

Overview of Legal Issues & Examples from Other Jurisdictions

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Purpose of This Document

2SHB 2106 requires DSHS to contract for child welfare services (including case management) in two demonstration sites. Among the case management duties that will transition to the private agency are:

- performance of court-related duties, including preparing court reports and attending hearings; and
- ensuring the child is progressing toward permanency within state and federal mandates, including the federal Indian Child Welfare Act.

The Legal/Practice Advisory Committee of the Transformation Design Committee (TDC) is charged with answering key questions related to how private agencies will relate to the courts and handle their legal case management responsibilities.

As one of the two national experts on the TDC, I was asked by several members of the Advisory Committee to review the research and describe how other states and jurisdictions that contract for case management have handled legal concerns and court-related duties.

Overview of Legal Issues

While all children are dependent on others for their care and well-being, children in the custody of the state are uniquely dependent upon government agencies and the courts. The public system must ensure that all needs, including physical and behavioral health needs, are properly provided.

Regardless of the degree to which case management is privatized in a given state, judges have the final authority to make decisions about the need for placement of a child, and they are charged with approving plans for a child's care when the child is under protective supervision. The courts also serve as the final decision-maker related to achievement of the permanency goal for the child: courts must approve plans to return children to their parents, place children permanently with relatives, or free children for adoption and place them with new families. Courts often also oversee plans related to youth's discharge from out-of-home care at the age of majority.

The issues related to the legal protections for the child and the ultimate authority of the courts are important considerations when designing performance- or risk-based contracts that include the transfer of case management from public agency workers to private agencies.

Although the federal government has a policy indicating that inherently government functions should not be contracted out, federal law has not addressed the nature of state public agency/private agency child welfare contracts. Instead, child welfare public-private contracting has been governed by state law and regulation (Federal Register, 2005).

Three key legal issues emerge when states consider privatizing case management for some or all children: the interpretation of the federal requirement that the state child welfare agency retain “overall responsibility” for child welfare; the allocation of responsibilities for court related matters; and the development of appropriate mechanisms to address potential state and private agency liability issues.

Interpretation of “Overall Responsibility” for Child Welfare

In order to remain in compliance with federal regulations and meet the State’s obligations under its federally-approved Title IV-E plan, public child welfare agencies must maintain “overall responsibility” for the care and placement of children in out of home care.

Different states have come to different conclusions about how “overall responsibility” can be maintained when case management is contracted out. The federal government has remained silent. ACF has not, at this point, issued policies that specifically address the level of authority and decision-making that a public agency must retain when contracting for services that include case management.

“The State is *ultimately responsible* for proper operation of the foster care program.” ACF Child Welfare Policy Manual (8.3A.12)

The ACF Child Welfare Policy Manual (8.3A.12 TITLE IV-E, Foster Care Maintenance Payments Program, Eligibility, Responsibility for Placement and Care) states that the public child welfare agency has the “ultimate responsibility” for the “proper operation of the foster care program.” The full text from this section of the Child Welfare Policy Manual reads:

“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.”

Rules within titles IV-B and IV-E allow States to make their own decisions about how to assign certain responsibilities to private providers through contractual arrangements. Public agencies that have contracted for case management have not interpreted “overall responsibility” as encompassing the decision-making authority over each decision in each child’s case. Instead, these jurisdictions have viewed “overall responsibility” as encompassing the retention of responsibility for ensuring, through carefully designed monitoring and oversight systems, the safety, well being and permanency of children in the agency’s legal custody.

Many states or jurisdictions have transferred significant if not primary case management authority to private providers. Kansas, Florida, Missouri, and Illinois, for example, maintain that the federal requirements for states to have “overall responsibility” for cases can be fulfilled through administrative oversight, quality assurance, and monitoring. Several direct service contracts in Washington DC and New York City have moved in this direction as well. In these states or jurisdictions, a public agency caseworker does not review day-to-day case management decisions for some contracts; instead, contract monitors from the state or county monitor large numbers of cases and/or evaluate overall contractor performance (ASPE, Topic Paper 3, 2008).

In summary, I am not aware of any federal authority that states that case management functions are non-delegable; similarly, I am not aware of any federal authority that states unequivocally that these functions are delegable for purposes of federal reimbursement. Given the absence of federal guidance it is advisable for Washington to work with the regional ACF office and, at a minimum, keep them informed of changes that will occur in the demonstration sites.

It may be that the issue in Washington is not whether or not privatization of case management is allowable under federal law (as that seems clear given the number of states that currently contract for case management) but rather that it is

not permissible under existing state law. If Washington has laws or rules that do not allow the public agency's case management role to be delegated to a private agency, the law would need to be amended to allow the state to move forward with the demonstration pilots.

Court Related Matters

Another area of concern relates to the court-related activities inherent in child welfare practice. The most common issues that arise in this area are:

- Whether private agency case managers can (or should) be allowed to participate in processes involving the filing of petitions that seek decisions on the part of the court regarding children's continued stays in foster care, their return home or placement with relatives, or the termination of parental rights.
- Whether private agency caseworkers can (or should) appear in court in cases which they manage but for which the State agency has legal responsibility.
- Whether attorneys representing the State can (or should) represent private agencies.

As with the interpretation of "overall responsibility," there is no policy guidance from the federal government on these issues. In an effort to address these concerns, some States have designated roles for both the private and public agency caseworkers. In these systems, it is common to find that the private agency case managers develop case plans with families and prepare all court related documents; public agency caseworkers review these documents prior to or at the time they are presented to the State's attorneys for filing; and public agency caseworkers attend all court hearings, either in place of or with the private agency case managers. Although these systems involve costly duplication, they are not uncommon, particularly in the early stages of a privatization initiative. Kansas, as the first State to fully privatize all services with the exception of investigations, for example, maintained a public presence at all court hearings on foster care and adoption cases through the first few years of the privatized contracts.

Court liaisons, based in the private or public agency, can support effective partnerships with the court and ease the transition of responsibilities when case management services are contracted out.

Other states, however, have fully delegated these functions to private agencies. Florida, for example, delegated all court related work to its contracted Community-Based Care (CBC) agencies. Florida maintained legal representation in each jurisdiction as it was prior to privatization (in some CBC sites, it is attorneys with the Attorney General's office; in others, it is attorneys within the Department of Children and Families). In some Florida jurisdictions, private agencies have created legal liaison positions to ensure smooth working relationships with attorneys and the courts. The liaisons track filing deadlines, review court documents prior to filing, and monitor the performance of the private agency's case managers in court duties.

It is important to note that in Florida as in other jurisdictions with privatized case management, case managers and their supervisors play key roles in planning and making decisions for children, but it is still the courts that make the final decisions as to whether a child will enter foster care and if so, the permanency outcome for the child. Attorneys prosecute cases; the case manager is a witness who provides reports and at times is called to testify. The same realities hold true for case managers in both public and private agencies. This point was underscored by Andry Sweet, Vice President of Operations for Children's Home Society of Florida,

"Our [private agency] case managers do not make legal decisions on behalf of children and families. The State of Florida retained Children's Legal Services (CLS), and it is the attorneys that present the cases in court. It is ultimately the judge who makes decisions on reunifications, termination of rights and all other judicial orders impacting the family. Our case managers in most cases are co-located with CLS and meet in staffings just as state employees used to do to review the cases and recommend an appropriate course of action to the judge based on the parents' compliance with the case plan. Our role is to work directly with families through a case planning process and make recommendations to the court based on our observations and interactions with the parent(s) and child(ren). This is no different than the role public employees played in the child welfare system in Florida before privatization."(TX Alliance, 2008)

In the fall of 2005, one of the first research activities conducted by the federally-funded national resource center that deals with privatization issues, the Quality Improvement Center on Privatization in Child Welfare (QIC PCW) was to estimate the extent to which states have privatized case management and core

child welfare services such as foster care and adoption and to examine among other things how states were handling various court-related responsibilities. Interviews were held with administrators in seven jurisdictions with privatized case management systems and the QIC-PCW reported that each had systems in place to ensure that decisions were reviewed by appropriate concerned parties, with designated attorneys presenting the state's case, and the courts playing the dominant decision-making role. As illustrated by the following examples, state approaches to handling various court-related activities vary, reflecting differences in how each handled these responsibilities prior to contracting for case management:

Transitioning Cases to Private Providers

One of the first responsibilities assigned to the private agency with case management responsibilities is the case assessment. How this function is carried out will be influenced by how the case is transferred from the public intake and investigation unit and the extent of direction given by state staff at that time. In all but one of the seven jurisdictions contacted, there was some form of face-to-face meeting between the investigative staff and the private agency assigned to the case, to discuss the family's strengths and needs and initial case planning.

The one jurisdiction where face-to-face meetings for case transfers are not mandated, Franklin County, Ohio, reported that if either the public or private agency worker involved with the case believes that there is a need for a meeting, one is called. In all other jurisdictions, respondents discussed some form of case staffing at, or near, the time of case transfer. In Missouri for example, there is a Family Support Team meeting held within 72 hours of the child coming into care. For the three regions in MO that use private providers for case management services, these meetings include the investigative staff, the new private agency case manager and supervisor, the child's Guardian ad Litem (GAL), the family and any informal supports the family wants to include. The meetings are held to discuss the reason for removal and the initial case plan, including placement and the visitation schedule. Similar meetings are held at 30, 60 and 90 days after placement and every six months thereafter. Public agency "oversight specialists" attend each six month permanency meeting to review and sign off on the case plan. (ASPE, Topic Paper 3, 2008).

Assessing Child and Family Needs

A second related area that is transferred to the private agency is the formalized assessment of child and family needs. The first round of Child and Family Services Reviews found that states did not perform as well as expected on

the quality and depth of child and family assessments and service planning (US DHHS, 2004). In discussions with county officials, the QIC-PCW explored which workers, those in the public or private agency, conduct the case assessment beyond the original safety assessment completed during the investigation.

Several sites explained that this was a slightly blurred function between systems. The Kent County, Michigan official explained that the assessment begins with the public agency intake worker and investigative worker but that the ongoing services team within the private agency was responsible for completing the full child and family assessments.

Individuals from Circuit 10 in Florida described a multi-tiered approach to case assessment and transfer activities. As background, Florida has gone farther than any other state in transferring day-to-day case management authority to the private provider community. In Florida, the state child welfare agency retains responsibility for child protective investigations, program oversight, and in some jurisdictions child welfare legal services. The private community-based lead agency receives the case during the investigation when it becomes clear that ongoing services (either voluntary or court ordered) are needed. The lead agency retains the case until the case is closed. The responsibilities of the private agency include placement and service delivery functions in addition to case management.

In Florida's Circuit 10, public agency protective investigators conduct an initial safety assessment during the investigative process and, when indicated, a home study and risk assessment prior to placement of a child in the home of a relative or non-relative. Protective Investigators also initiate the "comprehensive behavioral health assessment" which is completed on every child sheltered away from a parent. The referral for a comprehensive behavioral health assessment must be completed within 7 days of the shelter hearing and the assessment is completed within 24 days of the referral. The results of the comprehensive behavioral health assessment are shared with the private provider in an effort to better address the physical, educational, environmental and mental health needs of the child and family.

Cases and case management authority are transferred to the private, lead agency at an "early intervention staffing." This staffing is designed to ensure that the appropriate services for the child and family are identified and steps to ensure early engagement of the family are outlined. The Protective Investigator presents the case to the private agency and a standing committee of treatment professionals. The group reviews and assesses the service intervention needs of the child and family and provides advice about appropriate interventions and

permanency options. The private agency has a Staffing Master who facilitates the meeting and takes the lead during the staffing in developing an initial service plan. This plan is used by the case manager as a precursor to the initial case plan that will be developed with the family and submitted to the Court for approval. Decisions are made during the staffing regarding the family's risk level, intensity of services, identification of absent parents and frequency of contact needed to ensure continued safety.

Because the information on the comprehensive behavioral health assessment is not available at the time of initial placement, a "placement assessment" which gathers information on mental health and the delinquency history of the child among other things, is conducted by the Placement Unit within the private agency prior to placement of a child in a licensed setting.

Once the case is transferred to the private agency, the agency is responsible for all subsequent child and family assessments.

Selecting Client Services

The literature on child welfare privatization suggests that of all case management decisions and functions, the most commonly transferred to private providers involves selecting and coordinating client services (Westat & Chapin Hall 2002; McCullough, 2003). This was supported in the QIC-PCW report of the seven sites. In six of the seven sites, site officials reported that the private agency makes decisions about the appropriateness of services to be provided or purchased for clients. In two instances, county officials volunteered that private providers needed to get authorization for services not typically funded through child welfare or Medicaid payments, including specialized therapies or for specialized events such as surgery.

Determining Level of Placement

Officials in six of the seven sites reported that private providers had primary case management authority to determine level of placement for clients, subject to periodic review or review of certain placements by a public agency worker and the courts. For instance, in the District of Columbia, private providers make most placement decisions but must get permission to use a residential treatment facility prior to placing the child. (In this case, the public or private agency worker must first get authorization from the city's Department of Mental Health before placing children in these facilities.)

In Sedgwick County (Wichita), Kansas, after private agency workers were given primary authority for placement decisions, the county official explained

that during intake and investigation, when out-of-home placement becomes likely, public agency workers look for relatives with whom to place the child(ren). If relatives are identified by the time of referral to the private agency, public agency workers encourage the private providers to pursue these leads.

Setting Visitation Schedules

Contracts often specify minimum standards for visitation that the private agency must meet. In the District of Columbia, for example, the implementation decree associated with the court settlement the agency operates under specifies that if the plan is reunification, visitation between parents and children must occur weekly and visitation between siblings must occur twice per month. If the private provider cites extenuating circumstances such as the child not wanting to visit the parent or if the parent presents a clear threat to child, then the private provider must document these issues and seek a court order changing pre-established visitation schedules.

Deciding to Return Home or to Terminate Parental Rights (TPR)

All sites interviewed by the QIC-PCQ concurred that the decision to return a child home is made by the courts. In most cases, the private agency develops a recommendation, and in some sites, there is a case staffing with the public agency worker prior to the hearing.

Similarly, all sites discussed the fact that it is ultimately the court's decision to terminate parental rights. Kent County, Michigan described a process where the private agency worker makes "suggestions", but the public agency worker makes the determination of what will be presented to the court. In Florida's Circuit 10 and Milwaukee, it is the private agency worker that puts forth this recommendation to the courts with limited public agency involvement.

Both Franklin County, Ohio, and Sedgwick County, Kansas use some form of a formalized case staffing to reach agreement about the appropriateness of the termination. In Ohio, the private agency agency submits a recommendation for TPR to the public agency. This is followed by a meeting that includes the attorney representing the state and public agency director as well as the private agency staff to review the case, the recommendations and the criteria for TPR.

In Sedgwick County, Kansas, following the private provider's recommendation for TPR, there is a permanency staffing involving the private agency case manager, two co-chairs who are independent of the case (one from the public and one from the private agency), therapists, the representing attorney (from either the public agency or Assistant District Attorney) and the Guardian

ad Litem. The group reviews whether reasonable efforts to return the child home have been implemented and together, decide the appropriateness of TPR. Once this is decided, the group considers options for adoption.

Presenting Case Plans in Court

In all seven sites, for hearings held after the detention or protective custody hearing, a private agency case worker presents the case plan in court, with some exceptions described below. In several cases, a public agency worker also attends the hearings. For instance, in Sedgwick County, Kansas while private providers present all case plans in court, a public agency worker may also present to discuss policy and procedural issues if they arise (e.g. the adoption assistance program and other funding matters). This public agency “monitor,” who carries a caseload of approximately 140 families, is familiar with the case plan if other issues arise. Also, in Franklin County, Ohio, if the decision is made to terminate parental rights, it is a public agency worker that presents the case in court with the state’s attorney. In Sedgwick County, Kansas, both the private and public agency workers present the case for termination to the judge.

In Kent County, Michigan, the private agency worker presents the case in all quarterly hearings held subsequent to the initial hearing. The site official interviewed explained that this process had evolved over time because judges once expected a public agency worker to attend all hearings (as they do in other parts of the state.) However, if the judge has questions or concerns about the case, they can request that a public agency worker be present. Like Kansas, these public agency case monitors carry large caseloads and are familiar with the case. It was noted that there are instances when the private agency requests that the public agency worker attends a hearing in anticipation of questions or concerns from the bench. In these instances, the public agency worker’s primary role is to “reassure” the judge that the agencies concur on the case plan decision.

Attorneys Representing the State’s Case

States use various arrangements to provide legal representation for the state’s case. Attorney’s playing this role in the seven jurisdictions reviewed by the QIC-PCW ranged from District Attorneys (WI), to agency attorneys (FL), and Assistant Attorneys General (DC). In some instances, the attorney assigned changes at different points in the case, for instance, in Sedgwick County Kansas, the state’s case is first represented by the County’s Assistant District Attorney at the disposition hearing, and then by the public agency attorney for all remaining hearings.

All but two of the sites consulted (Florida's Circuit 10 and St. Louis) discussed instances when the private agency also brought its own attorney. In Milwaukee, private agencies bring attorneys when there are divergent interests between the public and private agency. In Kansas, it was reported that the only time a private agency brings its own attorney is when the worker is in contempt of court, which was described as a very rare event. At these times, the only role of the private agency attorney is to provide consultation on the private agency's actions, not to present information on the case plan.

Among the initiatives consulted, only Franklin County Ohio used private agency attorneys for child welfare proceedings on a regular basis once the case is disposed. These attorneys are responsible for representing the caseworker and filing motions. However, if the decision is to terminate parental rights, the public agency attorney is solely responsible for representing the case in court. Public and private agency legal staffs meet quarterly to discuss issues as they arise on both a case-level and policy basis.

The Judicial Perspective

It is important for states to engage the Judges and periodically assess satisfaction when decisions are made to privatize case management. Missouri was one of the states selected by the QIC-PCW for a demonstration project. The purpose of the project is to ensure quality in contracted services. As part of the required independent evaluation of the demonstration, Paul Sundet at the University of Missouri conducted focus groups and interviews with judges and attorneys to assess their level of satisfaction with the private foster care agencies who had assumed case management duties. He synthesized his findings: (personal email 4/27/10)

"From my contacts I would say that the judges (and, in fact, all judicial officers) do not see any particular or unique conflict in privatization of care quite simply because as far as they are concerned the ultimate case responsibility still rests with the state agency. Typical of responses, a St. Louis judge said, "That is the Children's Division chair in my court - all I require is that the person sitting in it is professional and competent - the label is unimportant." A Kansas City judge put it this way. "It's the CD administrator that is on my speed dial."

The general consensus was that contract care is just another form of resource mobilization being used by the state agency. When the court orders medical care or therapy or whatever, the expectation is that the state agency submits a plan to achieve the actions in the court order but

that does not mean that the agency personnel themselves will execute all of the actions themselves. The fundamental safeguard is in the contract process which provides that all contractors will strictly abide by the policy, practices and standards in the state Children's Division Manual of Practice.

In Missouri, it is the function of the Oversight Specialists to facilitate compliance, investigate and report on non-compliance and initiate corrective action plans. There have been a few instances in which judges have found private agencies to be deficient and they have acted exactly as they do when the case is being carried by the state agency with the one exception that the judge may order that children no longer be placed with that facility. These situations have almost always been related to matter of due diligence and the threat of a contempt citation is levied against the party who has the implementation responsibility as well as the state agency administrator responsible for contract implementation.

In Missouri the judges have been very supportive of private agency care of foster children, seeing the advantages of additional resources and a highly therapeutically trained staff. Their major reservations had to do with the implementation phase in which private agency staffs often were inadequately trained in policy, procedure and legal aspects of foster care. There was an assumption that because they were experienced clinicians they didn't need extensive orientation and that proved to be false. Now, a cadre of experienced workers and supervisors has built up in the private agencies."

In summary, there is no evidence that courts abdicate their authority or responsibilities when private agency workers assume case management duties. I am aware of no federal requirement that only public agency staff may prepare court documents or appear in court on behalf of the State; similarly, I am not aware of federal guidance that states unequivocally that these functions can be delegated. I have only the experiences of other jurisdictions on which to draw.

It is important for Washington to have explicit language in its procurement documents and contracts that specify how all legal matters will be handled, including defining responsibilities for court hearings and how legal representation will be provided. One example, an excerpt from the Missouri contract with private agencies, is attached. Examples from other states can be provided if needed.

Liability for the State and Private Agencies

When states contract for case management services they need to consider liability issues that relate to eligibility determinations, potential loss of federal funds, and risks associated increased liability for private agencies.

Eligibility Determination

In studies of the privatization process in Kansas, researchers found that one area overlooked in the initial round of privatization reform was the specification of the contractor's role in determining eligibility for federal funding—namely title IV-E foster care maintenance and Medicaid case management funding. Following privatization, the state noted that the information needed for this function rested with private providers. Yet private providers—focused on delivering child welfare services within negotiated reimbursement rates and schedules—viewed this as an additional burden that fell outside their contracts as originally negotiated (Ensign and Metzenthin, 2007).

Under federal rules, only state agencies can make the final determination of a child's eligibility under title IV-E and submit claims to the Federal Administration for Children and Families for reimbursement. Five of the seven sites interviewed by the QIC-PCW described systems where public agency staff continues to carry out most of the functions for determining eligibility for Federal IV-E funds and Medicaid. While private agencies may supply the state with support information and documentation, it is the public agency that determines eligibility and prepares the paperwork for Federal claims. In the two remaining sites, private agencies played larger roles in this process. In Milwaukee, Wisconsin, there is a separate private contractor that completes eligibility determination based on information received from the private agency case manager and State public agency staff are responsible for final approval of submissions. In Florida's Circuit 10, the private lead agency has an eligibility determination unit that focuses on title IV-E claims. In this circuit, the state co-located two public agency staff in the private agency offices that focus on determining Medicaid eligibility. Public agency staff also review and approve information collected by the private agency staff for title IV-E claims.

Potential Loss of Federal Funds

Concerns are sometimes raised that contracting for case management might jeopardize the State's ability to claim federal reimbursement under Title IV-E. At issue is whether a private agency case manager would be able to

perform the same functions as a public agency worker, thereby generating the same potential to claim federal reimbursement for allowable expenses. Evidence would suggest that states that have privatized case management for some portion of the caseload have developed systems and procedures to support federal claims for work done by private agency case managers.

Florida, Kansas, and other states with privatization initiatives have undergone subsequent federal reviews of both programs and their Title IV-E eligibility determination and claiming practices. There is no evidence that these states have lost Title IV-E funds as a result of privatization. Nor is there evidence that the federal government has put these states on notice that their practices and policies fail to comply with Title IV-E regulations.

Private Agency Liability & Sovereign Immunity

A third area relates to professional liability that private agencies incur as they assume case management responsibility. Typically, private agencies do not enjoy the level of immunity from litigation that public agencies hold (sovereign immunity). In all states in which I have worked, private child welfare agencies are required to have specified amounts of liability insurance coverage and have performance bonds and do so.

The combined impact, however, of dramatically increasing premiums in the child welfare sector and the assumption of increased levels of responsibility for children and families has raised a number of questions as to how public and private child welfare agencies can and should address professional liability issues.

Discussions between the public and private agencies on issues of professional liability and immunity are essential.

In several states, the proposal has been made that states confer sovereign immunity to agencies under contract with the state for child welfare activities. Legislative language has been proposed, for example, in Illinois which provides:

“If the Department contracts with a private child welfare agency to provide child welfare services or to provide the arrangement of child welfare services, then the private child welfare agency and its employees shall not, as a result of their acts or omissions, be liable for civil damages, unless the acts or omissions constitute willful and wanton misconduct.”

Florida did not grant sovereign immunity to its private community-based care agencies though the legislation did place some caps on liability. The statute that called for the privatization also specified the amount and type of liability

coverage private agencies had to obtain (Florida Title XXX, Social Welfare, CHAPTER 409, Social and Economic Assistance.) This issue has been re-visited a number of times in Florida. In 2002, a Florida legislative report, recommended that consideration be given to the status of private entities contracted with by the state, concluding, "Greater legislative specificity could result in clarifying precisely which entities are subject to the state's sovereign immunity, and in turn, may result in decreased litigation and lower state purchasing costs. The savings that stem from lower private contractor liability costs should be passed onto the state in the form of lower bids. The potential downside, however, is that more injured victims may not be made whole, less accountability will be required for negligent acts, and the Legislature may have to consider a larger number of claim bills." (Florida Senate, December 2002).

The Missouri contracts with foster care agencies who assume case management contain a clause related to qualified immunity:

"The contractor shall have qualified immunity from civil liability for providing such services when the child is not in the physical care of such private contractor to the same extent that the children's division has qualified immunity from civil liability when the division or department directly provides such services."

In summary, liability issues can have a significant impact on states' ability to attract agencies and retain agencies when it enters into performance- or risk-based contracts, particularly smaller, community based agencies that provide culturally competent services but which do not have the resources to respond to litigation should it arise.

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Language taken from MO contracts- (Missouri, Department of Social Services, RFP NO.: B3Z08185, Foster Care Case Management Contract (06/27/08)).

1.1 Legal Issues:

1.1.1 Conflict of Interest

In any legal proceeding or situation where a conflict of interest may arise between the interests of the contractor and the state agency, Department of Social Services, or State of Missouri, the Division of Legal Services (DLS) shall represent the interests of the state agency, Department of Social Services, and State of Missouri.

- a. The contractor covenants that he or she presently has no interest and shall not acquire any interest, directly or indirectly, which would conflict in any manner or degree with the performance of the services hereunder. The contractor further covenants that no person having any such known interest shall be employed in the performance of the contract or conveyed an interest, directly or indirectly, in the contract.

The contractor's personnel may not serve as foster parents for children in the custody of the state agency except when all parental rights have been terminated and the employee plans to adopt the child, or the child is a relative or child of a close friend. The contractor may not provide case management services on a case where the contractor's personnel are serving as the foster parents. Any exceptions to this policy must be requested in writing by the contractor and must be approved in writing by state agency Central Office staff.

- b. Contractor's personnel who want to adopt a child in the custody of the state agency must be approved by the state agency. Contractor's personnel may adopt a child in the custody of the state agency when the contractor is not providing supervision of the placement.
- c. Contractor's personnel providing services under this contract shall not run for or hold partisan or non-partisan political office when it would conflict in any way with the services provided herein. The contractor must notify the state agency when personnel run for or hold political office.

- 1.1.2 Representation - The Division of Legal Services will not represent the interests of the contractor when it is indicated that the contractor violated or may have violated any state or federal statute or regulation, court order

or procedure or policy of Department of Social Services or the state agency.

1.1.3 Legal Matters

- a. The contractor shall fully cooperate with the state agency and the Division of Legal Services (DLS) in the preparation for and handling of any legal matter that may arise regarding any child or family receiving services under the terms of the contract.
- b. The Director of the Division of Legal Services or his/her designee reserves the right to assign counsel to represent the interests and position of the Department of Social Services and the state agency in any case involving a child or family receiving services under the terms of the contract.
- c. The contractor shall immediately notify the state agency if the contractor is served with any demand letters, motions and/or orders to show cause seeking to hold the contractor or the state agency in contempt or for imposition of sanctions including money damages against the contractor or the state agency for any services to be provided under the terms of the contract.
- d. The contractor shall provide immediate, written notice to the state agency and Division of Legal Services of any petitions, complaints, motions, orders or any and all legal documents to show cause seeking any damages, sanctions or other relief against the state agency, Department of Social Services, or the contractor. In any such action, Division of Legal Services will represent the interests of the State of Missouri, the state agency and the Department of Social Services.
- e. If the interests of the state agency or the contractor are not represented by the Division of Legal Services counsel in any case and the contractor determines the best interests of the Department of Social Services, the state agency, the child, the family, or the public may be served by having legal representation, the contractor shall notify the state agency and Division of Legal Services and counsel may be assigned at the discretion of the Director of Division of Legal Services.
- f. If the contractor desires to refer a child for guardianship or some other action that would require the utilization of Division of Legal Services services, the contractor shall fully advise the state agency of the need and the state agency shall make the referral to Division of Legal Services if the state agency determines that such a referral is

appropriate. The contractor fully understands and agrees that Division of Legal Services is not obligated to act upon the referral if the request would adversely impact the state agency.

- g. The contractor can at its option hire its own legal representation. If it chooses to hire an attorney to represent its interests, it shall be responsible for the costs associated with retaining private counsel.
- 1.1.4 Immunity - The contractor shall have qualified immunity from civil liability for providing such services when the child is not in the physical care of such private contractor to the same extent that the children's division has qualified immunity from civil liability when the division or department directly provides such services.

1.1.5 Indemnification

- a. In the event the court finds the contractor liable for sanctions or otherwise hold the contractor in contempt as a result of the contractor's violation of any law, rule, court order or procedure or policy of Department of Social Services or the state agency, the contractor shall be solely responsible for the payment of any fines, penalties or sanctions, including attorney fees and costs, that arise under any such action. In addition, the contractor shall save, indemnify and hold the State of Missouri harmless, including its agencies, employees, and assigns, from every expense, liability, or payment arising out of such sanction, fine or penalty assessed against the contractor or against the state agency, Division of Legal Services or Department of Social Services as a result of the actions of the contractor, including court costs, attorney fees, and litigation expenses.
- b. The contractor agrees to indemnify and hold harmless the State of Missouri, the Department of Social Services and its agents, officers and employees from any and all liability, loss, damages, or expenses which Department of Social Services, the state agency or the State of Missouri may sustain, incur, or be required to pay by reason of any person's injury, death, property loss or damage sustained and/or suffered because of any act or omission by the contractor that results from violation of a law, regulation or policy of the Department of Social Services or the state agency. This includes, but is not limited to, court costs and attorney fees incurred by or charged to the Department of Social Services or the state agency as a result of such act or omission by the contractor, its officers, employees, agents, representatives or subcontractors.