Center *for* Public Policy Priorities
900 Lydia Street, Austin, Texas 78702
PH: 512.320.0222 FAX: 512.320.0227 www.cppp.org

MEMORANDUM

TO: Senate and House Conferees for Senate Bill 6

FROM: F. Scott McCown

DATE: April 27, 2005

SUBJECT: Senate Bill 6: Privatization of Case Management

Introduction

In their different versions of Senate Bill 6, both the Senate and the House require the Department of Family and Protective Services to discontinue its foster and adoption units and outsource all foster care and adoption services. The Senate and the House differ, however, with regard to privatizing "case management." The Senate authorizes a regional pilot to test the concept. The House mandates statewide implementation. The conference committee will have to choose between these two approaches.

As a state district judge, I heard child abuse and neglect cases for fourteen years. In total, I heard some 2,000 cases concerning some 4,000 children. From my experience on the bench, and from my study of the policy at CPPP, I have serious reservations about privatizing case management of child abuse and neglect cases.

I also have deep respect for the House sponsors of case-management privatization. Representative Toby Goodman, for example, has done as much for children and families as anyone in Texas, and he supports privatization of case management. I also respect the dedication of those at the Health and Human Services Commission, such as Anne Heiligenstein, the Deputy Executive Commissioner for Social Services, who have long worked in the interest of children and families and who support privatization of case management. Because of this interest in privatization of case management by people whom I respect and who care about children and families, I support the Senate's plan to authorize HHSC to undertake a pilot.

In many areas, the conference committee may wish to defer to the ingenuity and wisdom of the House. For example, Chairman Hupp's amendment to ensure that indigent parents get lawyers at the beginning of each case is an extremely important provision. Regarding case management, however, with the lives of children at stake, we can not risk more than trying a pilot. If Senate Bill 6 mandates statewide implementation of private case management, and it fails, Senate Bill 6 will be remembered for nothing more than the damage done to Texas children and families.

Defining Case Management

To understand the inherent risks in the House privatization proposal, one must understand how case management works. In every case, 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 case management, but it is composed of many tasks. There are only minor differences in how the Senate and House define those tasks.

The House defines case management in section 1.30 of its version of the bill as follows:

> Sec. 45.001. DEFINITIONS. In this chapter:
> (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.

At present, caseworkers doing this work are public employees. Contrary to what some have suggested, private providers do not now perform any of the tasks listed under case management. To learn more about case management privatization, see *Privatization of Child Protective Services* (CPPP March 2005).

As conferees, you must answer two questions. Are there advantages to privatizing case management? If so, should we try a regional pilot or mandate statewide implementation?

Are There Advantages to Privatizing Case Management?

This first question—are there advantages to privatizing case management—is better asked another way: What problems does private case management solve? Both the Senate and the House heard testimony about two problems in the area of child protection. Privatizing case management will not solve either of these problems.

First, you heard testimony that children's safety has been endangered by inadequate investigations. The money in the General Appropriations Act or the Supplemental Appropriations Act (HB 10) and the investigation reforms in Senate Bill 6 address that problem. Privatizing case management has nothing to do with investigations.

Second, you heard testimony that there were problems with the care children received in foster homes and residential treatment centers. Nothing about privatizing case management will reduce these problems. In fact, it might make these problems worse, as explained below.

Neither the Senate nor the House heard any testimony about any problems experienced by children or families as a result of our public case management system. In fact, our public system does as well as or better on outcomes related to case management as the systems of the 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). Moreover, privatizing case management might well make these outcomes worse, as explained below.

Neither HHSC nor private providers have established any reason to privatize case management. Both claim certain "advantages" to privatization, but when these supposed advantages are carefully examined, it is clear that either 1) the advantage is a worthy goal, but could be achieved without privatization, or 2) the claimed advantage would actually create serious problems that would undermine the child protection system.

For example, HHSC and private providers argue that outsourcing case management will result in better placement decisions. No evidence has been produced, however, that CPS doesn't select the best available placement. Of course, placements are not always adequate, but that is because Texas has too few foster homes and too few residential treatment centers. This lack of capacity results from what we pay providers, not how we manage cases. The Texas Alliance reports that in Fiscal Year 2004, rates paid to private agencies for basic and moderate service levels were only 80% of the calculated rate based on 2000 cost report data. This is why Texas lacks a sufficient number of quality placements. Some providers have implied that case management is somehow related to creating capacity, but only a moment of reflection is required to see that there is no link between the two. Indeed, money siphoned off to fund privatized case management might actually reduce capacity.

Supporters of privatization also claim that children will move through the system faster if providers operate under performance-based contacts awarded through competitive bids instead of open enrollment contracts. Nothing, however, prevents HHSC from using performance-based contracts now. Nothing prevents HHSC from contracting for services through competitive bids now. These are not advantages that flow from outsourcing case management but from writing performance-based contracts and using competitive biding.

Providers say, however, that they must be "in control" if they are to be held to performance standards. But the kind of control providers want is irrelevant to their ability to improve the quality of care under performance-based contracting. Simply put: What one is held accountable for determines what one needs to control. How children do in substitute care is determined by the quality of care provided, not by case management decisions by CPS. Private providers can also increase the stability of placements in substitute care without controlling case management, since many, if not most, disruptions in placements are the result of private providers *refusing* to provide continued care, not CPS moving a child to another home. Frankly, providers are using the issue of control over case management as a way to avoid accountability for the quality of care they provide.

Private providers have legitimately argued that they need a better seat at the table and that they need to work more closely with families. In my experience, good private providers elbow their way to a good seat at the table and insist on working with families. Whatever the case, there is a difference between a seat at the table and running the table, and a difference between working with a family and making decisions about the family. If internal CPS policy and practice need to be strengthened to ensure that private providers are better heard and work more with families, then DFPS should do that, but that doesn't mean private providers should be put in charge.

Not only might there be no advantages to privatization of case management, it may actually create huge problems in the system. Careful consideration is required. Questions that should be asked include: 1) What happens when the state abdicates its legal authority and control over placement decisions? 2) Will there be constitutional challenges related to separation of power? 3) Does privatization actually make things worse by creating conflict of interest and straining already limited resources? These questions are explored below.

Finally, regardless of the wisdom of privatization in the abstract, I make one last practical point. Senate Bill 6 calls for tremendous change requiring many significant management initiatives. To add on top the privatization of case management throughout the state is simply too much for our fragile child protection system to do.

Abdicating Control

Who has control under the House plan? The answer to this question is muddied by contradictory claims by HHSC about how a privatized case management system would actually work. On the one hand, HHSC has adopted the argument of private providers that if they are going to be held to performance standards they have to have "control." At the same time, HHSC has assured the public and the legislature that DFPS will "continue to manage the overall service plan for the child and family and make recommendations to the court."

In a document prepared for the House sponsors, HHSC sets out the contradiction very plainly (the underlining below is mine):

> HHSC Child Protective Services Privatization Q &A (April 2005), page 3:
>
> To hold providers accountable for client outcomes, such as the amount of time a child spends in foster care prior to achieving permanency or the number of placement moves, providers must have control over case decisions that impact these outcomes.
>
> HHSC Child Protective Services Privatization Q &A (April 2005), page 21:
>
> SB 6 includes court-related activities as part of the definition of case management services. Further, if performance-based contracting is to be used to privatize substitute care and case management services, then contractors must be involved in the Texas court system. Holding contractors accountable for child and family permanency decisions requires their input and presence in the courtroom. In no way will the contractor's involvement diminish the role of the Department as conservator of children in substitute care.

So which is it? Does the private contractor have control or does the state have control? Do private providers have "input" with a "presence" in the courtroom? Or, do private providers assume responsibility for legal duties?

Here is how the House plan would actually work under the language in the bill. DFPS would contract with an independent administrator, who could not be a service provider. The independent

administrator would procure substitute care services (foster homes and residential treatment centers) and case management services from private agencies. When a child entered the care of the state, the independent administrator would assign the child to an agency, not a home; the agency would then manage the case from that point. The independent administrator could not do case management. The state could not do case management. The private contractor expressly has control, which is what the private contractors have been seeking.

Look again at section 1.30 of the House version of the bill (Section 45.001):

> (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;
> (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 system until the child leaves the system.

The House bill goes on in Section 1.30 to provide (Section 45.002)(underlining below is mine):

> (b)
> (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; and
> (2) except as provided by Subsection (d) [relating to emergencies] and notwithstanding any other law, the department may not directly provide those services.

"Child-care institution" and "child-placing agency" are defined terms in the Human Resources Code. Neither the independent administrator nor the state comes within the definitions.

The House version of the bill expressly says (underlining mine): "the department may not directly provide those services." The department may "indirectly" affect how case management is done through contract language and licensing regulations, but under the House bill, the actual decisions in individual cases cannot be made by the department.

There is only one place in the bill that might suggest otherwise, and the House sponsors pointed to it to reassure the House during the floor debate. In Section 1.33 the House version says, in amending the Family Code:

> (h) A contract under this section does not affect the rights and duties of the department in the department's capacity as the temporary or permanent managing conservator of a child.

This provision may create an ambiguity, but in statutory construction, provisions must be harmonized and specific provisions control over general provisions. The likely reading of this section amending the Family Code is as follows: Against third persons such as parents, the

department's legal rights are undiminished, but between the department and the contractor, the contractor controls case management and the department does not.

Moreover, as a practical matter, under the House bill, DFPS would have no staff to oversee or override the private contractors. The Fiscal Note to the House bill says that upon full implementation of case-management privatization, DFPS would have a reduction of 1,690 caseworkers. Without this staff, DFPS cannot review cases or go to court. (For further discussion of the staffing numbers and implications, see page 8.)

The key decision facing the legislature is whether it is wise public policy to outsource these decisions to private providers and relinquish the state's authority in these matters. In my judgment, the person deciding whether to terminate a parent's rights and place a child for adoption should be a public employee under a direct line of supervision leading to the Governor of Texas. Philosophically, I take the conservative position that the police power of the state, meaning the state's authority to act against an individual, should never be outsourced. The decision to prosecute a petition to terminate parental rights should not be made by a private company. Such inherently governmental functions as those called for in case management should not be privatized.

Constitutional Questions

If the state privatizes case management as proposed by the House, the constitutionality of Senate Bill 6 will undoubtedly be challenged under separation of powers. Under our constitution, power is divided between the legislative, executive, and judicial departments. The constitutional principle of separation of powers is violated in either of two ways: exercising the power of another branch or interfering with another branch exercising its power. By taking case management away from state executive officers and allocating it to private companies as proposed by the House, 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.

That today's executive branch wants to give away the power to manage child abuse cases does not make the legislature's action constitutional. If the House's plan is accepted, the legislature would be turning every case of child abuse into a constitutional case, and if the Supreme Court concluded that privatizing these critical, inherently governmental executive decisions violated the constitution, thousands of child abuse judgments would be overturned, creating a nightmare for children and families.

Making Things Worse—Conflict of Interest and Resource Constraints

Setting aside this constitutional question, privatizing case management raises serious policy issues. As noted above, not only does privatizing case management not solve the problems that were the catalyst for Senate Bill 6, it might actually make them worse by inviting conflict of interest and depleting the scarce resources we have to protect our most vulnerable children. The Comptroller documented the problems in private foster homes and residential treatment centers that have resulted from inadequate resources and shoddy oversight. The *Dallas Morning News* recently reported the same findings.

Privatization will undoubtedly exacerbate these problems. If providers are in charge of both providing care and case management, you have the classic problem of the wolf guarding the sheep. A critic of public case management might say: "But these problems are happening on CPS' watch right now!" To which the simple answer is: "If your shepherd is overworked and underpaid, and you are losing some sheep, you add shepherds and increase salaries; you don't hire the wolf to guard your flock."

In its original report, HHSC recognized that the wolf had a "conflict of interest" if assigned to watch the flock, which is why HHSC originally proposed the independent administrator model. The way the independent administrator has been set up in the House plan, however, does not resolve the conflict of interest. The independent administrator does get to pick which wolf guards which flock, but a wolf is still left alone with the sheep. Somehow along the way, the House plan transformed into a model where the service provider does the case management. This is the very conflict of interest that helped doom the PACE Project in Fort Worth.

Moreover, this model is not well thought out. 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 the most 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?

The independent administrator does not do the case management. It only selects the agency that will pick the actual placements. If one agency assumes the "lead" and places the family through subcontracts with other agencies, and that agency does the case management for all the agencies, then the House bill has become the very "lead agency" model HHSC advised against in its original report.

If all three agencies are going to do their own case management, it defeats one of the primary goals of privatization, which was supposedly to better coordinate case management. More important, such an approach would bring disaster. Let's 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 with care of 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?

Private providers have oversimplified their description of a necessarily complex system to suggest 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. If case management is privatized, services will still be provided by multiple agencies employing multiple people. Inevitably, under either a public or private system, there must be a single point person who coordinates services, processes information, and makes decisions.

However it works, 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.

HHSC addresses the conflict of interest issues with three arguments. First, it claims that the state will remain in control of the cases. As explained above, however, under the House plan the state would not in fact retain legal control, and in any event, would not have sufficient staff to remain in practical control. Recall that the Fiscal Note says that 1,690 fewer staff will be assigned to case management.

In a heart-stopping argument, HHSC claims it will have plenty of resources for oversight of providers because of its new investigators. These investigators are being hired to investigate abuse and neglect in the community. They will bring caseloads down from a monthly average of 74 to 45, nearly twice the monthly average of 24 in 1998, and three times the best practices standard of 15. They will have no capacity to also police private providers. Moreover, investigators look for gross abuse and neglect; failing to do what is best for an individual child and family is not within the purview of child abuse investigators.

Second, HHSC claims that the state will control providers by contract. But failing to do what is best for an individual child and family is not likely to rise to the level of a contract violation. Moreover, as explained above, the state would be prohibited from doing case management in individual cases, and any assessment of contract performance therefore would be in the aggregate, not on an individual child or family basis. Further, again as a practical matter, HHSC would not have sufficient contract staff to provide oversight through contract management. Even though Senate Bill 6 proposes massive outsourcing, including outsourcing all foster care and adoption services, the Fiscal Note says that at full implementation only 184 additional staff would be added for procurement, evaluation, monitoring, and other oversight activities. Compare that 184 to the 1,690 staff overseeing cases now for 26,000 children.

Third, HHSC claims that the state will control providers through licensing, and notes increased penalties and 63 new staff for licensing regulation. Licensing, however, relates to violations of law and regulations, not to case management decisions about what is best for an individual child and family. Again, as a practical matter, the state lacks anywhere near enough licensing staff. Licensing has been woefully understaffed for years, which in part explains so many of the problems in private

facilities. The addition of 63 new staff is a drop in the bucket, particularly when one takes into account the increased outsourcing of all foster and adoption services.

Regional Pilot or Statewide Roll Out

HHSC has not produced a clear plan for case management privatization, leaving critical questions unanswered: Who will be responsible for what? How much additional resources are needed for adequate contract oversight? How will children and families be safeguarded? With over 26,000 children relying upon case management in a program that costs hundreds of millions of dollars, the longest description that HHSC has produced of how privatization would work is only a few vague paragraphs. The legislature is simply in no position to assess whether HHSC can successfully privatize case management. This argues for the Senate pilot approach.

The Senate proposes to authorize (not mandate) a regional pilot of case-management privatization. This approach allows the many difficult legal and practical questions discussed in this memo to be resolved before proceeding with statewide outsourcing of case management. In contrast, the House proposal would mandate privatization, even in the face of all the difficult legal and practical questions discussed in this memorandum, by September 2011.

There are four strong arguments for a pilot:

First, under the Senate pilot, each chamber will retain independent control of this experiment. If either chamber determines that privatization was a mistake, then the experiment stops. Under the House plan, if one chamber determines that privatization was a mistake, that chamber would have to pass a bill, get the agreement of the other chamber, and get the agreement of the governor to stop the experiment. *Why would either chamber give up its constitutional right to exercise its independent judgment?*

Second, under the Senate pilot, the state will get a better deal from private companies. If private companies have to sell the state on privatization by making the pilot a success, then the state will get the best possible performance at the lowest possible price. Under the House plan (which requires a roll-out by 2011 and can only be reversed by three-way agreement), private companies would have the state over a barrel in terms of negotiating price and performance. *Why would the legislature weaken the state's bargaining position?*

Third, under the Senate pilot, the state will get more out of its public workforce. DFPS Commissioner Carey Cockerell can say to CPS caseworkers: "This is an open competition between public case management and private case management; show the legislature what you can do." Under the House plan, the state's message to its dedicated public workforce would be that it had failed and was to be phased out within five years. In the meantime, some 26,000 children would have to rely on this demoralized workforce. Predictably, both caseworkers and supervisors would begin to move to new jobs, undermining the care of our children. *Why would the legislature undermine or dismantle our public system before it knows if it is possible to create a private system that does better?*

Fourth, under the Senate pilot, the state has a chance to evaluate the unknowns, the unintended consequences. Privatizing case management presents both known unknowns and unknown

unknowns. Here is an example of a known unknown: Right now the 1,690 conservatorship staff that HHSC proposes to terminate to fund privatization actually back up investigation staff across the state. These case managers do night duty and weekend duty and help when investigation staff are stretched too thin. What happens to the state's capacity to investigate and respond when it loses these 1,690 staff? Unintended consequences are an important reason to pilot.

The arguments against a pilot are unconvincing:

If we pilot, then the "bureaucracy" will make it fail. This may be true of pilots that do not have the support of the bureaucracy. In this case, the administration supports privatization of case management. More important, because this is a turn-key contract, the cooperation of the "bureaucracy" is not needed. An entire county or region would be turned over to an independent administrator. If the private contractor can't make its own system work, it won't be the fault of the "bureaucracy."

If we pilot, companies won't invest. Again, the nature of the proposed pilot makes this a false argument. The Senate plan allows an entire region to be piloted. If companies were willing to invest in Kansas, with about 5,000 children in care, they will be willing to invest in a county such as Harris County with about 4,000 children in care or one of the regions of Texas, some of which are much bigger than all of Kansas. Of course, an entrepreneur always bears the risk that the party with whom he contracts won't renew because of poor performance. Certainly you do not want to lock the state into a contract under which children are at risk, particularly a contract for a service in which the provider claims to be hesitant to invest.

Conclusion

I have serious reservations about the wisdom of privatizing case management. My reservations are shared by many of your legislative colleagues. The Senate was so opposed to privatizing case management that Senator Van de Putte withdrew Floor Amendment No. 12, which would have privatized all case management, and instead co-sponsored Senator Lindsay's Floor Amendment No. 13, which calls for a pilot. A substantial number of House members expressed reservations about privatizing case management by voting against tabling the debate on Rep. Coleman's amendment to strike case-management privatization from the House plan. Given this legislative history, and the questions raised in this memorandum, I respectfully submit that the better conference committee reconciliation would be to pilot case management.