



A REPLY TO THE TEXAS ALLIANCE

In September 2008, we published a report on child welfare privatization in Texas: *Drawing the Line between Public and Private Responsibility in Child Welfare: the Texas Debate*.¹ Our goal as expressed in the foreword was to consider the question of privatization based upon careful research and analysis, looking particularly at the experience in Kansas and Florida. In November 2008, the Texas Alliance for Child and Family Services, a business association of residential child care providers, released a response to our paper.² Unfortunately, the response does not fairly grapple with the difficult issues raised by privatization. Accordingly, we offer only this brief response.

Who Is Who

The Center for Public Policy Priorities is a nonprofit, nonpartisan policy institute long concerned with child welfare. We are funded by foundation grants and individual gifts. We base our policy positions solely upon our research and analysis. The Texas Alliance for Child and Family Services is a business association representing private providers. CPPPP's staff has extensive experience in child welfare.³ Our staff is also financially disinterested in the outcome of this public policy debate, unlike the consultants cited by the business alliance.

Methodology

In our research we did two things. First, we interviewed a broad cross-section of stakeholders in Kansas and Florida, the two states that have substantially privatized child welfare, and Texas. Many of these individuals requested anonymity. Our report does not claim to be a qualitative analysis as would be done at an academic institution. Rather, we did a review typical of a policy institute that must make program recommendations in real time. Second, we used publicly available data to compare performance across the three states. More data became available during the delay between completion of our research and publication of our report, and more data will become available in the future. But as of today, even after taking into account everything claimed by the business alliance, our conclusions and recommendations remain sound.

Where We Agree

Our report expressly acknowledges the important role that private providers play in the child welfare system, and our report generally supports the pilot approach to outsourcing adopted by the Texas Legislature in Senate Bill 758 in 2007. The business alliance's response does not substantively disagree with our conclusions or recommendations and offers no conclusions or recommendations of its own. In fact, the business alliance's response supports two of our primary conclusions.

The business alliance concurs with our conclusion that privatization has produced mixed results at best and Texas continues to perform at least on a par with states that have privatized. The business alliance admits that the "CPPPP report is correct when it states that [privatization] results in Florida and Kansas are mixed."⁴ And although it uses different data to compare outcomes in Texas to Florida and Kansas, even these data support our conclusion: Texas has generally performed better than or equal to Kansas, while in comparison to Florida, Texas has performed better on some measures and worse on others.

Specifically, the business alliance's data show:

- Texas may reunify children slightly slower than Kansas or Florida, but the reunifications are more appropriate and permanent as fewer of Texas' children are re-abused or re-enter foster care as compared to Florida and Kansas.
- For children who are adopted, Texas moves them through the process at a faster rate than Kansas or Florida.
- Texas and Kansas seem to generally have problems with children who have been in care for a long period of time both in placement stability and moving them into permanency as compared to Florida, although all three states fell below the national median on these measures.

While the business alliance claims that we mischaracterized the results in Florida because we did not discuss recent trends showing that certain outcomes have been improving, even the business alliance admits that Florida's lead agencies continue to fall short of required standards and goals.⁵ Ironically, by not providing an update of outcomes in Texas, the business alliance does exactly what it complains we did. As the business alliance knows, with legislative reforms and increased appropriations, outcomes in Texas' publicly run system have been improving.⁶ Texas has succeeded in lowering caseloads⁷ and worker turnover,⁸ bringing fewer children into foster care,⁹ placing more children in the care of relatives,¹⁰ and increasing adoptions.¹¹

The business alliance also agrees with our conclusion that any improvements in states with a privatized system cannot be attributed easily—and certainly not solely—to privatization. The business alliance concedes that the financial flexibility provided by a federal Title IV-E waiver (which is no longer available) and increased state funding were at least important contributing factors.¹²

Inexplicably, even though the business alliance has always taken the position that Texas spends too little on child welfare and that rates for residential care are too low, it attacks our cost comparison analysis. Though cost comparisons between states are always difficult, we relied upon the most up-to-date and reliable data available to compare child welfare spending among the states in our investigation. We found that while both Florida and Kansas significantly outspend Texas, neither state outperforms Texas. Our purpose in doing a cost comparison was to underscore our point that privatization is costly and has not proven to yield greater gains than a better-funded public system might achieve.

The business alliance does cite two instances where it claims Texas spends more per child. First, the business alliance cites data about spending per foster child. But the source is an unpublished draft report that uses data from 2000. As even the business alliance admits, child welfare funding in all states has significantly changed in the eight years since then, making that comparison questionable. The other per-child spending data is only slightly more recent (2003) and it lumps child welfare spending in with spending on education and health, making the comparisons totally irrelevant.

Nothing the business alliance says, however, rebuts that Texas spends too little on child welfare, or that outsourcing will cost more. In fact, the business alliance has already requested a rate increase from the Texas legislature for the work it is doing today. Contracting for a greater scope of work would cost the state even more.

Where We Disagree

CPPP and the business alliance do firmly disagree on one question: In the prosecution of the state's case against a parent, who should make the decisions that affect the parent-child relationship? We think that such decisions must remain a public responsibility, while the business alliance supports outsourcing this governmental function to private corporations. Contrary to the claim by the business alliance, we do not mischaracterize who makes what decisions in a child welfare case or confuse the definition of case management. A child protection case is prosecuted by the executive branch in the name of the state. The

public attorneys who represent the executive branch do not have the authority or the expertise to make case management decisions. Those decisions are made by Child Protective Services. *Devolving that responsibility to a private company is problematic because of the inherent conflict private companies have when a private business both makes case management decisions and financially benefits from those decisions.* This conflict arises in both for-profits and non-profits. Even non-profits must make money, and even non-profit direct service providers are influenced by financial considerations.

The business alliance argues that the federal child welfare structure allows states to delegate this case management responsibility. But to say something *can* be done is not to say it *should* be done. Our report concludes that as a matter of public policy, case management *should* remain a public function. When it adopted Senate Bill 758 in 2007, the Texas Legislature came to this same conclusion.¹³

Moreover, state law, not federal law, is the primary law in child welfare. Depending upon the jurisdiction, state law may well prohibit the delegation of governmental decisionmaking to a private corporation. Under the Texas Constitution, for example, taking ultimate decisionmaking away from state executive officers and allocating it to private companies as proposed by the business alliance runs afoul of constitutional principles.¹⁴ Suffice it to say that the contours of both state and federal law remain unsettled in this emerging policy area.

In an attempt to solve the conflict of interest problem, the business alliance argues that state courts act as a check on a private provider's authority regarding placement, returning a child home, and adoption. While courts are a check, courts are extremely underfunded and even in the best of circumstances cannot easily police conflicts of interest held by the prosecuting authority, which in a privatized model would be a private corporation. Courts operate on an adversarial model, dependent on the position the parties take and information the parties bring. In a fully privatized model, positions and information are largely controlled by the private corporation.

Contracting and licensing oversight also do not provide a check on private providers. The limitations of each were thoroughly discussed in our paper. In child welfare there are no agreed-to norms regarding the best outcomes for children and families in the aggregate, making performance-based contracting and monitoring very difficult. The challenge of crafting appropriate performance measures in social services contracting is a common refrain in the research on privatization. The national study cited by the business alliance itself confirms this challenge: "In fact, there is evidence that there is considerable disagreement among experts in the field as to the correct decision in any particular case."¹⁵ As for licensing, while it establishes minimum standards, it provides no way to determine if outcomes are appropriate in either individual cases or in the aggregate. Moreover, states typically underfund both contracting and licensing, making it difficult to achieve even the full potential of both these checks on private providers.

Next Steps

Given the economic downturn and the significant cost of privatization, Texas may have no immediate next steps. Before the economic downturn and drop in state revenue, the state had proposed possible models for a contracted case management pilot program.¹⁶ CPPP continues to support a responsible pilot with a careful division of duties, as long as the state fully funds the pilot without draining funding from the public system. Contrary to the assertions by the business alliance, our viewpoint is widely shared, supported by the research, and offered in our sincere judgment about what is best for Texas children and families.

¹ Available at <http://www.cppp.org/files/4/CPSreportweb.pdf>.

² Available at <http://data.memberclicks.com/site/tac2/Alliance%20Response%20to%20CPPP%20report-10-31-08.pdf>.

³ See brief staff biographies at <http://www.cppp.org/about/staff.php>.

⁴ Alliance at 15.

⁵ Alliance at 10.

⁶ DFPS Data available at <http://www.dfps.state.tx.us/About/Renewal/CPS/default.asp>.

⁷ DFPS Data Book at 31-32. Available at:
http://www.dfps.state.tx.us/Documents/about/Data_Books_and_Annual_Reports/2007/databook/CPS_FY07.pdf.

⁸ DFPS Rider 13 – Human Resources Management Plan, October 1, 2008. Available at: http://www.dfps.state.tx.us/documents/about/pdf/2008-10-01_Rider13.pdf.

⁹ DFPS Data available at http://www.dfps.state.tx.us/About/News/2009/2009-01-23_Reduce-removals.asp.

¹⁰ DFPS 2007 Annual Report at 12. Available at:
http://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2007/annual_report/2007CPS.pdf.

¹¹ DFPS 2007 Data Book at 56. Available at:
http://www.dfps.state.tx.us/Documents/about/Data_Books_and_Annual_Reports/2007/databook/CPS_FY07.pdf.

¹² Alliance at 11.

¹³ Senate Bill 758 carefully delineated the role of the public agency from the private provider, distinguishing case management from “conservatorship services” and requiring that conservatorship services remain under DFPS control. The law defines conservatorship services to include “services provided directly by the department that the department considers necessary to ensure federal financial participation and compliance with state law requirements, including initial placement of a child and approval of all subsequent placements of a child, approval of the child and family case plan, and any other action the department considers necessary to ensure the safety and well-being of a child.

¹⁴ See generally *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997) (discussing unconstitutional delegation of legislative power to private corporation). An analogy is helpful to understand this point. Under the constitution, the attorney general has the power to issue advisory opinions on legal questions. Suppose that the legislature thought that the attorney general did his job too slowly and gave bad advice. Then suppose the legislature decided to require the attorney general to hire private lawyers to answer all questions and prohibited the attorney general from answering any questions. The legislature would not be exercising the attorney general’s power, but it would nonetheless be violating the separation of powers because the legislature would be interfering in the exercise of the executive branch’s power.

¹⁵ U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. *Topical Paper #3: Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems*. March 2008.

¹⁶ See http://www.dfps.state.tx.us/about/renewal/cps/case_management.asp.