



## STRENGTHENING CHILD PROTECTIVE SERVICES

### An Analysis of DFPS's LAR and Senate Bill 758

When the Legislature convened in 2005, Child Protective Services was in a crisis. In response, the Legislature passed Senate Bill 6 and increased funding for Child Protective Services. While this was a major step forward, the Legislature needs to take a second step. In 2005, the Legislature focused largely on the problems of investigations, increasing funding for investigators, providing training and additional resources, and strengthening links to law enforcement. As a result, CPS has made progress in investigations. Caseloads are down and CPS is doing a better job addressing the immediate problems of children and families. Now, the Legislature needs to turn its attention to the problems of children in out-of-home care. Senate Health and Human Services Committee Chair, Jane Nelson, the author of Senate Bill 6, has introduced Senate Bill 758 as a second step. Though the reforms initiated last session are important, they are not enough. To make a true difference in the lives of children at risk, the state must better fund CPS. This policy page analyzes SB 758. Before doing so, however, this policy page briefly comments on CPS funding.

#### DFPS LAR and Supplemental Request for CPS Reform

The Department of Family and Protective Services' Legislative Appropriations Request (LAR) seeks additional funding for CPS. Several of the department's Exceptional Items are critical to maintaining CPS, including items 1 (\$32 million General Revenue [GR] for foster care costs), 2 (\$20 million GR for additional staff), 4 (\$8.5 million GR for technology), and 6 (\$11 million GR for a new post-psychiatric hospitalization foster care rate). In addition, the department has a special supplemental request for \$90 million GR to continue CPS reform. Separately, the Health and Human Services Commission has included a 3.99 percent across-the-board inflation adjustment in its budget for foster care rates (at a cost of \$22.6 million in GR).

By itself, legislation will not keep our children safe and strengthen our families. To meet the needs of Texas children and families, the Legislature needs to fund the department's request, including Exceptional Items 1, 2, 4, and 6 and the \$90 million supplemental request to continue CPS reform.

Even though funding for child protection has increased significantly over the last decade, CPS remains grossly under funded. In 2004, the most recent year for which national comparisons are available, the state spent \$837 million on child protection (prevention, services, and foster care), for an average of \$134 per Texas child. This is 58 percent lower than the U.S. average of \$319 per child—low enough to rank Texas 47<sup>th</sup> nationally.

To reach the national average in 2004, Texas would have had to spend an additional \$1.2

billion in state and federal funds. Even to reach the Southern-states' average of \$206 per child, Texas would have had to spend \$451 million more on child protection in 2004.<sup>1</sup> In 2005, CPS reform added roughly \$250 million over two years. Texas has a long way to go before we can say we are adequately supporting CPS.

## Analysis of Senate Bill 758

### Sections 5-8 and Sections 22-27— Privatization

SB 6 mandated the complete privatization of CPS post-investigation by 2011. SB 758 takes a different approach, mandating the privatization of substitute care services by September 2009 and mandating the privatization of case management for 10 percent of the cases by September 2009.

While the center supports the use of competitive bidding and performance-based contracting to secure services as appropriate, we continue to oppose the privatization of either substitute care or case management.

### Privatization of Substitute Care Services

SB 758 requires the outsourcing to private agencies of all “substitute care services” by September 1, 2009, essentially 24 months. SB 758 relies upon the definition of “substitute care services” from Senate Bill 6, now in Family Code § 264.106(a)(5):

“Substitute care services” means services provided to or for children in substitute care and their families, including the recruitment, training, and management of foster parents, the recruitment of adoptive families, and

the facilitation of the adoption process, family preservation, independent living, emergency shelter, residential group care, foster care, therapeutic foster care, and post-placement supervision, including relative placement. The term does not include the regulation of facilities under Subchapter C, Chapter 42, Human Resources Code.

At a minimum, we recommend revising this definition to narrow the services that the department must outsource. For example, we do not think SB 758 means to outsource all family preservation and post-placement supervision, including relative placement.

More broadly, we have serious concerns about outsourcing *any* substitute care services. When the legislature passed SB 6 to privatize all of case management, outsourcing substitute care was a necessary step. SB 758, however, provides only for outsourcing case management in *10 percent of the cases*. This change allows for rethinking whether the state should privatize all of substitute care. Privatizing all of substitute care would be a mistake, for several reasons.

First, it is costly. The department's LAR, Exceptional Item 7, requests \$24.5 million in All Funds (\$17.5 million in General Revenue) merely to outsource foster care and adoption services. No one has even calculated the cost of SB 758.

Second, outsourcing actually reduces market competition, thereby increasing the state's costs in the end. The public sector is itself a competitor with private providers. If the public sector can deliver a service cheaper and better, then we should use the public sector. If we put the public sector out of business, private providers have less competition. Prices go up because the public sector no longer has the capacity to compete.

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<sup>1</sup> Spending data are from the Urban Institute, *The Cost of Protecting Vulnerable Children V* (May 2006); child population data are from the U.S. Census Bureau, State Population Estimates.

Third, if the department gets out of the business of providing services, it loses much of its internal expertise about service delivery and best practices. This expertise is important to the department as both a regulator and a contractor. Moreover, if you outsource everything and then discover you made a mistake, you will have dismantled your system, which will be next to impossible to rebuild.

Fourth, we should never forget the problem of unintended consequences. For example, CPS does far more adoptions from its own foster homes than private providers do from theirs. Outsourcing could significantly slow adoptions.

Fifth, outsourcing substitute care services will be a terrible disruption to children. Right now children are in foster homes that may or may not be able or willing to transfer to a private provider. Requiring that the state close these homes means forcing children to move. Even if foster parents are willing to move from CPS to private providers, these private providers will have different therapists and doctors, disrupting the continuity of care to children.

Sixth, one of the problems with an outsourcing plan that is untested, but has a mandatory “finish line,” is that state employees begin leaving for other jobs as soon as the plan is announced, undermining ongoing efforts to improve the system.

Seventh, whatever the plan, we strongly advise against mandating a date certain by which the department must get out of the business of providing foster care and adoption services. A rigid mandate creates the problem of the “distress sale.” If the department has flexibility, it can get a better deal than if the private providers know the department must have outsourcing finished by a date certain.

Finally, the timeline is unrealistic. A task of this magnitude will be impossible to accomplish in 24 months. This is an incredibly complex process involving many children across a big and diverse state.

If the Legislature wants to outsource substitute care services, it should do so slowly and incrementally, so that the department can test its effectiveness before proceeding with a statewide plan. We strongly advise against mandating that the department outsource all these services by a date certain.

### **Privatization of Case Management**

SB 758 proposes to outsource 10 percent of the cases by September 1, 2009, essentially in 24 months. As a technical matter, SB 758 needs to define “case,” to clarify whether it means children or court cases. Ten percent of the children would be roughly 3,200.

However defined, there has to be one person responsible for making sure that the case moves forward and that the outcome is in the best interest of the children. This job goes under the name of case management, but it is composed of many tasks. At present, caseworkers doing this work are public employees under the direct supervision and control of the DFPS commissioner.

SB 758 relies upon the definition of “case management services” from Senate Bill 6, now in Family Code § 264.106(a)(1):

“Case management services” means the provision of case management services to a child for whom the department has been appointed temporary or permanent managing conservator, including caseworker-child visits, family visits, the convening of family group conferences, the development and revision of the case plan, the coordination and monitoring of

services needed by the child and family, and the assumption of court-related duties, including preparing court reports, attending judicial hearings and permanency hearings, and ensuring that the child is progressing toward permanency within state and federal mandates.

While we prefer the approach of SB 758 to SB 6, we continue to strongly oppose outsourcing case management services.

To begin with, we question the constitutionality of outsourcing case management. Our constitution divides power among the legislative, executive, and judicial departments. The constitutional principle of separation of powers is violated in either of two ways: 1) exercising the power of another branch or 2) interfering with another branch exercising its power. By taking case management away from state executive officers and allocating it to private companies as proposed in SB 758, the legislature might well be violating separation of powers by interfering with the executive's exercising of its power. 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 may be helpful here. 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.

In addition to this state constitutional problem, federal law may prohibit the state from giving case management decisions to private providers. The Legislature needs to clarify the limits of federal law before proceeding with outsourcing case management.

Our fundamental objection, however, is that no one has ever explained why the state should privatize case management. Our public system *does as well as or better* on outcomes related to case management as the systems in states that have privatized case management. To learn more about these outcomes, see *CPS: Is the Legislature Going to Make Things Worse for Texas Children and Families* (CPPP April 2005).

So, why privatize? Some have argued that if the department used performance-based contracts awarded through competitive bids instead of open enrollment contracts, it could better serve children and families. Nothing, however, prevents the department from using performance-based contracts now. Nothing prevents the department from contracting for services through competitive bids now. Whatever advantages these contracting methods have, the state can realize them without outsourcing case management.

Moreover, private case management is going to lead to greater fragmentation. For example, take a case with a mother and three children. The oldest child needs residential treatment. The middle child needs a basic foster home. The youngest child is a drug-addicted newborn who needs a habilitative home. Assume no one agency has all three homes, which is a likely scenario. Consequently, three different agencies take the children. In addition, the mother needs drug treatment. Plus, a father about to get out of prison needs

parenting classes and job training. Who does the case management for this family?

If multiple private agencies are going to do their own case management, it defeats the goal of coordination. Let us say, one agency argues that the kids should go home to mom; another agency argues they should be united in the basic foster home; the third agency argues they should be adopted. Or, perhaps each agency proposes a different plan for each child. What about the mother and the father? Are the agencies that care for the children really the best able to determine the services needed by the mother and father, or assess whether the parents have made satisfactory progress for the children to go home?

Some have oversimplified their description of a necessarily complex system to argue that privatization of case management means that one agency with one caseworker who best knows the children will be in charge of making wonderful placements and moving the case to a rapid conclusion. Nothing could be further from the truth. In reality, as the simple hypothetical above illustrates, no one person, indeed, no one agency will be providing all services.

Furthermore, private providers are in a deep and inherent conflict of interest when it comes to case management. They earn money under a payment system of incentives, disincentives, and risk shifting that may lead them to make decisions that are not in the best interest of a particular child or family. They may also be guided by a mission that is in conflict with the best interest of a particular child or family, such as being philosophically opposed to residential treatment or family reunification.

Proponents claim that the state will remain in control of the cases. As explained above, however, under SB 758, the state would not in fact retain legal control. Moreover, as a

practical matter, the state would not have sufficient staff to remain in practical control.

The state cannot maintain control by contract. Failing to do what is best for an individual child and family is not likely to rise to the level of a contract violation. The state also cannot maintain control through licensing. Licensing relates to violations of law and regulations, not to case management decisions about what is best for an individual child and family.

Finally, the state cannot afford the cost of privatization. Make no mistake, privatization costs more. The Quality Improvement Center on the Privatization of Child Welfare Services at the University of Kentucky reports:

One area that deserves noting is cost containment. National studies reviewed for this project suggest that, unlike the assumptions in the early literature that privatization would lead to efficiencies and cost savings, in most cases overall spending for projects has increased over previous levels due to a range of including the costs of monitoring and services.<sup>2</sup>

Texas cannot afford to do less for more.

### **Section 1—Contracting with Law Enforcement**

SB 6 already authorized increased use of law enforcement and forensic methods. We recommend giving SB 6 time to work before taking any further steps in this direction. Perhaps an interim study of how SB 6 and increased coordination with law enforcement is working would be useful. While law

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<sup>2</sup> Planning and Learning Technologies, Inc. and the University of Kentucky, *Literature Review on the Privatization of Child Welfare Services* 43 (Aug. 25, 2006), available on the internet at: <http://www.uky.edu/SocialWork/qicpcw/documents/QICPCWLiteratureReview.pdf>

enforcement has an important role to play in child protection, we are concerned about over-criminalization of child and family issues.

We are also concerned about unintended consequences. Right now, Family Code § 261.301(a) reads, in pertinent part: “With assistance from the appropriate state or local law enforcement agency as provided by this section, the department or designated agency shall make a prompt and thorough investigation of a report of child abuse or neglect allegedly committed by a person responsible for a child’s care, custody, or welfare.”

If the Family Code is amended to say that the department may contract with law enforcement, then law enforcement may require payment to do what is now its duty to do *without* payment. We are particularly concerned about the term “intervention activities.” Right now, law enforcement helps CPS in dangerous circumstances. This term, however, suggests that law enforcement may only have to help when paid. Given limited funding, this new language could mean less law enforcement rather than more.

### **Section 2—Access to Records**

This section increases access by CPS to medical records needed to determine if abuse or neglect has occurred and to locating information for a family. We support this section.

### **Section 3—Visitation for a Child under Two**

This section relates to visitation for children under the age of two.

Requiring the department to consult with relevant professionals to develop an appropriate service plan (lines 15-18) is a good idea. Why limit this requirement to children under two? All children would

benefit from service plans developed in consultation with appropriate professionals.

We are extremely concerned, however, about the requirement for therapeutic family visits with a licensed psychologist (L 19-22). First, when a service plan is required, this section appears to *require* visits for children under two. Under Family Code § 262.2015, Aggravated Circumstances, there are some very serious cases in which no service plan is required. It is not true, however, that in every case in which a service plan is required, visits between a child and an alleged abuser are automatically in the best interest of a child. Yet, this section appears to mandate such visits.

Requiring a licensed psychologist to supervise visits is also problematic. Occupations Code, Chapter 501, defines who is a Licensed Psychologist. By limiting supervision to a licensed psychologist, you limit the pool of available professionals, drive up the costs of compliance, and drive down the number of possible visits. If this section really means that only a licensed psychologist can supervise any visits, then parents will actually have fewer needed visits. With children under two, professionals recommend shorter but more frequent visits.

Other appropriate professionals for this task, depending on the particular case, include 1) Marriage and Family Therapists, Occupations Code, Chapter 502; 2) Licensed Professional Counselors, Occupations Code, Chapter 503; 3) Chemical Dependency Counselors, Occupations Code, Chapter 504, and 4) Licensed Social Workers, Master Social Workers, or Licensed Clinical Social Workers, Occupations Code Chapter 505. Even if all the professionals are added to the list, however, the state will still be short of needed professionals to implement this requirement, particularly in rural areas.

#### **Section 4—Burial Expenses**

This is a technical change to allow payment of burial expenses for youth over the age of 17 who are still in foster care, but not managing conservatorship. We support this change.

#### **Section 8—Placement Decisions**

Section 8 is designed to improve placement decisions. We support this initiative. We recommend, however, that the child's attorney ad litem be added to the list of those who CPS must consult about placement. Family Code § 107.012 requires a court to appoint an attorney ad litem for a child in a termination case to ensure adequate representation for the child. The child's lawyer should be one of the persons consulted about placement decisions. Often the lawyer will also be the guardian ad litem, but not always, making a separate listing necessary.

#### **Section 9—Placement of Children Under Age Two**

This section requires safe and stable placement for children under the age of two. While this is a worthy goal, it would be better to leave placement issues to administrative discretion because of unintended consequences. For example, if the most stable placement cannot accommodate a sibling group, does this section mean that CPS should split a child under two from the child's siblings, preferring stability to sibling placement? As another example, does this section mean that children under two cannot go into emergency shelters under any circumstances? What is best for a particular child must be decided case by case rather than micromanaged by legislation.

#### **Section 10—Hearing Impaired Placements**

This section requires coordination among state agencies to address the needs of children with hearing impairments. We support this initiative.

#### **Section 11—PAL**

This section requires the distribution of information about preparation for adult living. We support this section.

#### **Section 12—In-Home Support**

This section adds an enhanced in-home support program for children and families in child neglect cases when poverty is a significant factor. We applaud this initiative. We note, however, that implementation is contingent upon funding.

#### **Section 13—Court Ordered Services**

This section provides new authority for judges to order services. We support this section.

#### **Section 14—Committee on Medical and Financial Issues**

This section creates a new committee on medical and financial issues. We applaud this initiative. We have two suggestions, however. First, a prosecutor who represents CPS should serve on this committee. While the attorney general has an important perspective, elected district and county attorneys represent CPS. Second, we suggest changing the word "proving" to "determining" in line 25. The focus of the state should always be on fairly determining whether abuse or neglect occurred rather than proving that it has.

#### **Section 15—State Auditor**

This section merely deletes a reporting requirement for the state auditor.

#### **Section 16—Heroin and Cocaine**

This section adds heroin and cocaine to the list of drugs in the program to protect drug-endangered children. We support this section.

### **Section 17—Specialists, Analysts, and Performance Management**

We support this section with reservations. Over many years, as caseloads have risen, rather than add staff to reduce caseloads, the first response has been to hire a specialist. While a specialist can be helpful, a few specialists are not a substitute for an adequate number of qualified, trained, frontline staff.

### **Section 18—Committee on Licensing Standards**

This section creates a new committee on licensing standards. We support this section but have one suggestion. The list of committee members does not include any professionals in the field working with foster homes and residential treatment centers. Even the department's members come from licensing rather than from conservatorship. The committee would benefit from making one of the departmental representatives a conservatorship worker, and adding a CASA or an experienced prosecutor.

### **Section 19—Oversight of Foster Homes**

This section takes steps to strengthen the oversight of foster homes. We support this section.

### **Section 20—Facility Evaluation Form**

This section adds a facility evaluation form to function as a suggestion box for use by providers. We support this section.

### **Section 21—Provider Information Database**

We support this section, though there is one technical problem. Child placing agencies are licensed, but individual homes are verified rather than licensed. To address the problem of bad homes merely moving from one agency to the next, you need to collect the track record of each actual home. Moreover, the department does not have access to these data; only the child-placing agencies themselves will have the data. Implementation of this section will require new reporting requirements and the construction of a new database, taking both time and money.

### **Section 28—CPS Improvement Plan**

This section adds an improvement plan for CPS with new reporting requirements. The department's \$90 million supplemental appropriations request would fund much of this plan, and without this supplemental appropriation, this plan is next to meaningless. We strongly support the implementation of this improvement plan along with approval of the department's Legislative Appropriation Request, including the \$90 million supplemental appropriation.

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