Human Resources Code:

* * * * *

(2) either contract directly with private agencies as part of regional community-centered networks for the provision of all necessary substitute care and case management services or use an independent administrator to contract for those services;

* * * * *

(f) A contract with an independent administrator for substitute care and case management services under Subsection (b)(2) must include department approved provisions that:

* * * * *

(3) require all independent administrators and private contractors to disclose to the department any information that may indicate an actual or potential conflict of interest with the commission, the department or another health and human services agency, including information regarding actual or potential related-party transactions, relationships, interests, or business history, and any other factor that may indicate an actual or potential conflict of interest; * * * * *

TEX. FAM. CODE. ANN. § 264.106 (Vernon Supp. 2005) [*emphasis added*]. An authority for Harris County to contract with TDFPS is found in section 40.058(a) of the Texas Human Resources Code, which provides, in pertinent part as follows:

The department may enter into contracts or agreements with any person, including a federal, state, or other public or private agency, as necessary to perform any of the department's powers or duties.

TEX. HUM. RES. CODE ANN. § 40.058(a) (Vernon Supp. 2005) [*emphasis added*].

Since Harris County has worked with TDFPS for many years, it asked TDFPS for its interpretation of section 264.106 of the Texas Family Code as amended by S.B. 6, §1.46 and Chapter 45 of the Texas Human Resources Code as amended by S.B. 6 §1.123. TDFPS stated that it has no authority under the amended sections of these laws to continue contracting with Harris County. A basic rule of statutory construction is that the construction placed upon a statute by the agency charged with its enforcement is entitled to great weight. *Seawall East Townhomes Ass'n, Inc. v. City of Galveston*, 879 S. W. 2d 299 (Tex. App. – Houston {14th Dist} 1994, no writ). Despite section 40.058(a) of the Texas Human Resources Code authorizing contracts between TDFPS and a public agency, TDFPS says that the amended sections of Chapter 45 of the Texas Human Resources Code and 264.106 of the Texas Family Code only allows contracts with private agencies or an independent administrator with regard to providing case management and substitute care services. Chapter 45, as well as section 40.058 (a) of the Human Resources Code and section 264.106 of the Texas Family Code all pertain to contracting with TDFPS and would be *in pari materia*. Under Texas law, statutes *in pari materia* are to be construed together unless one is more general and the other more detailed. *Huynh v. State*, 901 S.W. 2d 480, (Tex. Crim. App. 1995) on remand 928 S. W. 2d 698.

Section 264.106 of the Texas Family Code and Chapter 45 of the Texas Human Resources Code are more detailed statutes regarding case management and substitute care services and are also subsequent enactments. A special or specific act is properly regarded as an exception to, or qualification of, a general law on the same subject previously enacted. *Scurlock Permian Corp. v. Brazos County*, 869 S.W. 2d 478, (Tex. App. – Houston [1st Dist.] 1993, writ denied). Accordingly, in light of the specific mandates of section 264.106 of the Texas Family Code, Chapter 45 of the Texas Human Resources Code and the statement of TDFPS, it does not appear that Harris County can continue to contract with TDFPS for substitute care and case management services.

TDFPS has also stated that even though it can no longer contract with Harris County, an independent administrator has such authority. Construction of a statute by an administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute. *Atascosa County v. Atascosa County Appraisal Dist.*, 962 S. W. 2d 188 (Tex. App. - San Antonio, 1998) reversed in part on other grounds, 990 S.W. 2d 255 (Tex. 1999); *Tarrant Appraisal Dist. v. Moore*, 845 S. W. 2d 820, 823 (Tex. 1993). The main goal of statutory construction is to effectuate intent of the legislature; words and phrases are to be read in context and given their common, everyday meaning unless they have

acquired technical or particular meaning. *R.R. E. v. Glenn*, 884 S. W.2d 189, (Tex. App. - Fort Worth 1994, writ denied).

Section 45.001(10) of the Texas Human Resources Code defines "privatize" as "contracting with a private entity to provide certain governmental services." See TEX. HUMAN RESOURCES CODE ANN. § 45.001 (10) (Vernon Supp. 2005). It appears that an independent contractor must also contract with "private entities," so that TDFPS can ascertain whether the contracts entered into by the independent administrator with the private agencies are more beneficial in terms of service delivery and cost, than services previously delivered by TDFPS. TDFPS must report its findings to the legislature. See TEX. HUM. RES. CODE ANN. §§ 45.054(d), 45.054(e)(1), (2) and (3) and 45.054(g)(1) and (2), (Vernon Supp. 2005). Since it appears that the legislature wants to make a comparison of privately provided services versus government provided services, it does not appear that an independent administrator can contract with any governmental entity to provide substitute care and case management services.

Further, since Harris County's child welfare board is deemed to be an entity of TDFPS under section 264.005(d) of the Texas Family Code, it appears there is a second prohibition in regard to contracting with Harris County since TDFPS cannot provide these services itself, except in an emergency or as a provider of last resort. See TEX. FAM. CODE ANN. §§ 264.106(j) and (k) (Vernon Supp. 2005) and TEX. HUM. RES. CODE ANN. §§ 45.002 (d) and (e) (Vernon Supp. 2005). Section 264.106(k) of the Texas Family Code reads:

The department may provide substitute care and case management services as a provider of last resort in any region of the state in which **the department or an independent administrator contracting with the department is unable to contract with a private agency to provide those services.**

TEX. FAM. CODE ANN. § 264.106 (k) (Vernon Supp. 2005) [*emphasis added*]. A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it. *Acker v. Texas Water Commission*, 790 S.W. 2d 299 (Tex. 1990). See *Robinson v. Budget Rent-A-Car Systems, Inc.*, 51 S.W. 3rd 425, (Tex. App. - Houston [1st Dist.] 2001, pet. ref'd) (discussing the use of the word "shall" in statutory construction). In Op. Atty. Gen. No. GA-0416 (2006), the Attorney General said that a statute needs to be considered as a whole. The opinion cites *Helena Chem. Co. v. Williams*, 47 S. W. 3d 486, 493 (Tex. 2001) holding that: "[W]e must always consider the statute as a whole rather than its isolated provisions We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone."

An independent administrator cannot contract with a governmental entity to provide case management and substitute care services because to do so would thwart the efforts of the legislature to determine whether private entities have the capacity to provide

TDFPS services in a more cost effective manner. Even though the legislature may have omitted the word "private" in front of every description of a provider or a service, it appears that the legislature intended to implement privatization (only with private entities), study it, and change it during implementation as necessary. Section 45.002(a) of the Human Resources Code provides a date up to September 1, 2011 that appears to allow for changes. The amended sections 264.106 and 264.1063 of the Texas Family Code and Chapter 45 of the Texas Human Resources Code do not appear to allow a public entity to provide case management and substitute care services by contracting with either TDFPS or an independent administrator. When interpreting a statute, the context and consequences that would follow a particular interpretation must be examined and an interpretation should be avoided that would produce absurd results. *City of Laredo v. Villareal*, 81 S.W. 3rd 865 (Tex. App.- San Antonio 2002, no pet.)

It also appears that Harris County cannot provide any community based family services that are included within the definition of case management and substitute care services. To do so would also thwart the intentions of the legislature to be able to measure the ability of private providers to assume the duties of TDFPS.

We request your expedited opinion on this matter. For your convenience, we attached pertinent statutes.

Pertinent Provisions of SB 6 Requiring Privatization

Chapter 45, Tex. Human Resources Code, (Vernon's Supp. 2005), as amended by S.B. 6, sets out the plan for privatization, in pertinent part, as follows:

§ 45.001 Definitions

In this chapter:

* * * * *

(3) "Department" means the Department of Family and Protective Services.

* * * * *

(6) "Independent administrator" means an independent agency selected through a competitive procurement process to:

(A) secure, coordinate, and manage substitute care services and case management services in a geographically designated area of the state; and

(B) ensure continuity of care for a child referred to the administrator by the department and the child's family from the day a child enters the child protective services system until the child leaves the system.

* * * * *

(10) **"Privatize" means to contract with a private entity to provide certain governmental services.**

* * * * *

§ 45.002. Privatizing Substitute Care And Case Management Services; Department Duties

(a) Not later than September 1, 2011, the **department shall complete the statewide privatization of the provision of substitute care and case management in this state.**

(b) On and after September 1, 2011:

(1) all substitute care and case management services for children for whom the department has been appointed temporary or permanent managing conservator must be provided by child-care institutions and child-placing agencies; * * *

(Harris County Protective Services, a governmental entity, has a license from the department to operate a shelter for children in the custody of the department, and the department refers to Harris County as a child-care institution. However, Harris County is not a private provider. Accordingly even though Harris County holds the appropriate license, it would not appear that Harris County can provide services as a "governmental child-care institution," especially before September 1, 2011.)

§ 45.004 Independent Administrators; Department Duties

(a) The department shall research and develop a comprehensive strategy for contracting for management support services from independent administrators on a regional basis. **If the department determines that an independent administrator could manage and procure substitute care and case management services with private agencies** (emphasis added) and conduct placement assessments in a more cost-beneficial manner, the department shall implement a transition plan to transfer the procurement, management, and oversight of substitute care and case management services from the department to an independent administrator, as well as responsibility for placement assessments. **If the department determines that contracting for management support from an independent administrator is not cost beneficial, the privatization of substitute care and case management services will occur as provided by Section 45.002 (b).**

(b) **The comprehensive strategy, at a minimum, must:**

* * * * *

(2) **require independent administrators to contract with private agencies that will:**

* * * * *

Section 264.106 of the Texas Family Code further provides changes in the Human Resources Code as follows:

§ 45.051 Reorganizing Staff Responsibilities

Not later than March 1, 2006, the department shall develop a plan for reorganizing the department's operation to support **future procurement of, contracting with, and monitoring of private contractors and enforcement of the licensing of facilities.**

* * * * *

§ 45.052 Financing

The department shall create financing and payment arrangements that provide incentives for an independent administrator and substitute care and case management providers to achieve safety, permanency, and well-being outcomes and improved system performance.

(Even though the legislature omitted to use the word "private" in front of the word substitute in this last section, it would appear that they mean this is financing for "private" providers).

§ 45.053 Adoption of Transition Plan

* * * * *

(b) Not later than March 1, 2006, the commission and the department shall, in consultation with private entities under contract to provide substitute care services for the department including members of the boards of directors of the private entities and other community stakeholders, develop and adopt a substitute care and case management services transition plan consistent with the requirements of Subchapter C.

§ 45.054 Regional Implementation

(a) The department shall implement the privatization of substitute care and case management services on a regional basis in accordance with the transition plan.

* * * * *

(c) Not later than the first anniversary of the date the department enters into the first contract for substitute care and case management services under this section, the department shall contract with a qualified, independent third party to evaluate each phase of the privatization of substitute care and case management services. Each evaluation must:

* * * * *

(4) **determine if contracted services are cost beneficial; and**

(5) **assess the private sector's ability to meet the performance measures, including service capacity, for the remaining regions.**

(e) The department shall continue to implement the transition plan) for

the second and third regions only after:

(1) the commission reports to the House Human Services Committee, or its successor, and the Senate Health and Human Services Committee, or its successor, the status of the initial transition of services to a contractor in the first region not later than December 31, 2006;

(2) the independent third party with whom the department contracts under Subsection (c) evaluates and reports... on the performance of contracted substitute care and case management services in the first region not later than December 31, 2008; and

(3) the commission determines, based on the report prepared under Subdivision (2) or information obtained by the review required under Subsection (b)(6), whether material modifications to the model for privatization of substitute care and case management are necessary ...

§ 45.102. Transition Plan Requirements

The transition plan developed by the department and the commission must:

* * * * *

(4) include an implementation plan to transfer all foster homes certified by the department to private child-placing agencies, ensuring minimum disruption to the children in foster care and current foster parents;

* * * * *

(6) include a process for assessing each child who is transferred to a private substitute care provider to verify the child's service needs;

(7) include an implementation plan to transfer all adoption services to private agencies including details of how and when cases will be transferred and how adoption provider contracts and reimbursement methods will be structured;

(8) describe the process to transfer the duties of case management and family reunification services from department staff to private agency staff, including the integration of family group conferencing into private agency case management;

* * * * *

(12) require the department to enter into contracts for the provision of substitute care and case management services as required by Section 264.106 Family Code, and describe the procurement and contracting process, including:

Section 264.106 of the Texas Family Code, provides, in pertinent part as follows:

* * * * *

(b) The department shall, in accordance with Section 45.004, Human Resources Code:

* * * * *

(2) **either contract directly with private agencies as part of regional community-centered networks for the provision of all necessary substitute care and case management services or use an independent administrator to contract for those services;** (emphasis added)

(3) **contract with an independent administrator, if cost beneficial, to coordinate and manage all services for children in the temporary or permanent managing conservatorship of the department in a designated geographic area;**

* * * * *

Section 264.1063 of the Texas Family Code provides, in pertinent part:

§ 264.1063 Monitoring Performance of Substitute Care and Case Management Providers

(a) The department, in consultation with **private entities under contract with either an independent administrator or the department to provide substitute care or case management services**, shall establish a quality assurance program that uses comprehensive, multitiered assurance and improvement systems based, subject to the availability of funds, on real-time data to evaluate performance.

(b) The contract performance outcomes specified in a contract under Section 264.106 must be consistent with the fiscal goals of **privatizing substitute care and case management services** and must be within the contractor's authority to deliver. The contract must clearly define the manner in which the substitute care or case management provider's performance will be measured and identify the information sources the department and, if applicable, the independent administrator will use to evaluate the performance."

[*Emphasis added.*]