COMMONWEALTH of VIRGINIA

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December 6, 2006

The Honorable William H. Fralin, Jr.
Member, House of Delegates
P.O. Box 20363
Roanoke, Virginia 24018

Dear Delegate Fralin:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether § 63.2-905 mandates that mental heath services be provided to children pursuant to the Comprehensive Services Act for At-Risk Youth and Families[1] ("CSA") to prevent parents from having to relinquish custody of those children to receive such services. You then ask whether the provision of mental health services is mandated pursuant to the CSA for all children who are in need of such services.

Response

It is my opinion that § 63.2-905 does not mandate that mental health services be provided. Rather, § 63.2-905 merely defines the term foster care services. Requirements for the provision of services are addressed in the Comprehensive Services Act, a section of which incorporates the definition of foster care services from § 63.2-905. CSA mandates the provision of such foster care services by the state and locality to prevent foster care placements when the child receiving the services is abused and neglected as defined in § 63.2-100, or the child is in need of services as defined in § 16.1-228. It further is my opinion that statutory and constitutional provisions require mandated services pursuant to CSA to be provided to eligible children who are in need of such mental health services without their parents having to relinquish custody to local social services agencies.

Applicable Law and Discussion

Your inquiry relates to the wrenching and potentially tragic situations that some families in Virginia confront. Specifically, as the provisions of CSA have been applied in many localities, some parents must choose between maintaining their family unit and receiving urgently needed mental health treatment for their troubled children. This Hobson's choice occurs because as CSA presently is interpreted by those localities, such parents may access funds for mental health services only by

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[1] VA. CODE ANN. tit. 2.2, ch. 52, §§ 2.2-5200 to 2.2-5214 (2005 & Supp. 2006).

relinquishing custody of their child by agreement with their local social services agency.[2] Once the child is placed in foster care, mental health services are mandated by CSA.[3] However, this choice infringes upon the compelling state interest in supporting and maintaining the family unit. It also violates the clear statutory public policy of the Commonwealth in providing these needed services in a comprehensive manner in the least restrictive environment while preserving families. The legislature intended in CSA to avoid this troubling choice, and a careful reexamination of the defined terms in CSA eliminates the conflict.

I. Section 63.2-905

Section 63.2-905 defines the term "foster care services" as "the provision of a full range of casework, treatment and community services" to a child who is either abused or neglected, as that term is defined in § 63.2-100,[4] or a child who is in need of services, as defined in § 16.1-228.[5]

Section 63.2-905 defines the scope of foster care services broadly and although "mental health treatment" or "mental health services" are not specifically referenced, the terms "treatment" and

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[2] *See* VA. CODE ANN. § 63.2-900 (Supp. 2006).

[3] STATE EXEC. COUNCIL WORKGROUP, THE RELINQUISHMENT OF CUSTODY FOR THE PURPOSE OF ACCESSING BEHAVIORAL HEALTH TREATMENT, H. DOC. NO. 34 (2004), *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD342004/$file/HD34.pdf [hereinafter H. DOC. NO. 34].

[4] Section 63.2-100 defines "abused or neglected child" as "any child less than 18 years of age:"

"1. Whose parents or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement, or impairment of bodily or mental functions ... ;

"2. Whose parents or other person responsible for his care neglects or refuses to provide care necessary for his health. However, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child;

"3. Whose parents or other person responsible for his care abandons such child;

"4. Whose parents or other person responsible for his care commits or allows to be committed any act of sexual exploitation or any sexual act upon a child in violation of the law;

"5. Who is without parental care or guardianship caused by the unreasonable absence or the mental or physical incapacity of the child's parent, guardian, legal custodian or other person standing in loco parentis; or

"6. Whose parents or other person responsible for his care creates a substantial risk of physical or mental injury by knowingly leaving the child alone in the same dwelling, including an apartment as defined in § 55-79.2, with a person to the child is not related by blood or marriage and who the parent or other person responsible for his care knows has been convicted an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902."

[5] Section 16.1-228, in relevant part, defines a "child in need of services" as

"(i) a child whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child or (ii) a child under the age of 14 whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of another person ...."

This definition is followed by a separate paragraph, which states:

"However, to find that a child falls within these provisions, (i) the conduct complained of must present a clear and substantial danger to the child's life or health or to the life or health of another person, (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family."

"community services" certainly include mental health treatment or services. In fact, the Virginia Department of Social Services Foster Care Manual defines these services as including, "*but ... not limited to, counseling and treatment*, day care, medical, educational, employment, family planning, independent living, housing, respite care, legal, socialization and recreation services."[6]

Section 63.2-905 further states that the child must also meet one of the following three conditions to receive foster care services:

> the child (i) has been identified as needing services to prevent or eliminate the need for foster care placement, (ii) has been placed through an agreement between the local board or the public agency designated by the community policy and management team and the parents or guardians where legal custody remains with the parents or guardians, or (iii) has been committed or entrusted to a local board or licensed child placing agency.[7]

Foster care services, including mental health services, therefore may be provided to an abused or neglected child[8] or a child who meets the definition of being in need of services to prevent a parent from having to relinquish custody, i.e., "to prevent or eliminate the need for foster care placement." Section 63.2-905, however, only defines "foster care services"; it does not mandate services.

II. Comprehensive Services Act

The Comprehensive Services Act funds foster care services and other services. It was intended "to create a collaborative system of services and funding that is child-centered, [and] family-focused when addressing the ... needs of troubled and at-risk youths and their families."[9]

It is quite significant that CSA's statement of intent and purpose explicitly sets forth how it is to be interpreted and construed:

> This law shall be interpreted and construed so as to effectuate the following purposes:
>
> 1. Ensure that services and funding are *consistent with the Commonwealth's policies of preserving families and providing appropriate services in the least restrictive environment* ...;
>
> ....
>
> 3. Design and provide services that are responsive to the unique and diverse strengths and needs of troubled youths *and families*;
>
> 4. *Increase ... family involvement* in service delivery and management[.][10]

Such a bold and express guide to statutory interpretation from the General Assembly is exceedingly rare. This opinion is guided and illuminated by this clear legislative direction.

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[6] VIRGINIA DEPARTMENT OF SOCIAL SERVICES, FOSTER CARE MANUAL, Vol. VII, § III, ch. B, ¶ 1.1, at *4 (Feb. 2006), *available at* http://www.dss.virginia.gov/files/division/dfs/fc/fc_policy_manual/public_manual.pdf (emphasis added) (last visited Aug. 14, 2006).

[7] Section 63.2-905 (2002).

[8] Most children whose parents are considering relinquishing custody to obtain mental health treatment do not meet the definition of an abused or neglected child. *See* H. DOC. NO. 34, *supra* note 3, at *10.

[9] Section 2.2-5200(A) (2005).

[10] *Id.* (emphasis added)

CSA is administered by the State Executive Council for Comprehensive Services for At-Risk Youth and Families,[11] including the administration of policies regarding the use and distribution of the state pool of funds, as established under § 2.2-5211(A) and made available by the General Assembly. To receive funding from the state pool of funds, the child or family also must meet the eligibility requirements contained in § 2.2-5212.[12]

Funding pursuant to the Comprehensive Services Act is directed at five target populations of children.[13] Of those five target populations, only three specifically are "mandated," meaning that funds must be provided for necessary services. Section 2.2-5211(C) provides:

> The General Assembly and the governing body of each county and city shall annually appropriate such sums of money as shall be sufficient to (i) provide special education services and foster care services for children identified in subdivisions B 1, B 2 and B 3 and (ii) meet relevant federal mandates for the provision of these services.

The plain meaning of this statute is that state and local funding must be provided in sum sufficient amounts to cover children in the three categories listed, in addition to providing funding to meet any relevant federal mandates. When the language in a statute is clear and unambiguous, the statute must be applied according to its plain language.[14]

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[11] Section 2.2-2648 (2005) (establishing State Executive Council).

[12] Section 2.2-5212 provides that:

"A. In order to be eligible for funding for services through the state pool of funds, a youth, or family with a child, shall meet one or more of the criteria specified in subdivisions 1 through 4 and shall be determined through the use of a uniform assessment instrument and process and by policies of the community policy and management team to have access to these funds.

"1. The child or youth has emotional or behavior problems that:

"a. Have persisted over a significant period of time or, though only in evidence for a short period of time, are of such a critical nature that intervention is warranted;

"b. Are significantly disabling and are present in several community settings, such as at home, in school or with peers; and

"c. Require services or resources that are unavailable or inaccessible, or that are beyond the normal agency services or routine collaborative processes across agencies, or require coordinated interventions by at least two agencies.

"2. The child or youth has emotional or behavior problems, or both, and currently is in, or is at imminent risk of entering, purchased residential care. In addition, the child or youth requires services or resources that are beyond normal agency services or routine collaborative processes across agencies, and requires coordinated services by at least two agencies.

"3. The child or youth requires placement for purposes of special education in approved private school educational programs.

"4. The child or youth has been placed in foster care through a parental agreement between a local social services agency or public agency designated by the community policy and management team and his parents or guardians, entrusted to a local social services agency by his parents or guardian or has been committed to the agency by a court of competent jurisdiction for the purposes of placement as authorized by § 63.2-900."

[13] Section 2.2-5211(B) (1)-(5) (2005) (establishing target populations as: (1) children in special education; (2) children with disabilities; (3) children who need foster care services; (4) children placed by juvenile and domestic relations district courts pursuant to § 16.1-286 or 16.1-284.1; and (5) children committed to Department of Juvenile Justice and placed in public or private facility pursuant to § 66-14).

[14] HCA Health Servs. v. Levin, 260 Va. 215, 220, 530 S.E.2d 417, 419-20 (2000).

Section 2.2-5211(C) therefore requires sufficient funding by the state and localities for foster care services and special education services for eligible children in the following three categories: (1) children in special education; (2) children with disabilities; and (3) children who need foster care services.[15] It further requires sufficient funding to meet any relevant federal mandates regarding the provision of these services.[16]

Interpretation of the provision of service requirements for the third mandated group, children who need foster care services, is where the custody relinquishment dilemma arises. Children included in § 2.2-5211(B)(3) are:

> Children for whom foster care services, as defined by § 63.2-905, are being provided to prevent foster care placements, and children placed through parental agreements, entrusted to local social service agencies by their parents or guardians or committed to the agencies by any court of competent jurisdiction for purposes of placement in suitable family homes, child-caring institutions, residential facilities or independent living arrangements, as authorized by § 63.2-900.

Section 63.2-900 describes parental placements as agreements "where legal custody remains with the parent, parents, or guardians." CSA therefore mandates funding of services to (1) children for whom foster care services, as defined by § 63.2-905,[17] are being provided to prevent foster care placement; (2) children who are placed by or entrusted to local social service agencies through parental agreements; and (3) children who are committed by courts to local agencies for placement.

It is important to remember that the term "foster care services" is broadly defined in § 63.2-905 as a "full range" of services. The intent of CSA likewise is broad – so broad in fact that the General Assembly chose to call it "comprehensive." The plain language of CSA, and particularly § 2.2-5211(B)(3) and (C), when read in conjunction with the definition of "foster care services" in § 63.2-905, indicates that an eligible child, as set forth in § 2.2-5212, does not actually have to be placed in foster care to receive mandated services.

The dilemma of parents being forced to relinquish custody has arisen principally because there is inherent confusion regarding statutory interpretation when § 2.2-5211(C), relating to mandated CSA services, is read in conjunction with § 63.2-905, which defines foster care services, and § 16.1-228, which defines children in need of services. In short, a child is a mandated recipient of CSA funds pursuant to § 2.2-5211(C) if foster care services, as defined in § 63.2-905, are needed to prevent a foster care placement. The definition of foster care services in § 63.2-905 requires that the child be "abused or neglected" or "in need of services." The definition in § 16.1-228 of a child in need of services, though, is

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[15] *See* §§ 2.2-5211(B)(1)-(3); 2.2-5212 (2005).

[16] This provision raises the question as to whether requiring future General Assemblies to make specific appropriations runs afoul of Article X, § 7 of the Constitution of Virginia. This provision, however, is not unconstitutional on its face. A general rule of statutory construction is that every statute is presumed to be constitutional and that a court should construe statutes to avoid any constitutional difficulties. *See, e.g.*, Cox Cable Hampton Roads, Inc. v. Norfolk, 247 Va. 64, 67, 439 S.E.2d 366, 367 (1994); Taylor v. Worrell Enters., Inc., 242 Va. 219, 409 S.E.2d 136 (1991). A future General Assembly always has the authority to repeal the statute. Or, a future General Assembly could determine that the Commonwealth's sum is zero, leaving the local governments responsible for appropriating all of the funds to pay for such services.

[17] *See supra* section I herein.

subject to two differing interpretations. A narrow interpretation of this definition has resulted in the relinquishment of custody dilemma.

The definition of a child in need of services is in Title 16.1, which relates to the jurisdiction of juvenile and domestic relations district courts. The first paragraph, in pertinent part, provides:

> *"Child in need of services"* means (i) a child whose behavior, conduct, or condition presents or results in a serious threat to the well-being and physical safety of the child or (ii) a child under the age of 14 whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of another person[.][18]

However, a subsequent paragraph limits the preceding definition and provides direction to juvenile and domestic relations court judges about which children actually can be "found" *eligible for intervention by the court*:

> However, to find that a child falls within these provisions, (i) the conduct complained of must present a clear and substantial danger to the child's life or health or to the life or health of another person, (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family.[19]

If this limiting paragraph is interpreted to be part of the definition of a "child in need of services," then CSA presently is being correctly interpreted by those localities which are requiring parents whose children are not found *by a court* to be "in need of services" to relinquish custody to receive mandated services. Alternatively, the first paragraph (quoted above) contains the entire definition of a "child in need of services" and the purpose of the subsequent paragraph is to limit the number of cases where a court and its service unit may intervene for all purposes authorized by Title 16.1. It is noteworthy that the first paragraph in fact is an entire definition of a "child in need of services" that is capable of being read and understood independently of the second paragraph. The second paragraph is a limitation on the authority of the juvenile and domestic relations court that is relevant only to judicial proceedings arising under Title 16.1.

The clear statutory statement of intent by the General Assembly regarding how CSA is to be "interpreted and construed" is the determinative factor in the following analysis:

1. The first purpose that the General Assembly requires to be effectuated in the interpretation and construction of CSA includes "preserving families" and "providing appropriate services in the least restrictive environment."[20] An interpretation that requires parents to relinquish custody of their children as a condition precedent to receiving CSA services at the very time when a family's support and love are most needed directly contradicts the "preserving families" purpose. Likewise, an interpretation that requires a parent to relinquish custody fails the "least restrictive environment" test.

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[18] VA. CODE ANN. § 16.1-228 (Supp. 2006) (defining "child in need of services" for purposes of Chapter 11 of Title 16.1).

[19] *Id.*

[20] Section 2.2-5200(A)(1).

2. The fourth stated purpose ("Increase ... family involvement in service delivery and management"[21]) also is directly contradicted by an interpretation requiring custody relinquishment.

3. Finally, the definition of "foster care services," which is referenced and incorporated in CSA,[22] specifically states that such services are intended for the "child ... and his family."[23] It is inconceivable that the best way to provide such services to a child and his family is by an interpretation that tears the family asunder.

It is my conclusion, in light of all the factors analyzed in this opinion, that the General Assembly intended the term "child in need of services" to be defined broadly for purposes of CSA. Consequently, local social services agencies may determine that a child who otherwise meets the various conditions set forth in §§ 2.2-5212 and 63.2-905 is "in need of services" and eligible for CSA mandated services without a specific finding by a court.

III. Constitutional Concerns

Although your request relates only to statutory construction, it also raises federal constitutional issues of paramount importance. The Constitution of the United States protects "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[24] Consequently, "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[25] Indeed, "the custody, care and nurture of the child reside first in the parents."[26] The practical effect of a narrow interpretation of "child in need of services" for purposes of CSA mandated services is to interfere with this fundamental right. Quite simply, parents who cannot afford the costs of mental health treatment for their seriously mentally ill children effectively are told to relinquish their fundamental legal rights relating to the care, custody, and control of those children.

Additionally, under the principle known as the unconstitutional conditions doctrine, the government may not deny a benefit to a person on a basis that infringes his constitutionally protected fundamental right "even if he has no entitlement to that benefit."[27] If government "may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may be thus manipulated out of existence."[28] In other words, if the government may not accomplish an objective directly, then likewise it may not accomplish it indirectly by imposing conditions on the receipt of a

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[21] Section 2.2-5200(A)(4).

[22] *See* § 2.2-5211(B)(3) (referencing § 63.2-905).

[23] Section 63.2-905.

[24] Troxel v. Granville, 530 U.S. 57, 66 (2000).

[25] Pierce v. Society of the Sisters, 268 U.S. 510, 535 (1925) (discussing compulsory school attendance laws).

[26] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[27] United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 210 (2003) (quoting Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972))); *see also* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (discussing doctrine of "unconstitutional conditions").

[28] Frost v. R.R. Comm'n, 271 U.S. 583, 594 (1926).

benefit.[29] Clearly, the government may not directly require parents to relinquish their parental rights. Therefore, it may not indirectly require parents to surrender their fundamental right to direct the upbringing of children as a condition of receiving mandated services for those children.

Finally, the Equal Protection Clause[30] is "essentially a direction that all persons similarly situated ... be treated alike,"[31] and it protects "*persons*, not *groups*."[32] Indeed, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[33] If a program treats everyone equally, there is no equal protection violation.[34] Although the "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest,"[35] this general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize "suspect" or "quasi-suspect" classifications.[36] Because the parental right to direct the upbringing of one's own children is fundamental, any Equal Protection challenge to this statute would be subjected to strict scrutiny. Moreover, even non-suspect classifications have been struck down as irrational.[37] Thus, while classifications based on disability generally are considered non-suspect,[38] a court could find the statute's differing treatment of children with disabilities to be irrational and the relevant provision of CSA, as presently applied, unconstitutional.

Conclusion

Accordingly, it is my opinion that § 63.2-905 does not mandate that mental health services be provided. Rather, § 63.2-905 merely defines the term foster care services. Requirements for the provision of services are addressed in the Comprehensive Services Act, a section of which incorporates the definition of foster care services from § 63.2-905. CSA mandates the provision of such foster care services by the state and locality to prevent foster care placements when the child receiving the services is

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[29] Rumsfeld v. Forum for Academic & Inst'l Rights, 126 S. Ct. 1297, 1307 (2006).

[30] U.S. CONST. amend. XIV, § 1.

[31] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

[32] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (emphasis in original); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (noting that standard of review under Equal Protection Clause is not dependent on race of those burdened or benefited by particular classification); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986) (noting that legislation including racial classifications require strict scrutiny to ensure that racial classification narrowly is tailored to achieve compelling government interest).

[33] Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

[34] Romer v. Evans, 517 U.S. 620, 623 (1996) (noting that Equal Protection Clause enforces principle that United States Constitution neither knows nor tolerates classes among its citizens).

[35] *Cleburne*, 473 U.S. at 440; *see also* Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (holding that unless statute employs suspect or quasi-suspect classification or impinges on fundamental rights, court employs rational basis scrutiny).

[36] *Cleburne*, 473 U.S. at 440-42; Graham v. Richardson, 403 U.S. 365 (1971); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).

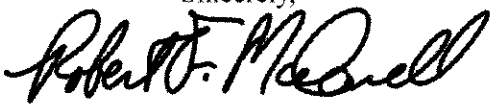
[37] *See Romer*, 517 U.S. at 631-33.

[38] *See Cleburne*, 473 U.S. at 446-47 (noting that classifications based on disability are subjected to rational basis review).

abused and neglected as defined in § 63.2-100, or the child is in need of services as defined in § 16.1-228. It further is my opinion that statutory and constitutional provisions require mandated services pursuant to CSA to be provided to eligible children who are in need of such mental health services without their parents having to relinquish custody to local social services agencies.

Thank you for letting me be of service to you.

Sincerely,



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