

RECEIVED
JAN 24 2006
OPINION COMMITTEE

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

January 20, 2006

ALBERT HAWKINS
EXECUTIVE COMMISSIONER

The Honorable Greg Abbott
Attorney General of Texas
Office of the Attorney General
209 West 14th Street
Austin, Texas 78701

FILE # ML-44578-DL
I.D. # 44578

RQ-0434-GA

Re: Texas Office for the Prevention of Developmental Disabilities Funding and
Accountability

Dear General Abbott:

Pursuant to Government Code §402.042, the Health and Human Services Commission (HHSC) requests your opinion concerning questions relating to oversight and accountability for state funds allocated to HHSC for the Texas Office for the Prevention of Developmental Disabilities (TOPDD). Specifically, we request opinion on the following questions:

1. Is TOPDD an autonomous state agency, or is it, by contrast, subject to HHSC fiscal oversight and control?
2. Is TOPDD authorized to solicit funds such as private grant money?
3. Assuming that TOPDD does have authority to solicit funds as described above, then, pursuant to Tex. Const. art XVI, §6(b) and according to its organic statute, but in the absence of specific legislative appropriation, is TOPDD authorized to spend funds received through grants and donations received from public, private, state, and federal sources?

Our briefing of these issues follows.

Background

The 71st Legislature established the TOPDD in 1989.¹ The purpose of TOPDD is "to minimize the economic and human losses in Texas caused by preventable disabilities through the establishment of a joint private-public initiative."² Although its existence is not mandated by

¹ Act of May 26, 71st Leg., R.S., ch. 1209, 1989 Tex. Gen. Laws 4912 (adopting Subchapter C of Human Resources Code Chapter 112).

² A related entity, the Texas Planning Council for Developmental Disabilities, had previously been established in 1983 to assure state compliance with applicable federal developmental disability laws. Act of May 29, 1983, 68th Leg., R.S., ch. 970, 1983 Tex. Gen. Laws 5272 (adopting Human Resources Code Chapter 112). Some legal characteristics of this agency (restrictions on lobbying) were later addressed by Tex. Att'y Gen. Op. No. JC-0161 (1999).

federal law, the potential creation of such an office was suggested by federal legislation at least as early as 1987.³

TOPDD's governing body is its executive committee.⁴ The executive committee is authorized to appoint a board of advisors and to hire an executive director, "to serve as the chief executive officer of the office and to perform the administrative duties of the office."⁵

On an agency level, TOPDD is directed (among other duties) to, "solicit, receive, and spend grants and donations from public, private, state, and federal sources."⁶ That fundraising function is replicated at the executive committee level, as this body may "apply for and distribute private, state, and federal funds to implement prevention policies set by the executive committee."⁷ The executive committee may appoint a board of advisers, which may in turn, "serve on task forces [and] solicit donations and grants."⁸ The executive committee is authorized to establish such task forces, which shall (among other duties), "arrange for funds through ... (A) contracts for services from participating agencies; (B) grants and gifts from private persons and consumer and advocacy organizations; and (C) foundation support."⁹ Thus, fundraising was and remains a core part of TOPDD's mission.

Administrative Support of the TOPDD

The 76th Legislature administratively attached TOPDD to the Texas Department of Mental Health and Mental Retardation (TDMHMR) in 1999.¹⁰ The Legislature uses administrative attachment to establish a relatively small, often highly specialized, state agency or entity within a larger host agency, while preserving the smaller agency's independence. There are many similar examples of administrative attachment in Texas statutes. A typical example is the Manufactured Housing Board, an independent entity within the Texas Department of Housing and Community Affairs.¹¹ Another example is the State Office of Risk Management, which is administratively attached to the Office of the Attorney General, with a provision that, "the office shall be independent of the office of the attorney general's direction."¹²

³ See Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987, Pub. L. No. 100-146, §202. The re-codified version of the federal statute is now at 42 U.S.C. §15025(d)(2)(A)(iii). This statute allows that the "designated State agency" which provides support to a State Council on Developmental Disabilities may be a "State office..." (among other options).

⁴ *Id.*; codified at Human Resources Code §112.045 (Vernon 2005).

⁵ See generally, Human Resources Code §§112.045 – 112.050 (Vernon 2005).

⁶ Human Resources Code §112.044(5).

⁷ Human Resources Code §112.050.

⁸ Human Resources Code §112.046.

⁹ Human Resources Code §112.048(c)(3).

¹⁰ Act of April 26, 1999, 76th Leg., R.S., ch. 751, 1999 Tex. Gen. Laws 3359, codified at Human Resources Code §112.043.

¹¹ Government Code §2306.6003 (Vernon 2005).

¹² Labor Code §412.0111 (Vernon 2005).

The Legislature provided for TDMHMR to support, but not control, the TOPDD via the administrative attachment relationship. The Legislature mandated that TDMHMR:

- (1) provide administrative assistance, services, and materials to the office [i.e., TOPDD];
- (2) accept, deposit, and disburse money made available to the office;
- (3) accept gifts and grants on behalf of the office from any public or private entity;
- (4) pay the salaries and benefits of the executive director and staff of the office;
- (5) reimburse the travel expenses and other actual and necessary expenses of the executive committee, executive director, and staff of the office incurred in the performance of a function of the office, as provided by the General Appropriations Act;
- (6) apply for and receive on behalf of the office any appropriations, gifts, or other money from the state or federal government or any other public or private entity, subject to limitations and conditions prescribed by legislative appropriation;
- (7) provide the office with adequate computer equipment and support; and
- (8) provide the office with adequate office space and permit the executive committee to meet in facilities of the department.¹³

These 1999 provisions do not necessarily conflict with the 1989 legislation; however, TDMHMR's directives (regarding the acceptance, deposit and disbursement of money made available to the office, and regarding the acceptance of gifts and grants on behalf of the office) create some overlap with the pre-existing fundraising functions vested in the TOPDD. There is at least some potential for confusion between and among the agencies and entities that procure funding and donations, and for the proper characterization of and accounting for such monies.

Although the Legislature administratively attached TOPDD to TDMHMR, the Legislature clearly signaled that TOPDD was to remain independent from TDMHMR:

[T]he executive director and staff of the office are employees of the office and not employees of the Texas Department of Mental Health and Mental Retardation....¹⁴

The 76th Legislature also passed a related contingent appropriation by which it authorized TDMHMR to expend up to \$120,000 each fiscal year during the 2000-01 biennium for salaries,

¹³ Human Resources Code §112.043(b) (Vernon 2005).

¹⁴ Human Resources Code §112.043(c) (Vernon 2005).

benefits, travel expenses, and other support of TOPDD.¹⁵ The 77th and 78th Legislatures attached substantially similar riders to TDMHMR's budgets.¹⁶ Three consecutive Legislatures thus used the administrative attachment mechanism to allocate funds to TOPDD while refraining from granting TDMHMR any substantial degree of oversight, responsibility, or authority over TOPDD.

78th Legislature Restructures Health and Human Services Agencies with House Bill 2292

The 78th Legislature passed House Bill 2292 (H.B. 2292) in 2003, which brought about a major restructuring of health and human services in Texas.¹⁷ H.B. 2292 consolidated various health and human services programs and functions, abolished several state agencies (including TDMHMR),¹⁸ and abolished several advisory committees.¹⁹

HB 2292 did not directly amend the statute²⁰ whereby TOPDD had been administratively attached to TDMHMR, and thus was silent, in one respect, concerning which state agency would succeed TDMHMR in providing support for TOPDD. On the other hand, H.B. 2292 did provide for the transfer of all TDMHMR programs, powers and duties. The bulk of TDMHMR program duties were transferred to two newly created agencies, the Department of State Health Services (DSHS)²¹ and the Department of Aging and Disability Services (DADS).²² The remainder of TDMHMR's powers and duties, including administrative support services, accounting and financial management, were transferred to HHSC.²³ HHSC has concluded that the function of providing support to TOPDD falls into this latter category.

79th Legislature Attaches Rider 47

With the abolition of MHMR and the transfer of its duties to other agencies, the function of providing administrative and financial support to TOPDD has been effectively transferred to the HHSC. Consistent with that result, the General Appropriations Act for the current biennium includes a rider to the HHSC's budget substantially similar to those which had been attached to TDMHMR's budget in each of the preceding three legislative sessions (1999-2003), directing HHSC to "...expend, from funds otherwise appropriated to the commission by this

¹⁵ Act of April 23, 1999, 76th Leg., R.S., ch. 1589, art. II, §1, 1999 Tex. Gen. Laws 5446, 5640 (Rider 48 of TDMHMR's budget).

¹⁶ See Act of May 24, 2001, 77th Leg., R.S., ch. 1515, art. II, §1, 2001 Tex. Gen. Laws 5411, 5618 (Rider 33 of TDMHMR's budget); and see Act of June 1, 2003, 78th Leg., R.S., ch. 1330, art. II, §1, 2003 Tex. Gen. Laws 5023, 5222 (Rider 31 of TDMHMR's budget, providing for support of the Office at the reduced amount of \$105,600 per fiscal year).

¹⁷ See Act of May 26, 2003, 78th Leg., R.S., ch. 198, 2003 Tex. Gen. Laws 611.

¹⁸ *Id.* at 641 (§1.26).

¹⁹ *Id.* at 708 (§2.151).

²⁰ Human Resources Code §112.043.

²¹ Act of May 26, 2003, 78th Leg., R.S., ch. 198, 2003 Tex. Gen. Laws at 636 [§1.19(a)(2)].

²² *Id.* at 637 [§1.20(a)(3)].

²³ *Id.* at 635-636 [§1.18(a)(1)].

[Appropriations] Act, an amount not to exceed \$100,320 each fiscal year for salaries, benefits, travel expenses, and other support of the Office for Prevention of Developmental Disabilities....”²⁴ (Rider 47). Again, the Legislature has not expressly assigned to HHSC any degree of oversight, responsibility, or authority over TOPDD. On the other hand, funding for TOPDD passes through HHSC, supporting the conclusion that TOPDD is now administratively attached to HHSC.

HHSC assumes that its administrative attachment and support role must include ordinary financial bookkeeping tasks. For example, it is clearly incumbent on HHSC to maintain an orderly record of disbursements of the yearly \$100,320 in general revenue funds appropriated for TOPDD. It is also logical to assume that HHSC may maintain records of receipts and disbursements of monies received from sources other than general revenue. TOPDD is required to submit biennial reports to the Legislature, which again will presumably entail assistance from HHSC, particularly with respect to financial matters. The review and recording of disbursements may potentially progress into an oversight role. HHSC suspects that further progression or elevation of these administrative support functions into actual or attempted financial oversight or control over TOPDD’s fiscal and contracting policies might violate legislative intent.

Spending Authority

As noted above, TOPDD has statutory authority to spend grants and donations from public, private, state, and federal sources. Generally speaking, however, absent a specific legislative appropriation, a state agency may not draw money from the Treasury, even if statutory authority exists.²⁵ On the other hand, a state constitutional exception exists involving, “state participation in programs financed with private or federal funds for rehabilitation of blind, crippled, or physically or mentally handicapped persons....”²⁶ In such cases, certain state agencies are empowered to receive and spend money without legislative appropriation:

State agencies charged with the responsibility of providing services to those who are blind, crippled, or otherwise physically or mentally handicapped may accept money from private or federal sources....

... Notwithstanding any other provision of this Constitution, the state agencies may expend money accepted under this subsection without the necessity of an

²⁴ Act of May 31, 2005, 79th Leg., R.S., ch. 1369, art. II, § 1, 2005 Tex. Sess. Law Serv. 4512 (Vernon) (Rider 47 to HHSC’s 2006-2007 biennium budget).

²⁵ Tex. Const. art. VIII, § 6. WITHDRAWAL OF MONEY FROM TREASURY; DURATION OF APPROPRIATION. “No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years.” Generally, Texas law requires that two independent prerequisites be met before state funds may be expended: (1) there must be not only the statutory authorization creating the program, but (2) there must be also a specific legislative appropriation. *Mutchler v. Texas Dept. of Public Safety*, 681 S.W.2d 282 (Tex.App.—Austin 1984, no writ).

²⁶ Tex. Const. art. XVI, § 6.

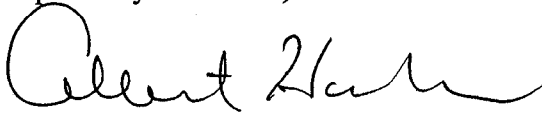
The Honorable Gregg Abbott
January 20, 2005
Page 6

appropriation, unless the Legislature, by law, requires that the money be expended only on appropriation. The Legislature may prohibit state agencies from accepting money under this subsection or may regulate the amount of money accepted, the way the acceptance and expenditure of the money is administered, and the purposes for which the state agencies may expend the money. Money accepted under this subsection for a purpose prohibited by the Legislature shall be returned to the entity that gave the money.²⁷

Absent such constitutional spending authority, TOPDD would be subject to an extremely limited yearly budget of \$100,320 per year. HHSC concludes that the Legislature intended for TOPDD to possess this spending authority described and authorized under art. XVI.

Please let me know if you have any questions or require additional information. Carey Smith, HHSC General Counsel, serves as lead staff on this matter and can be reached at (512) 424-6894 or by e-mail at

Respectfully submitted,



Albert Hawkins

AH:CES:KMR

²⁷ Tex. Const. art. XVI, §6(b).