S T A T E O F T E N N E S S E E
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Opinion No. 03-013

Exempting Human Resource Agencies From Conflict of Interest Provision in Child Care Broker Services Grant Application

QUESTION

Do Tennessee Department of Human Services' proposed rules exempting Human Resource Agencies from prohibitions which preclude persons with any interest in a child care agency from being awarded a contract or grant to perform child care broker services violate the Equal Protection Clause?

OPINION

No rules were found which satisfy your request. However, the disclosure of potential conflict of interest provision in the grant application for child care broker services in the child care certificate program, which is the only current document found which relates to your request, does not violate the equal protection provisions of the United States or Tennessee Constitutions.

ANALYSIS

Our investigation revealed no rules exempting Human Resource Agencies ("HRAs") from prohibitions which preclude persons with any interest in a child care agency from being awarded a contract or grant to perform child care broker services. A grant application for child care broker services in the child care certificate program,[1] which includes such a disclosure of potential conflict of interest, is the only current document found which relates to your request. Therefore, this opinion

[1]The Child Care and Development Block Care Grant Act of 1990, 42 U.S.C. § 9858, provides financial assistance for child care services to parents of eligible children through a grant to the state. In Tennessee, the Department of Human Services is designated as the lead agency responsible for administering this financial assistance and coordinating and monitoring the programs and services provided. 42 U.S.C. § 9858b; 45 C.F.R. §§ 98.10(a), 98.11 and 98.12. Pursuant to this grant, the state must provide assurances that the parent(s) of each eligible child who receives or is offered child care services for which financial assistance is provided has the option of either enrolling the child with a child care provider that has a grant or contract for the provision of such services or receiving a child care certificate for the value of the child care services provided. 42 U.S.C. § 9858c(c)(2)(A); 45 C.F.R. §§ 98.15(a) and 98.30(a).

will address whether the disclosure of potential conflict of interest provision in this grant application violates the Equal Protection Clause.

By its terms, the grant application relates to the award of grants for the provision of child care broker services to assist the State of Tennessee in managing child care services for eligible children. The term "child care broker services" is not more specifically defined, either by statute or in the grant application. However, our investigation revealed that the Department of Human Services has assisted parents in locating child care services, which is what is intended by the term "child care broker services." The grant application includes a potential conflict of interest disclosure which provides that:

> No person or entity, including the staff, corporate officers and board members of such entity, may be awarded a contract or grant to perform child care broker services, if such person or entity, or its staff, corporate officers or board members has any interest in a child care agency. This provision shall not apply to human resource agencies.

This disclosure is apparently taken from SB 1531/HB 1691, proposed legislation on this subject which was considered but not passed in 2001. Your concern is apparently whether the exclusion of HRAs from the application of this clause violates the Equal Protection Clause of the United States or Tennessee Constitutions.

The equal protection provisions of the 14th Amendment to the United States Constitution and Article 11, Section 8 of the Tennessee Constitution require that similarly situated persons be treated equally under the law. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). "[I]f a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). A right is fundamental if it is explicitly or implicitly guaranteed by the Constitution. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33-4 (1973). A suspect class is one that "commands extraordinary protection from majoritarian political process" because of a "history of purposeful unequal treatment" or "a position of political powerlessness." *Id.* at 28. There is no fundamental right to a state contract or grant and persons or entities applying to provide child care broker services do not comprise a recognized suspect class.

Under the rational basis test, the inquiry is whether the classification system has a reasonable relationship to a legitimate state interest. "Unless the individual challenging the statute can establish that the differences are unreasonable, the statute must be upheld." *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 154 (Tenn. 1993). If the classification is naturally and reasonably related to that which it seeks to accomplish, it has passed the rational basis test and has met constitutional standards. *Id.*

At issue here is a potential conflict of interest disclosure clause in a grant application, not a statute or law. This grant application is for the provision of child care broker services to assist the State of Tennessee in managing child care services for eligible children by assisting their parents to locate child care services. The potential conflict of interest disclosure clause in the grant application prohibits persons and entities, including their staff, corporate officers and board members, from being awarded a contract or grant to perform child care broker services if they have any interest in a child care agency, but excludes HRAs from its application. The prohibition on providing both child care services and child care broker services is not the subject of your inquiry; that conflict of interest is self-evident. Your inquiry is premised on the absence of an articulated rational basis for excluding HRAs from the disclosure of potential conflict of interest provision in the grant proposal.

Generally, the Department of Human Services has the authority to "utilize any state, federal, local or private funding to provide for any child care or adult day care services or training which it deems necessary to promote the welfare of children and adults or which are required or permitted by state or federal law or regulations, and to provide such services or training directly or by contract with any public or private entities." Tenn. Code Ann. § 71-1-105(5)(C). State agencies are not necessarily required to utilize request for proposal procedures to contract with other governmental units or state agencies, but may utilize sole source procedures. Tenn. Comp. R. & Regs. Ch. 0620-3-3-.04(a)(3). Human resource agencies are "public and governmental bodies acting as agencies and instrumentalities of the creating and participating counties and cities" and have been held to be state agencies. Tenn. Code Ann. § 13-26-105(a); *Hastings v. South Central Human Resource Agency*, 829 S.W.2d 679 (Tenn. Ct. App. 1992).

Both DHS and HRAs are subject to conflict of interest provisions with respect to any contracts in which they have an interest. Tenn. Code Ann. § 12-4-101(a)(1), which provides that:

> It is unlawful for any officer, committeeperson, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation. The provisions of this subdivision shall not be construed to prohibit any officer, committeeperson, director, or any person, other than a member of a local governing body of a county or municipality, from voting on the budget, appropriation resolution, or tax rate resolution, or amendments thereto, unless the vote is on a

> specific amendment to the budget or a specific appropriation or resolution in which such person is directly interested.

Thus, any contract between the State and an HRA for the provision of child care broker services would already appear to preclude the HRA's officers, director and staff from referring parents to a child care agency they own.

It is our understanding that at least some HRAs operate Head Start programs which are licensed as child care centers. The conflict of interest provisions of Tenn. Code Ann. § 12-4-101(b) would appear to address the indirect conflict of interest that could arise from the provision of these services by a governmental entity. That statute provides as follows:

> It is unlawful for any officer, committeeperson, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be indirectly interested in any such contract unless the officer publicly acknowledges such officer's interest. "Indirectly interested" means any contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality or county.

The application of these statutory conflict of interest provisions to HRAs would appear to obviate the need to include HRAs in any potential conflict of interest disclosures in a grant proposal. For these reasons, it is the opinion of this office that the exclusion of HRAs from the potential conflict of interest disclosure of a grant proposal for child care broker services does not violate the Equal Protection provisions of the United States or Tennessee Constitutions.

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