

Proposed request for a legal opinion from the Solicitor-General

Second Substitute House Bill 2106 (SSHB 2106), enacted in 2009, requires the Children's Administration of the Department of Social and Health Services to enter into performance-based contracts with supervising agencies at two demonstration sites no later than July 1, 2012. "[T]he department may not directly provide child welfare services to families and children provided child welfare services by supervising agencies in the demonstration sites..." SSHB 2106 sec. 3. However, "[c]hildren whose cases are managed by a supervising agency remain under the care and placement authority of the state." SSHB 2106 sec. 5.

The bill further provides "[t]he 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 has entered into performance-based contracts to provide child welfare services as soon as the contracts become effective." SSHB 2106 sec. 7.

Information presented to the committee clearly shows that the Department in general, and Children's Administration in particular, consistently has the largest exposure to tort liability of any state agencies or departments.

RCW 43.10.040 provides that the Attorney General "shall" represent state agencies and department "in the courts ... in all legal or quasi legal matters, hearings, or proceedings, and advise all [state agencies and departments] in all matters involving legal or quasi legal questions...." In addition to these general duties to represent state agencies and departments in all legal matters, RCW 4.92.030 requires the Attorney General to "appear and act as counsel for the state" in any matters involving an action or claim against the state. In such actions, the Attorney General's office is often required to legally represent Children's Administration employees, volunteers, and foster parents at state expense (RCW 4.92.060 and 4.92.070) and to indemnify such individuals if a judgment is taken against them in their case (RCW 4.92.075).

A child welfare transformation design committee (the "committee") was created in the bill. SSHB sec. 8. Its purpose was to "establish a transition plan containing recommendations to the legislature and the governor consistent with this section for the provision of child welfare services by

supervising agencies pursuant to section 3 of this act.” SSHB 2106 sec. 8(2).

In formulating its recommendations, the committee has identified several questions of law, the answers to which will significantly affect the committee’s recommendations. These questions relate to legal precedent set forth in the Washington Constitution, existing statutes, and court rules as well as case law.

The questions for which the committee is requesting an authoritative interpretation of law are as follows:

1. Is representation of a private contractor by the Attorney General an unconstitutional gift of public funds:
 - a. where the Attorney General provides direct representation of the supervising agency or
 - b. where the Attorney General causes to be provided legal services for the supervising agency?
2. Is representation of a supervising agency by the Attorney General an inherent conflict of interest, given that the Attorney General represents Children’s Administration in the contracting process and in exercising its ultimate “care and placement authority?”
3. Will representation of a supervising agency by the Attorney General in a court hearing involving dependency or termination of parental rights matters 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 rights of representation and indemnification for private social workers employed by supervising agencies?