

Chapter 3

Legislative Performance Audit Report

“ . . . I believe – and the Performance Audit Committee believes – that the theme you come back to over and over again, when you read this report, is the need for transparency, accountability, and leadership.”

*~ Senator John Harms,
Chair, Legislative Performance
Audit Committee*

HHS Committee Briefing, November 4, 2011 Senator John Harms

Thank you Senator Campbell and members of the Committee, I am Senator John Harms, Chairman of the Legislative Performance Audit Committee, and I'm here today to tell you about the results of our performance audit on child welfare privatization, which we undertook at your request. Very broadly, the audit produced a comprehensive timeline of events surrounding the privatization efforts and looked at three questions: (1) how DHHS, policymakers, and stakeholders would know whether privatization of services is working effectively to assure children's safety; (2) whether the Executive Branch exceeded its authority in implementing reform without legislative involvement; and (3) whether contract oversight is sufficient.

Before getting into specific findings and recommendations, let me tell you that I believe—and the Performance Audit Committee believes—that the theme you come back to over and over again when you read this report is the need for transparency, accountability, and leadership. All of the specific concerns tie back to these issues.

There's a lot of detail in this report but let me just highlight some of the most concerning findings and give you an idea of what the Audit Committee is recommending. First, in terms of the contracting process, the auditors found that prior to entering into the lead-agency contracts, CFS (the Division of Children and Family Services) failed to conduct any kind of cost-benefit analysis or similar financial assessment that would have given them a more realistic sense of the likely costs of privatization. The Audit Committee found this to be a serious accountability problem, and believes we need to change our state contracting statutes to keep this from happening again. What we recommend is that we work with your Committee and the Government Committee to propose legislation requiring agencies to work with DAS on personal services contracts and to place in writing some type of cost-benefit analysis prior to contracting for any contract over \$25 million. We are also recommending working with your committee to pass LB 95, or a similar bill to prohibit privatization in the service areas that currently do not have it.

Second, in the area of how we as policymakers and other stakeholders would know if privatization is working, the auditors found that CFS did not identify key goals, or benchmarks and time-frames for achieving them. Again, we believe this is a big problem in terms of accountability—we know it's a complex area and do not want the numbers to drive the system at the expense of children and families. However, without some key goals and benchmarks, it's impossible to know if the desired improvements are occurring and identify areas where adjustments may be needed. In the agency's response to the draft report, the DHSS CEO agreed with the need for these and indicated that they are working with Casey Family Programs to establish them. Our committee believes that this is a serious accountability problem and that the agency must do better and, importantly, must work with the HHS Committee on both establishing goals and reporting on progress.

We also found that in two areas that CFS has often cited as reasons for entering into privatization, they've made little progress since privatization was implemented in 2009. First, CFS often talked about reducing the number of children placed out of their homes from 70% to

30%, sometimes referred to as “flipping the pyramid.” We found that the number dropped 4% since privatization was initiated in 2009, but that is still not a very significant change given the amount of resources that have been placed into the system. The second area that was often given as a reason that privatization was needed was the state's scores on the federal CFSR (Child and Family Services Review). The Performance Audit Committee looked at one part of that review—six “data indicators” that are goals in the lead-agency contracts and tracked on the CFS Web site—and found that there was actually more improvement in them before privatization began than has occurred since then.

Other concerns relating to goals include the lack of analysis by CFS of why Nebraska's rate of children placed out of their homes is higher than many other states. For example, the inclusion of the juvenile justice population is often cited as a factor in that difference, although we found that it doesn't seem to fully account for the difference. CFS has not analyzed the reasons that Nebraska's placement rate is higher than other states. If you do not know *why* the problem exists, how do you

know privatization is going to fix it? There needs to be more rigorous and transparent analysis in these areas.

Another concern about goals is that we found CFS is very focused on measuring improvement using the statistical goals set by the federal Children's Bureau for improvement in the CFSR data indicators. We understand that to an extent they have to do this—participation in the CFSR process is required by federal law and the state could be subject to financial sanctions if CFS doesn't work with the Children's Bureau. However, the CFSR goals are measured in tenths-of-a-percent increments, and it's difficult to understand what that level of change actually means without some additional interpretation. Again, we feel this is a transparency problem—CFS does make a great deal of raw data available but we believe transparency has to go beyond that and include rigorous data analysis that interprets the raw data and informs policymakers and other stakeholders about how the system is actually performing.

Just one more point about goals. We believe that some of the goals CFS is trying to accomplish—including safely reducing the number of

children placed out of their homes—cannot be accomplished by CFS alone and should be treated as the policy issues they are and be considered by the Legislature. While we found that the Executive Branch did not exceed its authority when it pursued privatization without involvement of the Legislature, we also found that goals such as safely reducing the number of children placed out of their homes are policy questions that should be considered by the Legislature. The legislative process can bring the stakeholders together—especially the Judiciary, which plays such a significant role in the child welfare system—to build support for key system-improvement goals. With or without privatization, we believe substantive system change will only occur when that kind of coalition is in place.

In terms of contract oversight, time constraints limited the auditors' review to a comparison of CFS's process against the typical process identified in government contracting standards. With the significant exception of the need for additional cost analysis mentioned above, we found that the process was generally in compliance with those standards.

Let me begin to wrap-up my discussion by coming back to the Audit Committee's concern about leadership—we believe that so many of the problems we identified come down to this and have recommended that the CEO needs to evaluate whether there's the right match between the individuals in the CFS Division and the positions they hold. But we also think, and I know some of you do as well, that the agency itself may be too big for adequate internal oversight. So we've also recommended that your committee should review the agency structure and in fact we think you might want to contract with a management expert to get some additional information about what changes are needed.

The Audit Committee has incorporated information from both the State Auditor's financial audit and your LR 37 hearings. One of those is the need to change the budget process as it relates to DHHS generally and CFS specifically. As a member of the Appropriations Committee, I can tell you we have been frustrated by the lack of transparency regarding the additional \$30 million that has been moved into child welfare. Despite the best efforts of our fiscal staff, it has been extremely difficult to get timely information about this significant change and we

find that unacceptable. The Audit Committee plans to work with the Chair of the Appropriations Committee and DHHS CEO to pursue implementation of performance-based budgeting for the CFS Division for two budget cycles in order to get the agency to articulate goals, benchmarks and demonstrate progress towards meeting them. We also believe that budget program 347 is too large—it contains 26 subprograms representing more than \$200 million dollars—and believe that at a minimum, the child welfare subprogram needs to be made into a separate program to provide more accountability and transparency.

So, as I stated when I began these comments, our audit raises serious concerns about accountability, transparency, and leadership. We believe additional legislative oversight is needed and make specific recommendations about how to address these concerns. With that, I would be happy to answer any questions and also have Martha Carter, our Legislative Auditor, with me who can answer specific questions about the audit.

Audit Summary and Committee Recommendations

Audit Summary

This performance audit was undertaken at the request of the Health and Human Services Committee as part of its review, under interim study resolution LR 37, of the child welfare and juvenile services privatization initiative implemented by the Department of Health & Human Services (DHHS or department) Division of Children and Family Services. Specifically, the Legislative Performance Audit Committee directed the Legislative Audit Office (Office) to (1) provide a timeline of major events in the implementation privatization; (2) assess how DHHS, policymakers, and stakeholders know whether privatization of services is working effectively to assure children's safety; (3) assess whether the Executive Branch exceeded its authority in implementing reform without legislative involvement; and (4) assess whether contract oversight is sufficient.

The audit produced a comprehensive timeline of events relating to privatization, along with several significant findings, including that the Division of Children and Family Services (CFS or division) failed to:

- conduct a cost-benefit analysis or similar assessment prior to entering into the lead-agency contracts in 2009, which is contrary to best practice and was a critical error in the contracting process;
- identify key performance goals for improvements they expected to see following privatization or benchmarks or timeframes for meeting such goals; and.
- make significant progress in reducing the number of children placed out of their homes.

Nebraska's high rate of children placed out of their homes was one of the reasons CFS administrators cited as demonstrating the need for privatization. Another was Nebraska's low scores on the six data indicators that are part of the federal Child and Family Services Review process, and we also found little improvement in those scores since privatization began.

We determined that the Executive Branch did not exceed its authority in pursuing privatization without involvement of the Legislature. However, we also found that goals such as safely reducing the number of children placed out of their homes are policy questions that should be considered by the Legislature, because the legislative process allows for the coalition building needed to make substantive change.

Time constraints limited the auditors' review of contract oversight to a comparison of the CFS process to the typical process identified in government contracting standards. With the significant exception of the need for additional cost analysis mentioned above, we found that the process was generally in compliance with those standards.

Division administrators generally agreed with the audit findings and indicated that efforts were already underway to identify key outcome goals, along with benchmarks and timeframes for meeting them. The division also expressed its desire to work collaboratively with the Legislature and Judiciary to bring about system change.

Committee Recommendations

The Committee adopted the audit staff's draft recommendations, which begin on page V. In addition, the Committee believes that this performance audit report, the State Auditor's financial audit report, and information presented at the LR 37 public hearings document a critical lack of financial and performance accountability by the Department of Health and Human Services (DHHS or department) and makes the following recommendations to address this significant problem.

DHHS Management/Agency Structure

While the Committee believes that former and current DHHS management are in part responsible for the failure to provide adequate accountability, the Committee also believes that the department structure is part of the problem. The Committee questions whether any CEO could provide meaningful oversight of the multiple major programs within the agency. Similarly, the Committee questions whether any CFS director could provide enough attention to the broad scope of significant responsibilities under his or her review. Within the child welfare and the juvenile services program, the Committee questions whether the merging of the two populations into single system has resulted in a good "fit" or should be reconsidered.

Recommendation: The Committee recommends that the Legislature's Health and Human Services Committee, or a working group of that Committee, evaluate the 2007 restructuring of DHHS to determine whether changes are needed in order to facilitate sufficient oversight and accountability of the programs the agency administers. The Committee suggests that the HHS Committee consider contracting for the opinion of a management expert as part of the study, in order to get an objective assessment about what changes would be the most effective.

Recommendation: The Committee recommends that the DHHS CEO conduct a comprehensive evaluation of CFS staff to determine whether the division has made good matches between individuals and the positions they hold and report the results back to the Committee and the Health and Human Services Committee.

Contracting Process

The Committee believes that process used by CFS administrators to contract for child welfare and juvenile services was inadequate in significant ways. In particular, the absence of a written analysis of the

potential costs (through a cost-benefit or similar analysis) and the inadequacy of the assessments of the ability of potential providers to provide the necessary services and maintain financial viability were of concern. The Committee believes that statutory changes are needed to prohibit any state agency from entering into contracts that may present a high risk of service disruption and expose the state to high financial liability because of lack of adequate analysis and documentation.

Recommendation: The Committee will work with the Health and Human Services and the Government, Military and Veterans Affairs committees to propose and/or support legislation requiring agencies to work with the Department of Administrative Services in the letting of personal services contracts to ensure adequate accountability and sound contracting practices.

Recommendation: The Committee will work with the Health and Human Services Committee to propose legislation establishing a moratorium on adding any additional DHHS service area to any new or existing lead agency contract to provide services in the child welfare system and juvenile justice system and for wards of the state pursuant to the child welfare reform initiative known as Families Matter.

Budgeting Changes

Committee members are extremely concerned about, and find unacceptable, the difficulty the Legislature has had in getting accurate, timely fiscal information from DHHS about the child welfare services' contracts. The Legislature is responsible for appropriating funds to state agencies and must be able to obtain information about how those funds are spent.

The Committee is also concerned that budget program 347, which contains 26 subprograms—including Child Welfare Services, Temporary Assistance to Needy Families (TANF), and Employment First, among others—is too large and that having so many significant subprograms in one budget program hampers effective oversight. The Committee believes that the program needs to be broken up into smaller areas in order to facilitate appropriate oversight and understands that the Legislative Fiscal Office is reviewing options for doing so.

Recommendation: The Committee will explore legislation to require: (1) performance-based budgeting for the CFS Division for the 2013-2014 and 2015-2016 budget cycles—and then sunset—which would require the agency to articulate verifiable and auditable goals and benchmarks and demonstrate progress in those areas; (2)

creating Child Welfare Services as a separate budget program and possibly changing other subprograms from program 347 to separate programs; and (3) funds within program 347 be earmarked by the Legislature for specific purposes. The Committee will work with the Appropriations Committee and will request the participation of the DHHS CEO as well. The Committee acknowledges that budget-process changes, as well as contract-process changes discussed later in this section, may have fiscal impacts and will further identify those along with other consideration related to these recommendations.

SECTION II: Is Privatization Working?

Findings Relating to Outcomes

Our conclusion is that, to date, few outcomes show improvement and those that have improved do not show the degree of change we believe policymakers and other stakeholders expect from privatization specifically or from the broader system reform of which it is a part. For the goals and indicators we studied, including certain measures from the 2008 Child and Family Services Review (CFSR), the rate of out-of-home placements, and five indicators suggested by Children and Family Services (CFS or division) administrators, we found:

Finding #1: CFS met the performance improvement goals for five of the six data indicators prior to the start of privatization. (p. 25)

Finding #2: Scores on the data indicators since privatization began have been mostly down. Two scores went up since privatization began—one increased enough that it met the intermediate improvement goal for the first time—but the remaining four indicators went down. (p. 27)

Finding #3: Since 2006, there has been no significant decrease statewide in the proportion of children placed out of their homes but the rate improved (dropped) four percent between April 2010 and April 2011. (p. 30)

Finding #4: Fewer children are being placed in state custody, but the rate of decline is less than what is taking place nationally, which suggests that Nebraska should be doing more. In addition, the rate has slowed, not increased, since privatization began in 2009. (p. 37)

Finding #5: The proportion of kinship placements has increased since 2006, including a noticeable increase since privatization began in 2009. (p. 39)

Finding #6: We agree with CFS administrators that since 2009, there has been improvement in placement stability and kinship placements. Adoption timeliness measures have also improved, although that trend started before privatization began. We disagree that the measures relating to permanency, reentry, and maltreatment in foster care have improved in meaningful ways. (p. 41)

Finding #7: Nebraska is not unique in its inclusion of the juvenile services population in the data used to calculate the out-of-home rate and this factor alone does not appear to explain Nebraska's high rate compared to other states. (p. 32)

Recommendation: The Health and Human Services Committee may wish to consider whether it is satisfied with the current level of improvement in outcomes for children and families.

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Findings Relating to Goals

Finding #8: If CFS administrators intended the 70/30 reversal in the proportion of children removed from their homes to be a figurative goal, then the Division failed to adequately communicate that intent to stakeholders. (p. 30)

Finding #9: CFS administrators' failure to identify key goals, as well as performance benchmarks and timeframes for achieving them is contrary to best practice and their failure to recognize the importance of these reflects questionable professional judgment. (p. 34)

Finding #10: The statistical goals set by the Children's Bureau for improvement in the CFSR data indicators, which are measured in tenths-of-a-percent increments, are difficult to understand. (p. 41)

Discussion: While division administrators' commitment to establish key goals, timeframes and benchmarks is a good step, it does not change the fact that those important accountability tools have not been in place to date. That is first and foremost an accountability problem: without clear goals, it is very difficult to hold CFS—or any other part of the system—accountable, and the CFS leadership's failure to recognize that is concerning.

Recommendation: In establishing goals, timeframes and benchmarks for system improvement, CFS administrators must work with the Health and Human Services Committee to ensure that division goals reflect areas of interest to the Committee and that the division has the Committee's assistance in working towards goals that CFS cannot accomplish on its own. In addition, CFS staff need to

develop ways of discussing system improvement that go beyond statistical changes—like those used for the CFSR data indicators—to emphasize meaningful levels of change at a big-picture level and that are more comprehensible. The Committee strongly encourages division representatives to report quarterly (or at a frequency determined by the HHS Committee) to the HHS Committee on progress towards the identified goals.

Finding #11: Goals that CFS cannot accomplish on its own, including safe-reduction, are policy issues that should involve the Legislature. (p. 36)

Discussion: CFS is only one part of the child welfare and juvenile services and many goals that may be desirable—like safe-reduction—cannot be accomplished without commitment from other key players, especially the judiciary. As the policymaking arm of state government, the Legislature could bring the key players together to identify goals that all key players can support. With or without privatization, we believe real system change will only occur when that kind of coalition is in place.

Recommendation: The Legislature’s Health and Human Services Committee may wish to introduce legislation to establish goals for reform of the child welfare and juvenile services system. If it does this, the Committee should consider having a candid discussion with key stakeholders—especially the judiciary.

In addition to CFS administrators’ general unwillingness to commit to key goals, we found other aspects of their approach to measuring progress problematic, as reflected in the following findings.

Finding #12: CFS staff’s analysis of indicators they believe reflect system improvement was confusing, did not contain consistent information on the indicators and, in some cases used inaccurate methodologies, which are transparency problems. (p. 36)

Discussion: CFS makes a tremendous amount of data available through its Web site and we commend it for that level of transparency. However, transparency should also include producing and making available a clear and thorough analysis of progress on various indicators.

Recommendation: As recommended above, CFS administrators should work with the HHS Committee to identify the type of information and analyses of most value to policymakers and other stakeholders.

SECTION III: Questions of Legal Authority

Finding #13: DHHS neither overstepped Executive Branch authority nor violated state law by contracting out child welfare and juvenile services without legislative involvement. (p. 45)

Recommendation: None.

SECTION IV: Contract Oversight Standards

Our review of the lead agency contracts compared to contract oversight standards resulted in the following findings.

Finding #14: CFS's contracts with the lead agencies meet the Adequacy of Contract Provisions standards. (p. 48)

Finding #15: CFS staff met standards relating to the process for analysis of business needs, goals, objectives and services prior to determining whether contracting was necessary. (p. 50)

Finding #16: CFS did not conduct any type of cost-benefit analysis prior to entering into the 2009 lead agency contracts, which conflicts with contracting standards and we believe was a critical error. (p. 51)

Discussion: State government should have a protection in place to keep a state agency from being able to enter into substantial personal services contracts without conducting or obtaining a detailed analysis of the potential financial implications.

Recommendation: The Legislative Performance Audit Committee will work with the HHS Services and Government committees to propose or support legislation to require a written cost-benefit or similar analysis, or an opinion by a financial expert, of the potential financial implications of personal services contracts valued at \$25 million or more.