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ATTORNEY GENERAL OF WASHINGTON

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June 9, 2010

The Honorable Leonard Costello (Ret.)
Denise Revels Robinson, Assistant Secretary
Child Welfare Transformation Design Committee
c/o Julie Dunnington
Partners for Our Children
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Seattle, WA 98195-9476

Dear Judge Costello and Ms. Robinson:

It has been brought to the attention of the Attorney General's Office through our participation on the Child Welfare Transformation Design Committee (CWTDC) that the Committee has a number of legal questions related to this Office's role in providing legal services in dependency and termination matters where a private contractor is handling the underlying case. Because the answers to these questions may be fundamental to the direction of the Committee's future work, we wanted to provide our Office's interpretation of the law. In short, while the questions posed raise important practical considerations in designing a new child welfare system, the answers to the questions do not impose legal barriers to implementing SSHB 2106.

You have posed several questions which arise out of the application of Section 7 of SSHB 2106, codified as RCW 43.10.280, which is set forth below:

The office of the attorney general shall provide, or cause to be provided, legal services in only dependency or termination of parental rights matters to supervising agencies with whom the department of social and health services has entered into performance-based contracts to provide child welfare services as soon as the contracts become effective.

Your questions are summarized as follows:

1. Is representation by the Attorney General's Office in dependency and termination matters an unconstitutional gift of public funds where the state has contracted with a private supervising agency to manage the underlying case?

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2. Does representation of a supervising agency by the Attorney General's Office, as described in question 1, create an inherent conflict of interest given that the Attorney General's Office also represents the Department of Social and Health Services in the process of contracting with supervising agencies and in exercising the ultimate "care and placement authority" as required under federal law?
3. Will representation by the Attorney General's Office in dependency and termination matters, as described in question 1, create an attorney-client relationship with either the supervising agency or the private social worker involved with the case?
4. Would existing statutes, including RCW 4.92.030, RCW 4.92.060, and RCW 4.92.075, create a right of representation and indemnification for supervising agencies and private social workers employed by them?

By way of background, the legal framework for the role of the Attorney General's Office is summarized as follows. The Washington Attorney General is an independently elected constitutional officer. Const. art. III, § 1. The Attorney General is designated as "the legal adviser of the state officers." Const. art. III, § 21. With limited exceptions, the Attorney General statutorily is authorized to represent the state and all state agencies, and to prosecute and defend all civil actions on its behalf and in which it is a party. RCW 43.10.030(2); (3); .040; .045. In addition, "[t]he attorney general shall . . . [c]onsult with and advise the governor, members of the legislature, and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers." Accordingly, in large measure, the Attorney General is the exclusive source of legal advice and representation for state officers and agencies. *See also State v. Asotin Cy.*, 79 Wash. 634, 638, 140 P. 914 (1914) (describing the attorney general as the legal representative and counselor of the state).

In addition, the Attorney General has the specific legal responsibility to represent the state in dependency and termination proceedings under Chapter 13.34 RCW. The legislature reformed the state's juvenile justice system in 1977, and the state assumed much of the responsibility for child welfare services previously provided by the various counties. RCW 13.04.093 was enacted and states in relevant part: "It shall be the duty of the attorney general in contested cases brought by the department to present the evidence supporting any petition alleging dependency or seeking the termination of a parent and child relationship or any contested case filed under RCW 26.33.100 or approving or disapproving out-of-home placement."

Your first question relates to the provision of Washington's Constitution prohibiting the gifting of public funds. The prohibition states that the "credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation." Const. art. VIII, § 5. You question whether SSHB 2106 violates this constitutional provision because it states that the "office of the attorney general *shall provide, or cause to be provided, legal services* in only dependency or termination of parental rights matters *to supervising agencies.*"

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(Emphasis added). The primary test employed by Washington courts to determine whether an expenditure of public funds violates this prohibition is whether the funds have been expended to carry out a fundamental purpose of government. If the answer to that question is yes, then there has been no violation of the prohibition. *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1997).

Prosecution of dependency and termination proceedings and any related ongoing representation in matters involving social workers – whether public or private – is a fundamental purpose of government. Regardless of the specific model adopted by the state for the provision of child welfare services, the state is required to retain placement and care authority over children in dependency proceedings. In order to be eligible for federal reimbursement for foster care related expenses, federal law requires that placement and care authority over children must remain in a public agency. § 472, Title IV-E, Social Security Act, 42 U.S.C. §672(a)(2)(B). Placement and care authority is described by the federal Administration of Children and Families as follows:

A major responsibility in placement and care is the development of an individual case plan for the child, including periodic review of the appropriateness and suitability of the plan and the foster care placement, to ensure that proper care and services are provided to facilitate return to the child's own home or to make an alternative permanent placement. The case plan activities, such as assessing family strengths and needs, identifying and using community resources, and the periodic review and determination of the continued appropriateness of placement, and the efforts to finalize a permanency plan may be carried out by agencies from which services are purchased. However, the ultimate responsibility for ensuring that there is an appropriate plan of care, case review, and activities to improve the home of the child or identify and work toward a permanency plan for the child remains with the State agency identified in the State plan as having responsibility for the placement and care of the child. Thus, the State agency must actively supervise the various activities performed by the contractor or other agency. This supervision includes case plan assessment and case review functions and adherence to the requirements of the Act, Federal rules, regulations and policy interpretations in operation of the foster care maintenance program. The State is ultimately responsible for proper operation of the foster care program.

§ 8.3A.12, *Child Welfare Policy Manual*, Administration of Children and Families, Department of Health and Human Services (DSHS). This has also been addressed in a different section of SSHB 2106, which specifies that “children whose cases are managed by a supervising agency remain under the care and placement authority of the state.” § 5 of SSHB 2106, codified as RCW 74.13.364.

In addition to being a federal requirement, the responsibility of the state to retain placement and care authority is also consistent with the fact that state involvement in child welfare matters advances a compelling state interest. When the state acts to protect a child from child abuse or

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neglect and invokes the jurisdiction of juvenile court, it is acting pursuant to a well established “parens patriae right and responsibility to intervene to protect the child.” *In re Sumey*, 94 Wn.2d 757, 621 P.2d 108 (1980); RCW 13.34.020. In filing dependency, termination, and guardianship proceedings under Chapter 13.34 RCW, the state is acting in accordance with its compelling interest. *In re Dependency of I.J.S.*, 128 Wn. App. 108, 114 P.3d 1215, *review denied*, 155 Wn.2d 1021 (2005). Representation of the state’s interests in these proceedings by the Attorney General’s Office clearly serves to carry out a fundamental purpose of government, regardless of whether the social worker assigned to the case is employed by the state or a private agency under contract to the state. Under these circumstances the test is met, and there is no gift of public funds whether the Attorney General’s Office provides or causes to be provided representation in dependency and termination matters where a private agency is managing the underlying case.

Your second question relates to whether there is any inherent conflict of interest created by § 7 of SSHB 2106, given that the Attorney General’s Office not only provides representation in matters being handled by a private supervising agency but also represents the DSHS in the contracting process and in its exercise of ultimate care and placement authority. Just as with the gift of public funds analysis, the essential fact is that the Attorney General’s Office, at all times, is representing the interests of the state of Washington. Your third question is tied to this same analysis, as it relates to the nature of the attorney-client relationship created by virtue of representation in dependency and termination matters.

As noted above, the client of the Attorney General’s Office is viewed properly as the state of Washington. Whether an assistant attorney general (AAG) is in court with a DSHS social worker or with a private supervising agency social worker, the AAG does not have an attorney-client relationship with the individual social worker or with any individual in the agency’s chain of command. The social workers, whether employed directly by the state or providing case management services pursuant to contracts with the state, are furthering the state’s interests in child welfare. The DSHS holds the attorney-client privilege and relationship with the Attorney General’s Office as the state agency vested with placement and care authority. An AAG’s conversations with the social worker or other individual client representative are privileged from disclosure to third parties, but are not privileged as to management within DSHS. DSHS has the attorney-client relationship and holds the privilege and is the only entity that can waive the privilege.

Under SSHB 2106, the state will remain directly responsible for child welfare investigations and “emergency shelter care functions.” § 3 SSHB 2106, codified as RCW 74.13.360. Presumably it will continue to be the petitioner in most, if not all, dependency petitions filed in juvenile court and will transfer case management responsibilities to a private supervising agency only after a petition has been filed. § 22 SSHB 2106, amendment to RCW 13.34.065. While the CWTDC has not yet addressed the issue of who will be responsible for the decision to file a termination petition in cases assigned to private supervising agencies, in most jurisdictions that have privatized their child welfare systems, the decision to file a termination petition either remains

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vested with the public agency or the agency is involved with the decision through case staffing or other direct review. “Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems”, *Child Welfare Privatization Initiatives, Topical Paper #3*, March 2008, U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. In addition, the Attorney General’s Office will maintain the same independence it has in all cases to determine whether a proposed petition or other legal action requested by an agency or individual social worker meets appropriate standards of legal sufficiency.

It is our conclusion that § 7 of SSHB 2106 does not create an attorney-client relationship between the Attorney General’s Office or individual AAGs and either private agencies who provide child welfare case management services pursuant to contracts with the state or the individual social workers employed by those agencies. To the extent that the language of the statute may be subject to misinterpretation regarding the provision of legal services “to” a private agency, the CWTDC may want to consider recommending a technical or clarifying amendment to RCW 43.10.380. However, SSHB 2106 as currently written must and can be construed as explained herein so as to remain consistent with the state Constitution and the other statutes discussed above. As a practical matter, it may be useful for contracts between DSHS and private supervising agencies to clearly define these roles so that there is not a misapprehension of the role of the Attorney General’s Office in these cases.

Further, because the Attorney General’s Office is only representing the state’s interests in dependency and termination cases, there would not be an inherent conflict of interest created by § 7 of SSHB 2106. It would not be appropriate for the representation to address any extraneous matters such as business or contractual issues between DSHS and the private supervising agency, and it would be incumbent upon the private agencies to obtain private legal counsel for such matters. Indeed, SSHB 2106 makes it clear that the Attorney General’s Office provides legal services related to the work of a private supervising agency *only* in dependency and termination matters.

Your fourth question relates to the scope of RCW 4.92.030, .060, and .075. The answer to the question also requires reference to RCW 4.92.070 and .130. As contractors of the state, the supervising agencies and their employees are not entitled to request defense under RCW 4.92.060 or receive defense by the Attorney General’s Office under RCW 4.92.070. Nor may a judgment against the supervising agency or its employees be satisfied by the state under RCW 4.92.075. Each of those provisions explicitly provides defense and indemnification to state officers, employees and volunteers. The statute does not authorize indemnification or defense of contractors.

This limitation finds support in RCW 4.92.130, which establishes the self-insurance liability account (SILA) financed through assessments against state agencies. Consistent with the provisions in RCW 4.92.060, .070, and .075, the SILA is used to satisfy judgments against officers, employees, and volunteers and to fund their defense. Blurring the traditional distinction

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between contractors and employees could have significant ramifications for the SILA and for state government in general. State contractors are typically required to provide proof of insurance as a condition of contracting with the state and may be required to name the state as an additional insured under such insurance policies. Issues related to insurance and risk allocation should also be addressed in the contracting process.

We hope that the Committee finds our interpretation of the law helpful. This is not a formal opinion of the Attorney General, but it is intended to be shared with members of the Committee and legislature and others concerned about the questions discussed herein. We know that, during the course of its work, the Committee will be presented with many legal issues, small and large, and the Attorney General's Office stands ready to assist you by providing legal advice and guidance.

Please feel free to contact me at anytime.

Sincerely,



CHRISTINA BEUSCH
Deputy Attorney General

CB:kw

cc: The Honorable James Hargrove, Washington State Senator
The Honorable Ruth Kagi, Washington State Representative
Secretary Susan Dreyfus, Department of Social and Health Services