

This is a sanitized recommendation and an example of the work the Review Board does when it reviews 5,000+ cases each year. This document was sent to the legal parties prior to court.

This is also an example of the positive impact the Review Board has on foster children's lives.

The Guardian Ad Litem in this case acted on the Board's Recommendations and Bill and Will were adopted by their foster parents within 3 months of this review.

**NEBRASKA FOSTER CARE REVIEW BOARD
LOCAL REVIEW BOARD FINDINGS AND RECOMMENDATIONS**

| | | | |
|-----------------------|--------|---------------------------|---------|
| Bd. Number / Location | | Docket/Case Number | |
| Board Meeting Date | 3-2008 | Date Next Court Hearing | |
| Review Number | 3 | Date of next FCRB review: | 10/2008 |
| Last Review | 11-07 | | |
| Agency Rev/Date Rev | HHS | Court/County: | |

Confidential - Unauthorized disclosure of this report or any of its contents is a Class III misdemeanor under Nebraska Law.

In the Matter of:

| Child's Name | Birthdate | Age | Number of Times in Care | Number of Placements | Time in Current Placement | Total Time in Foster Care | % Of Life In Care |
|--------------|-----------|------|-------------------------|----------------------|---------------------------|---------------------------|-------------------|
| Bill | 11-06 | 1y4m | 1 | 2 | 1y4m | 1y4m | 100% |
| Will | 11-06 | 1y4m | 1 | 1 | 1y4m | 1y4m | 100% |

| Name | Relationship To the Case | Questionnaire | | Review | | Findings Submitted |
|----------------|--------------------------|---------------|-----------|---------|----------|--------------------|
| | | Sent | Returned | Invited | Attended | |
| Hon. | Judge | N/A | N/A | N/A | N/A | Yes |
| | County Attorney | N/A | N/A | N/A | N/A | Yes |
| | Guardian ad litem | Yes | via phone | Yes | No | Yes |
| | Case Manager | Yes | No | Yes | No | Yes |
| | HHS Supervisor | N/A | N/A | N/A | N/A | Yes |
| | HHS PSA | N/A | N/A | N/A | N/A | Yes |
| Foster Parents | Placement | Yes | No | Yes | Yes | No |
| | Concerned Party | Yes | Yes | Yes | Yes | No |

| | |
|--|--|
| PERMANENCY OBJECTIVE | Adoption (Case Plan 12-07) Concurrent Plan: Reunification |
| TARGET DATE for permanency to be achieved | 6-08 (Case Plan 12-07) |

CASE MANAGER CHANGES: According to NFOCUS this family has had 4 case manger changes since the children entered care on 11/29/06. From 10/04/07 until 1/27/08 there was not a PSW assigned to this case. Current PSW received this case on 1/27/08. The foster parents reported to the Board that this case will be transferring to the Adoption unit soon, therefore receiving a new PSW at that time.

BOARD'S RECOMMENDATIONS AND CONCERNS

The Board recommends the Department pursue adoption for Bill and Will in their current placement with the Smith family.

- Both children have been in this foster home for almost 100% of their lives and appear to be bonded to both foster parents.
- The placement is willing to adopt both children.
- The placement is willing to have an open adoption so biological relatives can remain a part of the boy's lives.
- The foster mother is a former special education teacher, and has experience with special needs.

The Board completed a project permanency visit to the Smith's foster home on 11-07. The Board found the foster home to be an appropriate loving home.

The Board recommends that a bonding assessment be completed between the Smith family and the twins.

Will and Bill are at risk for developmental and mental health delays and issues due to their mother's substance abuse while pregnant with the twins. The Board recommends that the children continue to be evaluated for services every six months.

The Board has concerns with the potential adoptive placement with the paternal aunt Aunt Lois.

- Aunt Lois has not consistently participated in the twin's therapy sessions or doctors' appointments.
- Aunt Lois is a single mother with two children, ages 13 and 10, living in her home.
- Aunt Lois works at Mart-Mart during the night and has reported that her family will watch the children while she is working.

If the Department continues to pursue placement with Aunt Lois, the Board recommends the following occur prior to moving the children:

- Three to Six month slow and gradual transition period from the Smith foster home, due to the twins' attachment to the current foster parents.
- Visinet continue to monitor visitation and progress with the twins.
- Aunt Lois be held accountable for picking up and dropping off the twins from the foster home to the visits.
- Aunt Lois be held accountable for setting up occupational therapy sessions and doctors appointments as well as provide transportation to and from appointments.

The Board is also concerned with the lack of consistency regarding case management on behalf of the Department. The Board recommends that all efforts be made to prevent further case management changes for this family.

- The case management of this case was vacant from 10-07 until 1-08. A supervisor covered until the position was filled.
- The children have had 4 case manager changes.
- The foster parents have been told this case in transferring case managers yet again to an adoption worker.

1A The Board finds that reasonable efforts were made to prevent the child's removal from the home or no efforts could have been made to prevent the child's removal.

REASON ENTERED CARE: Judy, the twins mother admitted to cocaine and alcohol use throughout her pregnancy. She tested positive for cocaine at delivery. Bill also tested positive for cocaine at birth. Judy also reported that she had limited to no prenatal care. (Hospital Records, Initial Assessment)

2A The Board finds that there is a written permanency plan with services, timeframes, and tasks specified.

COURT

| | |
|--|-------|
| Are court hearings occurring every six months? | Yes |
| Most recent court hearing? | 12-07 |
| Was the most recent case plan adopted? | Yes |
| Next court hearing? | 4-08 |

ADJUDICATION §43-247 3(a) on 11-06

CONTACT WITH CHILD:

HHS visited the children in the home on 2-08 (NFOCUS Narrative 2-08)

GAL visited the foster home for the 2nd time on 9-07. (FCRB Meeting, 11-07 with foster parents) The GAL also visited the potential adoptive home of the Aunt Lois on 2-08. (GAL phone contact 3-08)

The GAL reported to the Board that she is in support of the twins being adopted by the Smith foster family, who has had placement of the twins since birth. (GAL phone contact 3-08)

3A The Board finds that the current placement appears appropriate and safe.

CHILD'S PLACEMENT

Type of placement: Traditional Foster Home in Bellevue, NE

Date of placement: 2-07

Bill and Will are placed in a traditional foster home. The foster parents have a 6-year-old daughter and a 6-year-old son. There are no child abuse/neglect intakes on this home. A positive home study was available. (Home Study, 2006) The foster parents are willing to adopt should the boys become legally free. (FCRB Meeting, 11-07 with foster parents)

Potential Adoptive Home: DHHS is pursuing an adoptive placement with Aunt Lois, a paternal aunt, at this time. The PSW does have some concerns regarding this potential placement. Aunt Lois attended only half of visits set up by the current foster parents with the twins in 2007. (Addendum 8-07) Aunt Lois has two children of her own ages 10 and 13. She is employed at Mart-mart, her current hours at 10:00pm until 7:00am. (Home study) Aunt Lois reported to the FSW that she is not concerned about her hours since she has several siblings, who will help take care of the twins overnight. (FSW notes 12-07) Aunt Lois has been consistent with visitation, however she has not attended the twin's occupational therapy sessions for several months. Aunt Lois reported that she feels uncomfortable at the foster home where therapy sessions occur. Aunt Lois also did not attend their most recent physical exam on 3-08. (FCRB Meeting, 3-08 with foster parents and Sherry McIntyre)

Has a home study been completed on the foster home? Yes

Has there been intakes or assessment on the placement regarding the children? No

Was the child's placement given education and health information at the time the child was placed? Yes

Has the child been physically or chemically restrained or secluded in their current placement? None documented

4A The Board finds that all services in the plan are presently in motion.

CHILDREN:

Did the HHS case file contain updated health and information record? Yes

Will and Bill were born 6 weeks early. They were referred to Early Development Services through the Public Schools. Will receives Occupational Therapy twice a month in the foster home. Both twins have acid reflux, however, it seems to bother Will more than Bill. The twins had a physical exam on 3-08. The twins were hospitalized in February 2007 with pneumonia. The foster mom reports that the boys are doing great and have been healthy. The foster mother is a stay at

home mother therefore the twins do not attend daycare. (N-FOCUS Narrative 2-08) (Addendum 8-07) (FCRB Meeting, 3-08 with foster parents)

PARENTS

Jack received relinquishment counseling on 7-07 at Child Saving Institute. (Letter from CSI 7-07) Jack is currently incarcerated in Iowa, estimated release date in August 2008. (Court Report 12-07) Jack relinquished his parental rights on 2-08 (NFOCUS Narrative 2-08)

Judy received relinquishment counseling on 6-07. (Letter dated 6-07) Judy has had four other children removed from her care. Three of her children are in a guardianship and her parental rights were terminated to a daughter in August 2006. (Court Report 12-07) Judy has relinquished her parental rights to the twins (Case Manager contact 4-08).

5A The Board agrees with the permanency objective of adoption.

6D The Board finds that parental visitation is not applicable.

PARENTAL VISITATION PLAN

Aunt Lois, aunt and potential adoptive placement has supervised visitation twice a week for 2 hours each session. (Visitation Documentation 2007 and 2008) (FCRB Meeting, 3-08 with foster parents and Aunt Lois)

Transportation and Supervision: Visinet transports the children and supervises the visits. Visitation documentation reports that she demonstrates appropriate parenting skills with both children. (Visitation Documentation 2007 and 2008) (Court Report 12-07)

Parents:

Judy has not seen the twins since April 2007. (FCRB Meeting, 11-07 with foster parents)

Jack has not seen the twins since June 2007. (FCRB Meeting, 11-07 with foster parents)

7C The Board finds that sibling visitation is not applicable. (Siblings are placed together)

SIBLING VISITATION PLAN

Siblings: Mary, half sister (7-05)

Mary was adopted and the twins do not have contact with her. (FCRB Meeting, 3-08 with foster parents)

8A The Board finds that the Department has evaluated the safety of the child and has taken the necessary measures in the plan to protect the child.

9C The Board finds that reasonable efforts to return the child home are no longer required due to (Plan is no longer reunification).

10A The Board finds that progress is being made towards the permanency objective.

11B The Board finds that return of the children to the parents is not likely and recommends referral for termination of parental rights and/or adoption.

12A The Board finds that there is a continued need for out-of-home placement.

13D The Board's finding on whether the grounds for termination of parental rights appears to exist is not applicable. (Parental rights have already been relinquished/terminated)

BARRIERS TO THE PERMANENCY PLAN

340 HHS policy (Relative Placement)

341 Adoption paperwork not complete

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Prepared by

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STATE FOSTER CARE REVIEW BOARD
MINUTES – September 5, 2008
State Capitol, Room 1525 Lincoln NE

MINUTES OF BOARD MEETING

NO. 157

Call to Order A meeting of the State Foster Care Review Board was held on Friday September 5th, 2008. Notice of the meeting, pursuant to statute, was published. Board Chairperson Georgina Scurfield called the meeting to order at 9:02 a.m.

Roll State Board members present: Ron Albin, Gene Klein, Sarah Ann Lewis, Judy Meter, Mary Jo Pankoke, Alfredo Ramirez, David Schroeder, Dr. Mario Scalora, and Georgina Scurfield. Lisa Borchardt and Rev. Larry Brown M.D. joined the meeting later in the morning

Staff present: Carol Stitt, Linda Cox, Heidi Ore, Stacey Sothman and Tami Gangwish.

Visitors present: Liz Hruska from the Legislative Fiscal Office; Angela McClelland, and Stephanie Meese from the Legislative Research office; and Kathy Ewing from HHS.

Georgina Scurfield briefly discussed the schedule for the day and asked the State Board members if they wanted to break for lunch or order lunch in and work through lunch so the meeting could be done by 1 p.m. The State Board agreed to order lunch in for those who wanted it and work through lunch to be done by 1 p.m.

Minutes Georgina Scurfield asked if the State Board had any corrections or changes to the July 25, 2008 minutes. Mary Jo Pankoke moved to approve the minutes. Dr. Mario Scalora seconded the motion. No further discussion occurred. All were in favor in approving the minutes.

Budget Status The 9-1-2008 Budget Status Report was reviewed. Carol Stitt reported that 16.99% of that budget year had elapsed and the Board had expended 15.33% of its appropriations. Heidi Ore explained the Budget Status report and discussed how the report showed salaries and benefits for staff and how other operational costs were represented on the report.

Gene Klein asked about how the Review Board receives general and federal funds. Carol Stitt explained that general funds were appropriated to the Board as a set amount and that

IVE funds were received through a pass through grant from DHHS and were claimed based on the number of IVE eligible children reviewed in a given month. Ms. Stitt stated that FCRB federal funding and staff have been lost due to DHHS overturning IVE designation for several children because of incomplete court language and documentation and due to how IVE eligibility is reported to the Review Board and communicated to DHHS.

Carol Stitt stated that either a review by the FCRB or the courts within a 6-month period would count as a review by federal auditors. Mary Jo Pankoke asked if the Board recovers funds for children that had been reviewed by the court and not the Review Board. Ms. Stitt stated that the Board only claims funds for the children the Board reviews.

Carol Stitt stated that she is working to implement a process where notifications are e-mailed to legal parties in the case such as guardians ad litem in Omaha. Ms. Stitt asked Stacey Sothman, the Omaha Area Review Specialist Supervisor, how many children are represented by the Incontro Group in Omaha. Ms. Sothman estimated that 500 children have guardian ad litem representation by this group.

David Schroeder asked if the Data Processing expense line on the Budget Status represented a contracted amount to process FCRB queries for the year. Ms. Ore stated that this was an estimate of how much it would cost to query the system for the year and that this monthly bill is monitored due to inexplicable fluctuations.

Dr. Mario Scalora asked if vacancy savings could be used to fund overtime and/or contracting for assistance. Carol Stitt stated that it could.

Gene Klein moved to approve the September 1, 2008 Budget Status report. Dave Schroeder seconded the motion. No other discussion was held. All members were in favor.

Appropriations Process

Carol Stitt stated that the Review Board's Biennium Budget FY 10 – FY 11 would be submitted on September 15, 2008 per statute.

Dr. Mario Scalora asked if funding had been placed in the Budget to address the staff's safety, specifically a secure door in Omaha and a phone system that could identify, trace or log calls in Lincoln. Carol Stitt stated that the Omaha office had a

secure door installed. The State Board discussed the phone system and the need for security.

David Schroeder asked that the State Board be provided a fact sheet regarding the Board's Budget Request that could be used as the State Board discusses the request with Senators. Carol Stitt stated that she would provide that to the State Board.

Georgina Scurfield tabled the Appropriations Process discussion so Heidi Ore could discuss the Board's phone security needs with the Division of Communications.

Approval of New Bd Mbrs

Georgina Scurfield asked that the State Board to review a list of newly trained local board members for approval by the State Board. Ms. Stitt stated that the list included the new board member's occupations as requested by Mary Jo Pankoke.

Dr. Mario Scalora moved to appoint the newly trained local board members to local boards. Gene Klein seconded the motion. All members were in favor.

Technology Report

Georgina Scurfield asked for a report from the Technology Committee consisting of Sarah Ann Lewis, Dave Schroeder and Alfredo Ramirez. Sarah Ann Lewis stated that the committee had met via a conference call and had spoke with John Stefford, about how the Review Board could go paperless and retain confidential information. Ms. Lewis stated that she and the committee would like to talk to staff about their needs.

Mr. Ramirez stated that Mr. Stefford had discussed with them the overall possibilities that would be available. Mary Jo Pankoke asked if Mr. Stefford expected a contract with the Review Board for this work. Mr. Ramirez stated that Mr. Stefford had donated his time but that he does contract with corporations.

Linda Cox stated that the Review Board is obliged to work and consult with persons currently under contract with the State such as Nebraska Online to assure agencies are using compatible software and equipment. Mr. Ramirez stated that the nice thing about talking to persons outside the State was there were no limits to their creativity in designing a system.

Carol Stitt stated that it was a good time to look at a technology plan and to improve the Review Board's website to include pertinent information and the ability to fill out questionnaires online.

The State Board discussed what equipment could be provided to staff immediately that could help them do their work such as scanners so scanned information could be provided to local board members rather than sending hard copies.

Georgina Scurfield asked if there was anything identified that would help the staff do their work that could be included in the Budget request or if the committee would need to do its work and make a recommendation for implementation at a later time.

Alfredo Ramirez stated that he wanted to meet the needs of staff that travel first and then build from there. Heidi Ore reported that there were immediate needs to replace desktop computers and software needed to implement the new e-mail system.

Georgina Scurfield asked the Supervisors if it would be helpful to staff to have a scanner. Stacey Sothman stated that a scanner might be helpful for the Omaha staff when they work in their office but for staff doing file reviews at other locations such as Papillion and the ICCU, copies would still be made. Ms. Sothman stated that 3 to 5 inches of material could be copied per file reviewed. Ms. Sothman thought it might not save time to carry laptops and scanners into DHHS offices to conduct file reviews.

Mary Jo Pankoke stated that there was more work the subcommittee needed to complete before a decision could be made.

Carol Stitt stated that staff member's technology needs depended on where they did their work. Ms. Stitt stated that even the rural staff is not away from their offices everyday.

Gene Klein made a motion to authorize a request up to \$5,000 to meet the immediate technological needs of staff. Sarah Ann Lewis seconded the motion.

Georgina Scurfield asked the Supervisors to discuss their ideas about implementing the CFSR tool that was used during the federal audit of cases in July.

Tami Gangwish suggested that instead of desk top computers being replaced for staff, that laptop tablet computers be purchased and where these could be taken to file reviews, court hearings and local board meetings and that a custom review

software could be created that would work like the CFSR tool and material entered would be folded into a report. Ms. Gangwish felt that this could help reduce some duplication of effort on the part of the staff.

Carol Stitt stated that she had been working with DHHS on estimates for implementing the CFSR tool ever since the Supervisors had made the suggestion.

The State Board discussed purchasing laptops in lieu of desktop computers for the reviewers, if that could be accomplished with present funding and how many would be needed. Dr. Scalora suggested that the staff be given the discretion to decide what equipment they might need. Alfredo Ramirez suggested that Tami Gangwish be added to the Technology Committee. Carol Stitt suggested that Cheryl Johnson also be added to the committee and Gene Klein asked that Heidi Ore and Linda Cox also be consulted.

Gene Klein withdrew his previous motion. Mary Jo Pankoke made the motion to give the Executive Committee the authority to approve a recommendation from the Technology sub committee for the a set amount of funds to include in the Board's appropriation request to support the technology needs of staff and supervisors for the next two years. Sarah Ann Lewis seconded the motion. All members were in favor.

Appropriation Process Cont. Georgina Scurfield asked Heidi Ore if she had an update on security on the Review Board's phone system as the State Board discussed previously.

Heidi Ore reported that caller id was available through the State phone network and that it is currently on the Board's main phone but that there was not the ability to log calls.

The State Board discussed the value of caller id and the safety it can offer staff, the security of the Omaha Office given its location, and if the door in Omaha is secure. Georgina Scurfield asked that the staff report at the next State Board meeting about the cost of acquiring caller id compatible phones for the office staff persons. Ms. Scurfield asked if there was any further discussion concerning the Appropriations process. Seeing none the next topic was discussed.

Exec. Committee Report Georgina Scurfield reported that the Executive Committee did not formally meet although there was a great deal of communication. Ms. Scurfield did not provide Executive

Committee Minutes. Ms. Scurfield stated that the Committee members met with Carol Stitt at the end of July and in a conference call with Carol yesterday. Ms. Scurfield asked if there was any additional input that the other committee members wished to share. Seeing none the State Board discussed the next item on the agenda.

Workload Com. Report

Gene Klein reported that Ron Albin, Judy Meter and Mary Jo Pankoke had a conference call on Tuesday this past week and identified several initial questions that Carol Stitt had answered. Linda Cox stated that those answers were included in the State Board's packet.

Mr. Klein stated that he met with the Omaha staff a week ago to get a sense of where the staff is coming from as far as workload. Mr. Klein stated that the committee plans to have a report by November to the full state Board on how staff could do the requirements of the Review Board in an efficient manner. To do this Mr. Klein stated that he would be considering staffing, the formulas for caseload, and training requirements.

Mary Jo Pankoke stated that there was a good beginning discussion and that there needs to be more. Ms. Pankoke told Carol Stitt that she appreciated getting the information to the committee so quickly.

Carol Stitt stated that she had provided some examples of the staff's work to illustrate the kind of research that can be completed on a case such as showing that thousands of dollars had been expended on services for a family to facilitate reunification, how case advocacy can be an ongoing process and where permanency was realized for a child due to the positive results of advocacy. Ms. Scurfield asked if the cost for reunifying families was available in other parts of the State. Ms. Stitt stated that the information was in the file and on N-FOCUS. Ms. Stitt stated that the Board's report is a place where legal parties can find basic case information.

Georgina Scurfield asked if there was any other questions or comments. Carol Stitt asked that the recommendations be turned in at the end of the meeting. Dr. Mario Scalora excused himself from the meeting.

Break

The State Board took a break at 10:35 a.m. The meeting resumed at 10:50 a.m.

Performance Audit

Georgina Scurfield stated that the Executive Committee proposed to change the order of the agenda so the Performance Audit would be the next item discussed. All members were in agreement.

Georgina Scurfield stated that there were a few things to discuss regarding the Performance Audit. The first was that the State Board could expect the Auditor's draft report around October 17, 2008 and would have 20 working days to respond. Ms. Scurfield asked how the State Board planned to respond to the draft report from the Performance Auditors and, if Carol Stitt also responds, how that would be facilitated.

Ron Albin suggested that the Executive Committee lead the effort to draft a response. Ms Scurfield volunteered to take the lead on drafting the State Board's response and asked if the report should be shared between the Board members electronically as they work on it.

Gene Klein suggested that the Board's initial thought be solicited and then Ms. Scurfield could summarize those thoughts and everyone could react to that document.

Mary Jo Pankoke asked if a special meeting would be needed or if this work could be shared between them electronically. Georgina Scurfield stated that it would be difficult to organize an additional meeting. Timeframes and logistics were discussed.

Alfredo Ramirez stated that the Board should be objective and not defensive in its response. Mr. Ramirez added that he had concerns about how much the Executive Committee is doing and that the full board should be included.

Ron Albin stated that a draft could be expected from the Executive Committee in 10 days, that the Board should respond to the critical and core areas, not everything that is raised in the report.

Gene Klein asked if the State Board's response was a public document. Angie McClelland stated that the Board's response would be included verbatim in the Auditor's final report, which is a Public Document. Ms. McClelland stated that commonly responses focus on the recommendations included in the report. Ms. McClelland stated that the committee will decide when to release the report but it would likely be out late October or early November.

Dave Schroeder asked if the draft report was confidential. Angie McClelland stated that the confidential report would be mailed to Senators on the Performance Audit Committee, State Board members, the Executive Director of the FCRB, Carol Stitt, FCRB upper management, and the Review Board's Legislative Fiscal officer.

Judy Meter asked if the Review Specialist Supervisors would receive the report. Angie McClelland stated that they would not and that they could discuss which level of staff should receive the report.

Alfredo Ramirez stated that he was nervous about whom the report should be shared with and that information had been leaked before.

Dr. Larry Brown asked if there were punitive damages that might be levied against someone who would release the report. Angie McClelland stated that it would be a Class 2 Misdemeanor if the confidential draft were released.

Carol Stitt stated that she would be available to answer any questions or do research for the State Board as they draft their response. Gene Klein stated that any questions should be communicated through Georgina Scurfield.

Georgina Scurfield asked the State Board if they wanted a motion to reflect that the Executive Committee would set a response timeframe schedule for the rest of the State Board or would consensus be enough. The State Board felt that consensus was enough.

Georgina Scurfield stated that the second item for discussion would be what kind of tools or accommodations the State Board need to allow Ms. Stitt, like a transcription service or someone to help draft her response since she does not use a computer.

Carol Stitt stated that she normally works with Heidi Ore or Linda Cox on drafting and writing materials. Ms. Stitt asked if Georgina Scurfield wanted her to do something else. Ms. Scurfield thought it should be up to the Board if Ms. Ore and Ms. Cox could be involved in preparing Carol's response.

Ron Albin asked Ms. Ore and Ms. Cox if they had any problem keeping information confidential. Ms. Ore and Ms. Cox

responded that they had no problem with that and in fact it would be no different from the confidential material they work with every day.

Carol Stitt asked if it would be all right to confer with the State Board on her response. Ron Albin stated that would not be a problem. Georgina Scurfield stated that she just wanted to be clear that Heidi Ore and Linda Cox would be involved in drafting a response. Ms. Scurfield asked if there was any further discussion on that point.

Georgina Scurfield stated that there were a couple of issues that needed to be addressed concerning a e-mail from Martha Carter earlier in August and the attached e-mail that was sent to Senator Preister.

Judy Meter asked that since discussing Martha Carter's e-mail was not on the agenda could it be discussed per the Open Meetings Law. The State Board felt the topic was related but did not know if discussing it would be contrary to the Open Meetings Law.

Georgina Scurfield asked if the State Board wanted to respond to the conflict of interest issues raised in the e-mail attached to Martha Carter's e-mail since these issues had been raised before.

Ron Albin felt disinclined to respond to private correspondence directed at a Senator. Georgina Scurfield asked if there were any other thoughts.

Gene Klein stated that he was more concerned about how Martha Carter's e-mail implied that confidential material had been leaked to someone outside of the Board. Mr. Klein asked if the Executive Committee had made an inquiry.

Georgina Scurfield stated that the Executive Committee had not discussed this issue together but had had discussions separately. Ms. Scurfield asked if there was consensus that the Board did not wish to address issues raised in Senator Preister's e-mail but would want to address issues raised in Martha Carter's e-mail.

Mary Jo Pankoke suggested that a statement could be made that the State Board is functioning and working together and that the Board has not seen any behavior that would suggest that conflicts of interests exists.

Gene Klein stated that he thought the State Board's response should wait until the Performance Auditor's response was drafted.

Georgina Scurfield stated that other CASA Directors in her position on the State Board may also face this issue and as a result she felt the issue should be discussed.

Dr. Larry Brown stated that he had not seen behavior that would not allow State Board members to serve the children of Nebraska. Dr. Brown felt that it was appropriate for the disgruntled person to go to senators, as it was the Legislature who created these positions on the State Board. Dr. Brown also stated that it was the appointee's jobs to fill those positions and move on.

Alfredo Ramirez stated that the Board spends a lot of time discussing these kinds of issues rather than working on behalf of children and he asked that the Board get back on track. Mr. Ramirez stated that he is eager to finish work on the State Board's code of ethics. Georgina Scurfield stated that it looked like the general consensus was to no do anything right now and she asked if there was further discussion.

Lisa Borchardt stated that she thought a response could be sent now and that it might get lost in a response to the Performance Auditor draft.

Georgina Scurfield asked how the other State Board members felt about making a statement and to whom it should be sent. Alfredo Ramirez suggested that it be sent to the Performance Auditors and the Senators on the Performance Audit Committee. Ms. Scurfield asked the Board if she and Lisa Borchardt should draft this for the Board.

Gene Klein suggested that since Ms. Scurfield is named in the e-mail, it should come from the whole committee.

Dr. Brown stated that he wanted this response to go to the auditors and the Senators on the committee only. Mary Jo Pankoke stated that since the issue had been discussed with other senators previously that perhaps other senators should receive the statement. Gene Klein stated that the State Board's statement could be included in its response to the Performance Auditors report and that would be a public document.

Georgina Scurfield asked if there was consensus to this action. Ms. Scurfield saw consensus to sending a statement from the Executive Committee to the Senators on the Performance Audit Committee and the Performance Auditors. Dr. Brown asked that a draft be sent to the State Board prior to the statement being sent.

Georgina Scurfield stated that the next issue to discuss was addressing an issue identified in an e-mail from Martha Carter where Ms. Carter identified that someone within the organization who took information to someone outside the agency.

Angie McClelland said that she wanted to clarify that there was not an allegation from the Performance Auditor's office that someone had acted inappropriately, just that a person had shared misinformation with the author of an e-mail sent to Senator Preister.

Georgina Scurfield read from Martha Carter's e-mail, which stated, "Given the timing of the e-mail received by the committee I believe that the notes author may have spoken to someone we interviewed recently who then misinformed the author on this point. I know that the auditors have told staff and board members in their interviews that we are using the accountability and disclosure standards because those are the only statutes that deal with conflict of interest issues."

Georgina Scurfield asked if the State Board wanted to discuss the bigger issue here. Ms. Scurfield stated that Ms. Carter says that, "given the timing of the e-mail I believe the note's author may have spoken to someone who we interviewed recently and misinformed the author on this point."

Dr. Larry Brown stated that he agreed with Alfredo Ramirez who said this is just taking a whole bunch of our time and distracting us from serving children. Dr. Brown stated that he could not imagine ferreting out who did this and asked if there were punitive damages from having a discussion like this. Angie McClelland said there was not.

Dr. Larry Brown also stated that a code of ethics would only go so far and that only the Governor and the Legislature could remove State Board members from their positions. Dr. Brown and Ron Albin asked that this stop.

Lisa Borchardt expressed her disappointment in the whole issue since she had spent so much time supporting staff and this agency only to have that wiped away. Ms. Borchardt also asked that this behavior stop.

Dave Schroeder stated that he wanted to wait until the audit report is released before the State Board responds. Mr. Schroeder stated that the e-mail to the Senator was given more credit than necessary.

Gene Klein stated that as the ultimate managers of the agency he stated that if staff were involved or if some staff knew that other staff was involved they needed to come forward and the issue should be dealt with by the Executive Committee.

Mary Jo Pankoke stated that the e-mail stated that there was a specific time period and that someone who was interviewed recently disclosed the information.

Georgina Scurfield stated that Martha Carter had provided her with the list of the people who were interviewed during that time period as outlined in Ms. Carter's e-mail. Ms. Scurfield stated that she had not gone any further with the information and that she did not think the Board could specifically point fingers. Ms. Scurfield stated that there were ways that State Board Member behavior could be dealt with but that staff members needed to know that their job was in jeopardy if the State Board found out that they did this.

Dave Schroeder suggested that the statement from the State Board be shared with the staff. Dr. Larry Brown stated that was Carol Stitt's job to do that.

Carol Stitt stated that this was a helpful discussion and that the minutes would reflect that the State Board was moving on. Ms. Stitt stated that in the political arena of State Government there have been flabbergasting letters written about her and sent to senators. Ms. Stitt stated that there was a point where a reaction and the time spent on an issue can make it bigger than it is. Ms. Stitt suggested that the Board's response highlight their accomplishments.

Alfredo Ramirez stated that sanctions to State Board members would be included in the draft code of conduct.

Carol Stitt state that although she had not been a part of the State Board Members code of ethics discussions she suggested

that committee members could draft a conflict of interest statement where funding and employment could be disclosed. Ms. Stitt stated that it was her understanding that the Legislature's intent of broadening membership of the Board would lead to important and diverse discussions concerning the care of Nebraska's foster children from the different perspectives serving on the State Board. Ms. Stitt said it was frustrating that these issues did not seem to be discussed.

Georgina Scurfield asked if there was any further discussion.

Staff Turnover

Georgina Scurfield stated that the next item on the agenda was a report on staff turnover. Carol Stitt reported that she shared a memo with the State Board regarding current staff and staff vacancies. Ms. Stitt stated that positions had been advertised and interviews are underway for the Program Coordinator position. Ms. Scurfield asked if there were any comments.

Gene Klein stated that he was concerned that people were quitting and he thought the workload committee could address this if these resignations are workload related. Mr. Klein asked for this report on a regular basis.

Carol Stitt asked for feedback and documentation from the Executive Committee when they do exit interviews with staff since she had not received feedback on the exit interview with a 16-year employee. Judy Meter asked if the Executive Committee always completed exit interviews. Georgina Scurfield stated it was decided in the last State Board meeting that the Executive Committee would do these but that it had not been worked out how to communicate identified issues with Ms. Stitt or how that documentation would be documented or included in staff's personnel files. Ms. Scurfield stated they had only done one so far. Ms. Stitt reminded Ms. Scurfield that she had completed Kathleen Stolz's and Michele Blodgett's exit interview.

Case Review Numbers

Georgina Scurfield stated that the next item on the agenda was a report on case numbers. Carol Stitt stated that even through the Review Board had lost staff, there had been efficiencies implemented such as focusing the Board's reports on current issues and recommendations, and as a result the Board's review numbers have not gone down.

Carol Stitt also stated that a dramatic change under the leadership of Governor Heinemann and Todd Landry was the Review Board's participation and impact on case staffings.

Ms. Stitt stated that she would like to make an addendum to the report she issued to the Work Load Committee to include how protections for children are put in place because of this participation. Ms. Stitt stated that when the Board brings an issue, DHHS develops an action plan, timeframes, and next steps to address the issue.

Gene Klein asked that a report containing the number of children eligible for review, those reviewed and those not be submitted to the State Board at each meeting. Carol Stitt stated she would also include the ages of these children to this report.

Gene Klein agreed that the staffings were important and that the staff he met with in Omaha believed that case advocacy was critical, but unfortunately the Board does not get paid to do those things. Mr. Klein said that the Board should go to the Governor and ask him for additional funding before completing a special study.

Carol Stitt stated that it would be helpful if the State Board let the staff know that they supported the request for additional staff.

Georgina Scurfield said that she did not want to push people faster in a meeting than they wanted to go but asked if the issue should be dealt with by the Workload Committee.

Mary Jo Pankoke said she had to leave the meeting and asked that a timeframe for State Board meetings be set so time could be budgeted. Carol Stitt stated that at the next State Board meeting that the State Board may be briefing the Governor on the results of the Special Study and she would share details as they come available.

Break for Lunch

The State Board broke for lunch at noon and returned at 12:15 p.m.

Request to work at home

Georgina Scurfield stated that the next item on the agenda was a request from the Omaha Staff to work at home one day per week. Stacey Sothman stated that this came out of a staff meeting to address the price of gas.

Ron Albin and Judy Meter asked if there was a way to monitor that work was completed. Stacey Sothman stated that the work would be monitored. Mr. Albin asked that the State Board receive a productivity report. Gene Klein said this should be viewed as a privilege.

Sarah Ann Lewis moved to allow the Omaha office staff to work from home one day a week. Alfredo Ramirez seconded the motion. All members were in favor. Dave Schroeder made a friendly amendment to include both Lincoln and Omaha staff. Lisa Borchardt seconded the motion. All members were in favor.

25th Anniversary

Judy Meter reported on the 25th Anniversary Celebration. The location was moved from Mahoney State Park to the Fire Fighter's Hall in Lincoln to accommodate more attendees. Ms. Meter said the venue normally charged \$1,100 and that they are charging the Board \$150 to rent the hall. JoAnn LaBaron, one of the founders of the State Board was underwriting the dinner.

Carol Stitt suggested that a Dale and JoAnn LaBaron Advocacy award be established and given to an incredible advocate each year. Judy Meter motioned to create this award. Ron Albin seconded the motion. All members were in favor.

Alfredo Ramirez stated that he had approached a Mariachi Group in Madison to provide entertainment for the event and that they charged \$400 dollars an hour. Mr. Ramirez stated that he was looking for an underwriter for this.

Carol Stitt stated that there will be a living history program starting with the founders and that Dave Schroeder had agreed to narrate the program.

Georgina Scurfield asked if reimbursement for staff's time and mileage should be discussed. Carol Stitt stated that distance could be prohibitive for staff to attend the function. Dr. Mario Scalora made the motion to reimburse staff mileage and their time to attend the 25th Anniversary Event. Ron Albin seconded the motion. All members were in favor.

Scottsbluff training

Judy Meter stated that a training in Scottsbluff was held on August 7th, 2008 and that 65 persons including 25 HHS workers and 10 -12 CASA members attended. Ms. Meter reported that there was positive feedback about the presenters, Dr. Ann Coyne, Dr. Gregg Wright and Judge Glenn Camerer. Ms. Meter suggested that State Board members attend FCRB sponsored trainings. Carol Stitt stated that Georgina Scurfield, Dr. Mario Scalora, Sarah Ann Lewis and Dave Schroeder had attended FCRB sponsored trainings.

Volunteer Coor Position

Carol Stitt stated that she had visited with the Executive Committee members and she wanted to look at our review numbers and the Lincoln opening before offering a proposal. Georgina Scurfield stated that this could be discussed at the next meeting.

Code of Conduct

Ron Albin stated that he had an interim product but that it would need to be brought in November 7, 2008 meeting since earlier in the discussion some suggestions had been made regarding additional issues to include in the code.

Executive Director

Carol Stitt reported she had asked permission to extend the annual report deadline to mid October since she has been doing coverage.

Carol Stitt reported that there had been results already seen in the Review Board's special study of children who had been in care two years or longer with a plan of reunification. Ms. Stitt reported that at that in April there were 240 children in Omaha and 140 children in Lincoln in care 2 years or more with a plan of reunification and when the study was conducted in August, the Board found that 77 children's plans in Omaha and 44 plans in Lincoln had been changed to adoption. Ms. Stitt stated that she looked forward to analyzing the data and reporting the Board's findings.

Carol Stitt stated that she wanted to brief the Governor before the report is released at the State Board's November meeting.

Carol Stitt stated that she is working with Todd Landry on making the Governor reviews uniform across the State. Ms. Stitt stated she had shared an e-mail from Mr. Landry with the State Board regarding this issue.

Carol Stitt stated she had provided a list of duties to be completed in the next few weeks and asked the Executive Committee for some support.

Carol Stitt stated that Lisa Borchardt was helping her complete the interviews for the Program Coordinator. Judy Meter asked if Kathleen was still being considered for the position. Ms. Stitt stated that the Executive Committee had decided to base the position in Lincoln since much of the work was completed here.

Carol Stitt stated that Kathleen was a top candidate and that Ms. Stitt called her for an interview. Dr. Mario Scalora asked

if actual hiring issues were being discussed. Georgina Scurfield and Carol Stitt said no and that Ms. Borchardt was working with Carol on that issue.

Georgina Scurfield said that it was clear from the list of things that needed to get done that Carol has a lot to do at the moment and she asked the State Board how they thought Carol's work should be prioritized. Ms. Scurfield suggested that the separate Annual Report summaries not be completed as a way to cut down on the amount of work.

Carol Stitt suggested that perhaps the larger report could be limited since the summaries were so helpful in getting the Review Board's concerns expressed. Ms. Scurfield agreed with this suggestion.

Linda Cox reported that there was not much that needed to be updated or re-written in the big report. Carol Stitt asked if Dr. Mario Scalora would be available to help with the wording on the report. Ms. Stitt stated that it is helpful to have this input to strengthen the Board's message on behalf of children.

Dr. Mario Scalora said he would be available to help with the wording so that the Statutorily required a report is issued. Dr. Scalora thought that Carol and the Executive Committee members should review the workload together.

Carol Stitt asked that the State Board hold off on requests till after the report for so that this work can be accomplished.

Dave Schroeder asked if there were any agency visits occurring. Stacey Sothman stated that Ben Grey had organized a visit to Jacob's Place in Omaha and that Georgina Scurfield had gone on that visit and that Polly was completing Project Permanency visits.

Carol Stitt stated that she had completed a Project Permanency training and had it taped. DHHS was invited to discuss the safety ratings applied by DHHS at the time of removal that are currently being developed.

Public Input

Georgina Scurfield asked if there was any input from the public. Seeing none, the next item on the agenda was discussed.

Next Meeting

Georgina Scurfield stated that the next meeting, on November 7th, would be held at the Ferguson House and or the Governor's

Mansion and that it would be held when the Governor's schedule allows. Ms. Scurfield stated that it should be 5 hours long or so.

Meeting Adjourned

The meeting adjourned at 12:45 p.m.

From: "Carter, Martha" <mcarter@leg.ne.gov>
 <carol.stitt@fcrb.ne.gov>, <Georgie.Scurfield@gmail.com>, "Alfredo Ramirez" <Alfredo@Odyssey3.org>, <mscalora1@unl.edu>, <mjpankoke@nebraskachildren.org>, <slewis@voicesforchildren.com>, <gklein@projectharmony.com>, <daves880@msn.com>, <ralbin@inebraska.com>, <lborchar@nebrwesleyan.edu>, <grannyjudy1@hotmail.com>, <lbrown2@alegent.org>
To:
Cc: "McClelland, Angie" <AMcClelland@leg.ne.gov>, "Meese, Stephanie" <smeese@leg.ne.gov>
Date: 08/25/2008 04:00 PM
Subject: Another Conflict of Interest Question

Carol and Board Members,

The Performance Audit Committee has again received concerns about potential board member conflicts of interest and, specifically, what the note's author incorrectly describes as audit staff's decision to look at the "conflict of interest" question strictly in accordance with the Nebraska Statute that is part of the rules of the Nebraska Political Accountability and Disclosure Act." (See attached Word document.) Although the audit plan indicates that we will consider that Act, it also clearly allows us to use other standards we believe to be appropriate. (See the first bullet point under "Methodology" in the audit plan at this link <http://nebraskalegislature.gov/web/public/reports/audit>.)

Given the timing of the e-mail received by the Committee, I believe that the note's author may have spoken to someone we interviewed recently who then misinformed the author on this point. I know that our auditors have told board members and FCRB staff in their interviews that we are using the Accountability and Disclosure standards because those are the only statutory requirements that deal with potential conflicts of interest issues. I also know that people have suggested something similar to what the recent e-mail suggests--that there could be conflict of interest-type concerns, or at least the appearance of those types of concerns, that the A&D Act does not reach. And we do understand that point.

In our interviews it was suggested to us that we go beyond the statutory requirement and consider using relevant portions of the COSO standards (the subject of a previous series of e-mails), and we *are considering* those standards. We are also considering whether there are other ways to fairly evaluate whether actual conflicts or the appearance of conflicts *beyond those defined in statute* may exist. However, as you can well imagine, assessing the "moral and ethical issues" as suggested by the note's author is no small undertaking. If the note's author or anyone else would like to suggest a well-agreed upon set of ethical or moral standards we can use in this regard, we would be happy to consider them.

In addition, I want to reiterate a point I made in an earlier e-mail: if a board member or FCRB staff person has concerns about things our staff have discussed in interviews, I strongly encourage them to bring those to us directly. If people are not comfortable going back to the auditors, they are free to contact me at any time. That would be much more efficient in the long run than talking to someone outside the agency and having them contact the committee members, if that is in fact what is happening now.

Martha
 Martha Carter
 Legislative Auditor
 Nebraska Legislature
 402-471-0072
 <<E-mail (8.19.08).doc>>

Attachments:

File: [E-mail \(8.19.08\).doc](#) Size: 32k Content Type: application/msword

Sent: Tuesday, August 19, 2008

To: Sen. Preister, Don

Cc: Sen. Engel, Pat; Sen. Flood, Mike; Sen. Heidemann, Lavon; Sen. McDonald, Vickie; Sen. Schimek, DiAnna; Sen. Stuthman, Arnie

Subject: Direction of Performance Audit of Foster Care Review Board

Dear Senator Preister,

I am writing now because I understand that the Performance Audit is looking at the "conflict of interest" question strictly in accordance with the Nebraska Statute that is part of the rules of the Nebraska Political Accountability and Disclosure Act. Unfortunately, this act does not address the moral and ethical issues of having persons on the State Foster Care Review Board that have the conflict of interest affected the bias of their oversight of the Foster Care Review Board.

A little history may be helpful as follows. In 1987, Governor Kerry appointed DHHS administrators to positions on the State Board. When issues concerning foster children were brought to the State Board, when the Board sought to address issues or note concerns, these administrators would table the issue. The Legislature created a statutory mandate (LB 239 -1987) which added the following language, "**No person employed by a child-caring agency, a child-placing agency, or a court shall be appointed to the state board.**" This was done so that the Board would be free to discuss all issues affecting children in foster care and make recommendations, as it found appropriate. The bill also mandated that at least three members of local review boards, who see the children's cases, were appointed to the State Board, and that the Board be representative of each of the three congressional districts. This statute remained in effect until 2006. In 1990, the Legislature added that, "At least one member shall be an attorney with legal expertise in child welfare" should serve on the State Board.

The appointment of a CASA to the board appears to violate the Nebraska Constitution provisions regarding separations of powers, and puts the judges concerned in jeopardy of violation of the Nebraska Code of Judicial Conduct. The 2005 Bill LB 761 changed the language of 43-1302 to delete the effectiveness of the prohibition of having members that work for child care activities, child placement activities, and courts. This language is quoted in the entire section printed below, with the previous rules in **bold**, and the previous prohibition that no board member can work for a court, child caring agency or child placement being underlined.

"(1)(a) Until January 1, 2006, the State Foster Care Review Board shall be comprised of nine members to be appointed by the Governor, subject to confirmation by a majority of the members elected to the Legislature.

At least one member shall be an attorney with legal expertise in child welfare. Two members shall be from each of the three congressional districts as they existed on January 1, 1982. In addition to the six members representative of the congressional districts, three members shall be appointed by the Governor from a group consisting of all the chairpersons of the local boards, and one such chairperson shall

be appointed from each such congressional district. The appointment of a member of a local board to the state board shall not create a vacancy on the local board. Members other than those appointed from the group consisting of all the chairpersons of the local boards shall be appointed to three-year terms, and those members appointed from the group consisting of all the chairpersons of local boards shall be appointed to two-year terms. No person shall serve on the state board for more than six consecutive years. No person employed by a child-caring agency, a child-placing agency, or a court shall be appointed to the state board.

(b) On and after January 1, 2006, the State Foster Care Review Board shall be comprised of eleven members appointed by the Governor with the approval of a majority of the members elected to the Legislature, consisting of: Three members of local foster care review boards, one from each congressional district; one practitioner of pediatric medicine, licensed under the Uniform Credentialing Act; one practitioner of child clinical psychology, licensed under the Uniform Credentialing Act; one social worker certified under the Uniform Credentialing Act, with expertise in the area of child welfare; one attorney who is or has been a guardian ad litem; one representative of a statewide child advocacy group; one director of a child advocacy center; one director of a court appointed special advocate program; and one member of the public who has a background in business or finance.

The terms of members appointed pursuant to this subdivision shall be three years, except that of the initial members of the state board, one-third shall be appointed for terms of one year, one-third for terms of two years, and one-third for terms of three years, as determined by the Governor. No person appointed by the Governor to the state board shall serve more than two consecutive three-year terms. An appointee to a vacancy occurring from an unexpired term shall serve out the term of his or her predecessor. Members whose terms have expired shall continue to serve until their successors have been appointed and qualified. Members serving on the state board on December 31, 2005, shall continue in office until the members appointed under this subdivision take office. The members of the state board shall, to the extent possible, represent the three congressional districts equally.

(2) The state board shall select a chairperson, vice-chairperson, and such other officers as the state board deems necessary. Members of the state board shall be reimbursed for their actual and necessary expenses as provided in sections 81-1174 to 81-1177. The state board shall employ or contract for services from such persons as are necessary to aid it in carrying out its duties.

Sources:

Laws 1982, LB 714, § 2;
Laws 1987, LB 239, § 2;
Laws 1990, LB 1222, § 5;
Laws 2005, LB 761, § 1;
Laws 2007, LB 463, § 1133.”

There was good reason for this prohibition, because when this particular bill was passed in 1987, it had been the habit of Governor Kerry to appoint members of his HHS Children's agency on the board. The Legislature wisely elected to place this prohibition in the law in 1987. The deletion of this language in the 2005 LB-761 has resulted in the appointment of four persons that have employment, financial or contractual interests that preclude their objectivity on the State Board. The previous design in the 1987 bill eliminates the problems, but Senator Thompson apparently for whatever reason deleted this prohibition. The behavior of the persons on the current board is very similar to the behavior of the HHS board members that drove the legislature to insert to restrictive language, and as a FCRB local board member I am very concerned that his behavior puts our foster children at risk. Below, are my repeated concerns about these four:

- a. Mary Jo Pankoke, whose fulltime position is as Director of the Nebraska Children and Family Foundation. I understand, for example, that over \$1.5 million dollars income for the foundation in 2005 were from state and federal grants. Most of the funds came through DHHS channels and some went to DHHS contractors. I suspect that the case is the same for 2006 and 2007. Obviously, when that large amount of money is flowing to her from the DHHS, she cannot be objective in her governance of the FCRB agency, for fear that her support of the agency's message could be compromised.
- b. Gene Klein, whose fulltime position is Director of Project Harmony, a child advocacy center in Omaha. Mr. Klein receives substantial DHHS funding through the Nebraska Children and Family Foundation, many funds passing through there through DHHS. According to the Project Harmony website, it partners with a number of DHHS contractors including Child Saving Institute, Lutheran Family Services, and Heartland Family Service. How can a person that receives such substantial funds through DHHS and passes funds to contractors be an objective State Board member?
- c. Dr. Mario Scalora is a contract employee at the Lincoln Regional Center which also belongs to DHHS working on security issues, and a consultant to a number of DHHS contractors, and a portion of his income originates from DHHS through contractors. Again, I ask how can someone that receives substantial income from DHHS sources through contractors be an objective State Board member?
- d. The fourth member of the board, Georgina Scurfield is the Executive Director of the Sarpy County Court Appointed Special Advocates (CASA). Although this person's organization is a non-profit, her loyalty and her continued employment is highly dependent on her cooperation and compliance with the Sarpy County Juvenile Court Judges' desires, putting her in a similar position as the other three in terms of loyalty to the Judges or loyalty to the FCRB. This would apply to any CASA Director. Furthermore, the Nebraska Constitution is quite specific regarding separation of powers for the three branches of government, i. e., Judicial, Executive, and Legislative. In her

case, there is certainly a question of whether her governance of the FCRB and requirement for compliance with the judges is also a conflict of interest that violates the Separation of Powers paragraphs in the Nebraska Constitution. Furthermore, it appears that since the effect is to have a person appointed to govern an agency outside the Judicial Branch, it also puts judges that appoint CASAs and permit their governance of such an agency in violation of the Nebraska Code of Judicial Conduct, Canon 2.

I would appreciate your help in making the moral and ethical concerns part of the audit process as well as review of the separation of powers portion of the Nebraska Constitution and the Nebraska Code of Judicial Conduct.

I thank you again for the support you have provided for the foster children of Nebraska, the FCRB agency, and the 300 plus volunteer citizen board members that want to improve the lives of these victimized children.

Note: This document consists of the text of an e-mail sent to the Performance Audit Committee members on August 19, 2008. The audit staff removed identifying information consisting of (1) the author's name and (2) one sentence that could have identified the author and was not relevant to the issues discussed in the e-mail.

D

From: "McClelland, Angie" <AMcClelland@leg.ne.gov>
To: <carol.stitt@fcrb.ne.gov>, <georgie.scurfield@gmail.com>
Cc: "McClelland, Angie" <AMcClelland@leg.ne.gov>, "Carter, Martha" <mcarter@leg.ne.gov>, "Meese, Stephanie" <smeese@leg.ne.gov>
Date: 06/27/2008 02:38 PM
Subject: Performance Audit Plan

Carol and Georgina,

Attached is the audit plan that the Performance Audit Committee adopted this morning. Now that the Committee has voted, the audit plan is considered a public document.

As with the scope statement, I will send hard copies to you, the other members of the Board, the Health and Human Services Committee, and the Governor.

<<FCRB Audit Plan (final).pdf>>

Regards,

Angie McClelland

Angela McClelland
Senior Performance Auditor
Legislative Audit and Research Office
402-471-0066
amcclelland@leg.ne.gov

Attachments:

File: FCRB Audit Plan (final).pdf Size: 101k Content Type: application/pdf

Legislative Performance Audit

Committee

Committee Members:
Senator DiAnna Schimek, Chair
Senator Vickie McDonald, Vice Chair
Senator Pat Engel
Speaker Mike Flood
Senator Lavon Heidemann
Senator Don Preister
Senator Arnie Stuthman

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Section Staff:
Martha Carter, Legislative Auditor
Don Arp, Jr., Analyst
Abby DeBuse, Analyst
Angela McClelland, Analyst
Stephanie Meese, Legal Counsel
Sandy Harman, Committee Clerk

Audit Plan

State Foster Care Review Board

On or before **September 12, 2008**, the Performance Audit Section (Section) will submit a draft report of its audit findings and recommendations to the Legislative Performance Audit Committee (Committee) and the State Foster Care Review Board (FCRB).

Audit Scope

In the audit scope statement, the Committee directed the Section to address the following questions in the audit report:

- What are the FCRB's authority and responsibilities?
- Do any board members have employment or other interests that create a conflict with their responsibilities as members of the FCRB?
- Do current FCRB management practices reasonably follow generally accepted management standards and best practices?

Methodology

The Section will use a standard qualitative research methodology. We will:

- Review relevant state statutes, which include but are not limited to, the Foster Care Review Act¹ and the Nebraska Political Accountability and Disclosure Act;²
- Review other applicable documents such as legislative histories, Attorney General Opinions, rules and regulations, and budget information;
- Examine agency records, which include but are not limited to, technical reports, annual reports, internal policies and procedures, plans, correspondence, contracts, and related materials;
- Identify and review external management standards and best practices, which include but are not limited to, the Internal Control Integrated Framework from the Committee of Sponsoring Organizations of the Treadway Commission; and
- Conduct interviews with FCRB staff and others as necessary.

¹ Neb. Rev. Stat. §§ 43-1301 to 43-1318.

² Neb. Rev. Stat. §§ 49-1404 to 49-14,141.

Audit Report Contents

Under the Legislative Performance Audit Act (audit act), the Section must provide its written draft report to the agency. That report will consist of:

- background information concerning the program;
- discussion of audit work related to the scope statement questions; and
- Section findings and recommendations.

After receipt of the report, the agency will have 20 business days to review it and provide written comments to the Section. We expect to provide the draft report to the agency on or before **September 12, 2008**; however, should extenuating circumstances occur, the Committee may extend that date. The deadline for the agency response will be included in the correspondence accompanying the report when it is provided to the agency.

Following receipt of the agency's comments, the Committee will meet to consider the draft report and the comments. The Committee may elect to adopt recommendations at that time or to hold a public hearing on the audit before adopting recommendations. The Committee's final report will include the Section's report, the agency's comments, the Committee's recommendations, and other materials specified in the audit act.

Audit Plan adopted by the Legislative Performance Audit Committee June 27, 2008.

From: "Carter, Martha" <mcarter@leg.ne.gov>
To: "Georgina Scurfield (office)" <casa@sarpy.com>, <carol.stitt@fcrb.ne.gov>
Date: 07/03/2008 02:06 PM
Subject: Management Standards

Georgie and Carol,

Our Committee members have received some concerns about the standards listed in our audit plan. In particular a concern was raised about holding the FCRB to the standards contained in the Internal Control Integrated Framework from the Committee of Sponsoring Organizations of the Treadway Commission (COSO standards).

I want to clarify that we are not taking the COSO standards and applying them in their entirety to the FCRB. Instead, we identified basic COSO management standards and combined them with other management standards and best practices—including those DAS recommends to state agencies—to come up with a set of basic management practices that are reasonable to expect state agencies to follow. Through our review of documents and extensive interviews we will compare the FCRB to those basic standards. We would be happy to review any other management standards that you or others may be familiar with and I guarantee you that they will be comparable to what we're already working with.

In addition, as I believe I have explained before, we are not going to take one small point, or one person's opinion, and blow it out of proportion. As our previous reports reflect, we are thorough and fair in our approach and any findings we make will be based on sufficient, appropriate evidence as our auditing standards require.

If you have any concerns about our use of the COSO standards, or other questions about what standards we will hold the FCRB to, we would be happy to meet with you to discuss them in detail.

Martha

Martha Carter
Legislative Auditor
Nebraska Legislature
402-471-0072

From: "Stitt Carolyn" <carol.stitt@fcrb.ne.gov>
To: "Carter, Martha" <mcarter@leg.ne.gov>
alfredo@odyssey3.org, mscalora1@unl.edu, mjpankoke@nebraskachildren.org, slewis@voicesforchildren.com,
Cc: gklein@projectharmony.com, daves880@msn.com, ralbin@inebraska.com, Georgie.Scurfield@gmail.com,
lborchar@nebrwesleyan.edu, grannyjudy1@hotmail.com, lbrown2@alegent.org
Date: 07/07/2008 11:25 AM
Subject: Re: Management Standards

Martha

I would like to reiterate that the Foster Care Review Board looks forward to the opportunity to have the Performance Audit Committee look at how the Board works to fulfill its obligations as defined by statute and for their recommendations for ways the Review Board can improve.

I truly appreciate your offer for a meeting about what standards the Foster Care Review Board will be held to during our Management Audit. I have had an opportunity to review the COSO standards and the 300+ evaluation points and have found that the framework and guidelines appear to be most relevant to management and fiscal practices undertaken by publicly held corporations.

A general outline of what the Performance Auditor's standards will be would be most helpful and appreciated.

At our meeting, I would like to share with you the guidelines and framework that I use as the Director of a State Agency, which are:

Nebraska State Statute,
State of Nebraska Classified System of Personnel Rules and Regulations published by the Department of Administrative Services, Personnel Division,
NAPE/AFSCME and State of Nebraska Labor Contract,
DAS Accounting practices and policies (which include COSO's 5 components),
Relevant Attorney General Opinions,
Foster Care Review Board Rules and Regulations, and
Foster Care Review Board Policies and Procedures

I would also like to discuss some of my reasoning concerning why I requested your staff's questions in writing. As you know, the agency has been subject to investigative interviews in which questions and answers were not reflected in a truthful and accurate way. Having the questions in writing would put staff at ease, and give them the opportunity to provide complete, in depth answers with more information than would be provided should they not be given the opportunity to fully consider the questions in advance.

I am available this week on Tuesday, Wednesday and Thursday afternoon.

Carolyn K. Stitt, Executive Director
Foster Care Review Board
521 S. 14th Ste 401
Lincoln NE 68508

<https://email.ne.gov/worldclient.dll?Session=CGWCXJG&View=Message&Print=Yes&Number...> 11/24/2008

Phone - (402) 471-4420
Fax - (402) 471-4437
carol.stitt@fcrb.ne.gov

The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing.

Albert Einstein

-----Original Message-----

From: "Carter, Martha" <mcarter@leg.ne.gov>
To: "Georgina Scurfield (office)" <casa@sarpy.com>, <carol.stitt@fcrb.ne.gov>
Date: Thu, 3 Jul 2008 14:06:44 -0500
Subject: Management Standards

Georgie and Carol,

Our Committee members have received some concerns about the standards listed in our audit plan. In particular a concern was raised about holding the FCRB to the standards contained in the Internal Control Integrated Framework from the Committee of Sponsoring Organizations of the Treadway Commission (COSO standards).

I want to clarify that we are not taking the COSO standards and applying them in their entirety to the FCRB. Instead, we identified basic COSO management standards and combined them with other management standards and best practices—including those DAS recommends to state agencies—to come up with a set of basic management practices that are reasonable to expect state agencies to follow. Through our review of documents and extensive interviews we will compare the FCRB to those basic standards. We would be happy to review any other management standards that you or others may be familiar with and I guarantee you that they will be comparable to what we're already working with. In addition, as I believe I have explained before, we are not going to take one small point, or one person's opinion, and blow it out of proportion. As our previous reports reflect, we are thorough and fair in our approach and any findings we make will be based on sufficient, appropriate evidence as our auditing standards require.

If you have any concerns about our use of the COSO standards, or other questions about what standards we will hold the FCRB to, we would be happy to meet with you to discuss them in detail.

Martha

Martha Carter
Legislative Auditor
Nebraska Legislature
402-471-0072

From: "Carter, Martha" <mcarter@leg.ne.gov>
To: <carol.stitt@fcrb.ne.gov>
 <alfredo@odyssey3.org>, <mscalora1@unl.edu>, <mjpankoke@nebraskachildren.org>,
Cc: <slewis@voicesforchildren.com>, <gklein@projectharmony.com>, <daves880@msn.com>,
 <ralbin@inebraska.com>, <Georgie.Scurfield@gmail.com>, <lborchar@nebrwesleyan.edu>,
 <grannyjudy1@hotmail.com>, <lbrown2@alegent.org>
Date: 07/09/2008 04:11 PM
Subject: RE: Management Standards

Carol,

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 402-471-0072

-----Original Message-----

From: Stitt Carolyn [mailto:carol.stitt@fcrb.ne.gov]

Sent: Monday, July 07, 2008 11:25 AM

To: Carter, Martha

Cc: alfredo@odyssey3.org; mscalora1@unl.edu; mjpankoke@nebraskachildren.org; slewis@voicesforchildren.com; gklein@projectharmony.com; daves880@msn.com; ralbin@inebraska.com; Georgie.Scurfield@gmail.com; lborchar@nebrwesleyan.edu; grannyjudy1@hotmail.com; lbrown2@alegent.org

Subject: Re: Management Standards

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<https://email.ne.gov/worldclient.dll?Session=CGWCXJG&View=Message&Print=Yes&Number...> 11/24/2008

At our meeting, I would like to share with you the guidelines and framework that I use as the Director of a State Agency, which are:

- Nebraska State Statute,
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I am available this week on Tuesday, Wednesday and Thursday afternoon.

Carolyn K. Stitt, Executive Director
 Foster Care Review Board
 521 S. 14th Ste 401
 Lincoln NE 68508
 Phone - (402) 471-4420
 Fax - (402) 471-4437
carol.stitt@fcrb.ne.gov

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 Albert Einstein

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From: "Carter, Martha" <mcarter@leg.ne.gov>
 To: "Georgina Scurfield (office)" <casa@sarpy.com>,
 <carol.stitt@fcrb.ne.gov>
 Date: Thu, 3 Jul 2008 14:06:44 -0500
 Subject: Management Standards

Georgie and Carol,

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lborchar@nebrwesleyan.edu, grannyjudy1@hotmail.com, lbrown2@alegent.org
Date: 07/10/2008 09:33 AM
Subject: RE: Management Standards

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Date: 07/11/2008 11:24 AM
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Neb. Rev. Stat. sec. 50-1208(3) requires us to conduct an entrance conference at the beginning of each audit. We conducted our entrance conference for this audit at the board meeting on February 1, 2008. On that date we discussed the audit process and the broad parameters of the audit. The specific questions were subsequently identified in the scope statement approved by the Legislative Performance Audit Committee, in compliance with Neb. Rev. Stat. sec. 50-1208(4). The documentation we will need to answer those questions is outlined in the audit plan adopted by the Committee in compliance with Neb. Rev. Stat. sec. 50-1208(5)—essentially, we will obtain evidence from reviewing all relevant program related materials and talking to current board members and staff and some former staff members.

On March 7, we met with you and the Board Chair to further discuss the audit process. At the time, I indicated that while we would provide the chance for each board member and staff person to meet with the auditors individually—which we are in the process of doing—we would conduct meetings relating to the process with you and Georgie, or her representative, in order to assure that you as the Director as well as the Board are getting exactly the same information from us. With that in mind, we can meet with you on Monday from 2-3, if Georgie is also available at that time or if she would choose to have the Vice Chair or another board member represent her. If that is not workable, we will need to reschedule for a time when both you and Georgie are available.

We do not yet know exactly when the auditors will be interviewing you but we will take into account the time that you will be away from Lincoln. And, I will make sure that when Angie or Steph calls you, you will have the option to schedule the interview at least five business days from that call.

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To: Carter, Martha
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 lborchar@nebrwesleyan.edu, grannyjudy1@hotmail.com, lbrown2@alegent.org
Date: 07/17/2008 11:40 AM
Subject: RE: Management Standards

Martha,

Thanks again for working with Georgina, Lisa and my schedules to set up a meeting. Since we are not able to meet for two weeks, I want to restate my questions, which I think you can easily answer, in context.

My question was about the application of the COSO standards to the Review B and you had replied to my question saying, "we are not taking the COSO standards and applying them in their entirety to the FCRB. Instead, we identified basic COSO management standards and combined them with other management standards and best practices - including those DAS recommends to state agencies - to come up with a set of basic management practices that a reasonable to expect state agencies to follow."

I would just like to know the general outline of what the set of basic management practices you and your staff have developed during the course of your audit process and that you feel are reasonable to expect state agencies including the Foster Care Review Board to follow.

As I have said before, I hope to use the audit as an additional opportunity ensure the agency is maximizing productivity and applying appropriate steps ensure that reasonable standards are met. By communicating the standards by which you will measure us, you will help us further our meeting this goal.

Thanks again for trying to set up this meeting.

Carol Stitt

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<https://email.ne.gov/worldclient.dll?Session=CGWCXJG&View=Message&Print=Yes&Number...> 11/24/2008

To: "Georgie Scurfield" <georgie.scurfield@gmail.com>
 Cc: "carol. stitt" <Carol.Stitt@fcrb.ne.gov>
 Date: Mon, 14 Jul 2008 08:11:58 -0500
 Subject: RE: Management Standards

Actually, I will be out of the office at a conference all that week (July 21 to 25) so we'll need to find a date after that.

Martha Carter
Legislative Auditor
Nebraska Legislature
 402-471-0072

-----Original Message-----

From: Georgie Scurfield [mailto:georgie.scurfield@gmail.com]
Sent: Sunday, July 13, 2008 1:22 PM
To: Carter, Martha
Cc: carol. stitt
Subject: Re: Management Standards

Sorry Martha, sorry Carol, neither Lisa or I are available Monday. I would be happy to do the following Monday (21st) however, if that would work.
 Georgie.

On Fri, Jul 11, 2008 at 11:24 AM, Carter, Martha <mcarter@leg.ne.gov> wrote:

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From: "Carter, Martha" <mcarter@leg.ne.gov>

To: <carol.stitt@fcrb.ne.gov>

Cc: <alfredo@odyssey3.org>, <mscalora1@unl.edu>, <mjpankoke@nebraskachildren.org>, <slewis@voicesforchildren.com>, <gklein@projectharmony.com>, <daves880@msn.com>, <ralbin@inebraska.com>, <Georgie.Scurfield@gmail.com>, <lborchar@nebrwesleyan.edu>, <grannyjudy1@hotmail.com>,

<lbrown2@alegent.org>

Date: Wed, 9 Jul 2008 16:11:00 -0500

Subject: RE: Management Standards

Carol,

I apologize for the delayed response, I've been playing catch up this week after taking a couple days off. I'm not going to be able to meet with you this week but next week is pretty open so let me know if there's a time that would work for you then.

In the meantime, Angie is going to contact Stacey about starting the interviews tomorrow or Friday as we'd planned. I understand your interest in having the questions in advance but I'm going to have to stick with our standard process of not doing so. We will assure everyone we talk to that they can feel free to contact us after the interview if they think of something else they'd like to tell us.

Martha

Martha Carter
Legislative Auditor
Nebraska Legislature
402-471-0072

-----Original Message-----

From: Stitt Carolyn [mailto:carol.stitt@fcrb.ne.gov]

Sent: Monday, July 07, 2008 11:25 AM

To: Carter, Martha

Cc: alfredo@odyssey3.org; mscalora1@unl.edu;
mjpankoke@nebraskachildren.org; slewis@voicesforchildren.com;
gklein@projectharmony.com; daves880@msn.com; ralbin@inebraska.com;
Georgie.Scurfield@gmail.com; lborchar@nebrwesleyan.edu;
grannyjudy1@hotmail.com; lbrown2@alegent.org

Subject: Re: Management Standards

Martha

I would like to reiterate that the Foster Care Review Board looks forward to the opportunity to have the Performance Audit Committee look at how the Board works to fulfill its obligations as defined by statute and for their recommendations for ways the Review Board can improve.

I truly appreciate your offer for a meeting about what standards the Foster Care Review Board will be held to during our Management Audit. I have had an opportunity to review the COSO standards and the 300+ evaluation points and have found that the framework and guidelines appear to be most relevant to management and fiscal practices undertaken by publicly held corporations.

A general outline of what the Performance Auditor's standards will be would be most helpful and appreciated.

At our meeting, I would like to share with you the guidelines and framework that I use as the Director of a State Agency, which are:

- Nebraska State Statute,
- State of Nebraska Classified System of Personnel Rules and Regulations published by the Department of Administrative Services, Personnel Division,
- NAPE/AFSCME and State of Nebraska Labor Contract,
- DAS Accounting practices and policies (which include COSO's 5 components),
- Relevant Attorney General Opinions,
- Foster Care Review Board Rules and Regulations, and
- Foster Care Review Board Policies and Procedures

I would also like to discuss some of my reasoning concerning why I requested your staff's questions in writing. As you know, the agency has been subject to investigative interviews in which questions and answers were not reflected in a truthful and accurate way. Having the questions in writing would put staff at ease, and give them the opportunity to provide complete, in depth answers with more information than would be provided should they not be given the opportunity to fully consider the questions in advance.

I am available this week on Tuesday, Wednesday and Thursday afternoon.

Carolyn K. Stitt, Executive Director
 Foster Care Review Board
 521 S. 14th Ste 401
 Lincoln NE 68508
 Phone - (402) 471-4420
 Fax - (402) 471-4437
carol.stitt@fcrb.ne.gov

The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing.
 Albert Einstein

-----Original Message-----

From: "Carter, Martha" <mcarter@leg.ne.gov>
 To: "Georgina Scurfield (office)" <casa@sarpy.com>, <carol.stitt@fcrb.ne.gov>
 Date: Thu, 3 Jul 2008 14:06:44 -0500
 Subject: Management Standards

Georgie and Carol,
 Our Committee members have received some concerns about the standards

listed in our audit plan. In particular a concern was raised about holding the FCRB to the standards contained in the Internal Control Integrated Framework from the Committee of Sponsoring Organizations of the Treadway Commission (COSO standards).

I want to clarify that we are not taking the COSO standards and applying them in their entirety to the FCRB. Instead, we identified basic COSO management standards and combined them with other management standards and best practices—including those DAS recommends to state agencies—to come up with a set of basic management practices that are reasonable to expect state agencies to follow. Through our review of documents and extensive interviews we will compare the FCRB to those basic standards. We would be happy to review any other management standards that you or others may be familiar with and I guarantee you that they will be comparable to what we're already working with. In addition, as I believe I have explained before, we are not going to take one small point, or one person's opinion, and blow it out of proportion. As our previous reports reflect, we are thorough and fair in our approach and any findings we make will be based on sufficient, appropriate evidence as our auditing standards require.

If you have any concerns about our use of the COSO standards, or other questions about what standards we will hold the FCRB to, we would be happy to meet with you to discuss them in detail.

Martha

Martha Carter
Legislative Auditor
Nebraska Legislature
402-471-0072

From: "Carter, Martha" <mcarter@leg.ne.gov>
To: <carol.stitt@fcrb.ne.gov>, "Alfredo Ramirez" <Alfredo@Odyssey3.org>
 <mscalora1@unl.edu>, <mjpankoke@nebraskachildren.org>, <slewis@voicesforchildren.com>, <gklein@projectharmony.com>, <daves880@msn.com>, <ralbin@inebraska.com>,
Cc: <Georgie.Scurfield@gmail.com>, <lborchar@nebrwesleyan.edu>, <grannyjudy1@hotmail.com>, <lbrown2@alegent.org>, "McClelland, Angie" <AMcClelland@leg.ne.gov>, "Meese, Stephanie" <smeese@leg.ne.gov>
Date: 07/17/2008 03:50 PM
Subject: RE: Management Standards

Carol and Alfredo,

I think that Carol's request to know the general standards that we're using is a reasonable one and providing them is consistent with our standard practice. To that end, attached is a list of the general categories of management standards that we're using, which represent common elements we identified after reviewing a number of management resources. The list of those resources is also attached. (Note that I have deleted all previous e-mails in this thread except the two I received today in order to reduce the size of the e-mail.)

I would add that we are sensitive to a concern raised at one point about our holding the agency to standards that it was not required ahead of time to meet. However, our job is to answer the Performance Audit Committee's question about how well the agency is being managed and, to do so, we must have standards. We believe that the general categories we have identified from the literature are basic, common sense areas that any manager would need to address. We will determine whether or not the agency addresses these categories and we will be respectful of the fact that there is not necessarily one "right" way of meeting them.

While I am comfortable providing this information, I do also agree with Alfredo's concern about your receiving--and especially reacting to--information in a piecemeal fashion. If after reviewing the enclosed list you or others on the board have concerns about any part of it, I strongly encourage you to talk directly to Angie, Steph, or me about those concerns because we will most likely be able to address them. At the same time, I strongly encourage you not to overreact because we are still gathering evidence and until we're done with that we can't formulate our findings. You will have the opportunity to respond to those findings and that will be much more productive than trying to speculate now about what we may find.

Finally, please keep in mind that while the attached information will become public when the final report is released, at this time the documents are audit working papers and may not be released outside of the agency.

Martha

Martha Carter
Legislative Auditor
Nebraska Legislature
 402-471-0072

-----Original Message-----

From: Alfredo Ramirez [mailto:Alfredo@Odyssey3.org]
Sent: Thursday, July 17, 2008 1:10 PM
To: carol.stitt@fcrb.ne.gov; Carter, Martha
Cc: mscalora1@unl.edu; mjpankoke@nebraskachildren.org; slewis@voicesforchildren.com; gklein@projectharmony.com; daves880@msn.com; ralbin@inebraska.com; Georgie.Scurfield@gmail.com; lborchar@nebrwesleyan.edu; grannyjudy1@hotmail.com; lbrown2@alegent.org
Subject: RE: Management Standards

Dear Carol and Martha:

I would prefer the information being requested not be obtained prior to completion of the audit but rather that the recommendations being made by the auditors be a part of the full report. I think it would make more sense if we approach it from a whole then to get parts of

<https://email.ne.gov/worldclient.dll?Session=CGWCXJG&View=Message&Print=Yes&Number...> 11/24/2008

it. This way the full board can be on the (hate this saying!) same page. We have a tendency to receive info in a fragmented style rather than the full perspective. What does everybody else think? Thank you, Martha and Carol.
Alfredo

Alfredo Ramirez, MSW/LCSW/LADC
Odyssey III Counseling Svc, P.C.
401 S. 17th Street
Norfolk, NE 68701
alfredo@odyssey3.org

From: Stitt Carolyn [mailto:carol.stitt@fcrb.ne.gov]
Sent: Thursday, July 17, 2008 11:41 AM
To: Carter, Martha
Cc: alfredo@odyssey3.org; mscalora1@unl.edu; mjpankoke@nebraskachildren.org; slewis@voicesforchildren.com; gklein@projectharmony.com; daves880@msn.com; ralbin@inebraska.com; Georgie.Scurfield@gmail.com; lborchar@nebrwesleyan.edu; grannyjudy1@hotmail.com; lbrown2@alegent.org
Subject: RE: Management Standards

Martha,

Thanks again for working with Georgina, Lisa and my schedules to set up meeting. Since we are not able to meet for two weeks, I want to restate questions, which I think you can easily answer, in context.

My question was about the application of the COSO standards to the Revi Board and you had replied to my question saying, *"we are not taking the COSO standards and applying them in their entirety to the FCRB. Instead we identified basic COSO management standards and combined them with other management standards and best practices - including the DAS recommends that state agencies - to come up with a set of basic management practices that are reasonable to expect state agencies to follow."*

I would just like to know the general outline of what the set of basic management practices you and your staff have developed during the course of your audit process and that you feel are reasonable to expect state agencies including the Foster Care Review Board to follow.

As I have said before, I hope to use the audit as an additional opportunity to ensure the agency is maximizing productivity and applying appropriate steps to ensure that reasonable standards are met. By communicating the standards by which you will measure us, you will help us further our meeting this goal.

Thanks again for trying to set up this meeting.

Carol Stitt

Carolyn K. Stitt, Executive Director
Foster Care Review Board

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Lincoln NE 68508
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The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing.
Albert Einstein

Attachments:

| | | |
|--|------------|-------------------------------|
| File: General Categories of Management Standards 7-17-08.pdf | Size: 62k | Content Type: application/pdf |
| File: Management Standards Literature List 7-17-08.pdf | Size: 106k | Content Type: application/pdf |

General Categories of Management Standards

- *Ethics/Code of Conduct/Professionalism*
- *Job Descriptions/Expectations*
- *Training*
- *Performance Evaluations*
- *Agency Communication*
- *Disciplinary Procedures*
- *Human Resources Management*

Performance Audit Management Standards: Literature Reviewed

Comprehensive Standards

- *Internal Control—Integrated Framework*, Committee of Sponsoring Organizations of the Treadway Commission (COSO), September 1992.
- *Internal Control—Integrated Framework Evaluation Tool*, Committee of Sponsoring Organizations of the Treadway Commission (COSO), September 1992.
- *Standards for Internal Control in the Federal Government*, General Accounting Office (now Government Accountability Office), November 1999.
- *Internal Control Management and Evaluation Tool*, General Accounting Office (now Government Accountability Office), August 2001.
- *Management Accountability and Control, Circular A-123*, Office of Management and Budget.
- *12: The Elements of Great Managing*, Rodd Wagner and James K. Harter, Gallup Press, New York, 2006.

Supporting Literature

- *The Best of the Gallup Management Journal 2001-2007*, Edited by Geoffrey Brewer and Barb Sanford, Gallup Press, New York, 2007.
- *The Responsible Administrator*, Terry L. Cooper, Jossey-Bass Publishers, San Francisco, Oxford, 1990.
- *Human Sigma: Managing the Employee-Customer Encounter*, John H. Fleming and Jim Asplund, Gallup Press, New York, 2007.
- *In Praise of the Incomplete Leader*, Deborah Ancona, Thomas W. Malone, Wanda J. Orlikowski, Peter M. Senge, Harvard Business Review, February 2007.
- *What Your Leader Expects of You*, Larry Bossidy, Harvard Business Review, April 2007.
- *The Ethical Mind: A Conversation with Psychologist Howard Gardner*, Bronwyn Fryer, Harvard Business Review, March 2007.
- *What Every Leader Needs to Know About Followers*, Barbara Kellerman, Harvard Business Review, December 2007.
- *Avoiding Integrity Landmines*, Ben W. Heineman, Jr., Harvard Business Review, March 2007.

- *Managing Government Employees: How to Motivate Your People, Deal with Difficult Issues, and Achieve Tangible Results*, Stewart Liff, American Management Association, 2007.
- *Driving Fear Out of the Workplace: How to Overcome the Invisible Barriers to Quality, Productivity, and Innovation*, Kathleen D. Ryan, Daniel K. Oestreich, Jossey-Bass Publishers, San Francisco, Oxford, 1991.
- *30 Reasons Employees Hate Their Managers: What Your People May Be Thinking and What You Can Do About It*, Bruce L. Katcher with Adam Snyder, American Management Association, 2007.

Training Course Attended

The Director of the Department of Administrative Services Personnel Division recommended that performance audit staff attend a three-day supervisor training program—called SuperVision—that the department offers for supervisors in all state agencies. For more information on this training program, see:

<http://www.das.state.ne.us/personnel/nkn/nkncourses/orgeffect.htm>

**Foster Care Review Board
Goals for 2008**

Note: Most of the goals below are continuations of current practices. For ease of reading, "continue" is not included in every continuing element.

I. Maintain a quality tracking system (system is used for tracking and review)

Goals pursuant to **Neb. Rev. Stat. §43-1303 (1)**, " *...The state board shall establish a statewide register of all foster care placements occurring within the state ...* "

Goal 1: Track children in out-of-home care to meet mandates.

Objective 1: Provide timely input of information from the approximately 60,000 reports received each year on the over 10,000 children who are in out-of-home care at some point during the year.

- Reports are issued by DHHS, courts, and other required reporters when individual children enter care, leave care, and/or have status changes (such as changes of caseworkers or placements).

Objective 2: Provide timely input of information collected and/or verified from the over 5,400 reviews conducted annually, each of which involves over 100 individual fields of data.

Goal 2: Assure quality control of children's computer records.

Objective 1: Conduct research as necessary to assure data completeness and accuracy if reports to the tracking system are incomplete, inaccurate, or include conflicting information (an estimated 3,000 reports per year).

- This includes searching for information on the DHHS or Court's data systems, making contacts with case managers or court personnel, or making other contacts as necessary.

Objective 2: Utilize the monthly case assignment and review processes to examine whether certain pieces of assigned children's information is accurate and to alert review specialists to the need for additional clarification or updates.

Objective 3: Run queries on vital data elements (such as type of placement, omitted date entered care, etc.) and make corrections as necessary, at least on a quarterly basis.

Objective 4: Share lists with the courts at least twice yearly, to verify if children are in out-of-home care.

Objective 5: Conduct a special study of children who have not been reviewed and children who have been in care for 24 months

or more (about 500-1,000 children). Obtain updated and additional data from this study, and utilize this information for quality assurance.

Goal 3: Make tracking system entry and the retrieval of data more efficient.

Objective 1: Work with DHHS to secure the electronic transmission of data currently provided in paper reports in order to improve efficiency and free staff time for quality control.

Goal 4: Provide data and lists from the tracking system for internal and external use. (see provide and disseminate data below).

II. Provide and disseminate data

Goals pursuant to **Neb. Rev. Stat. §43-1303 (2) (d)**, "*Accumulation of data and the making of annual reports on children in foster care...*" **Neb. Rev. Stat. §43-1303 (2) (e)**, "*... evaluation of the judicial and administrative data collected on foster care and the dissemination of such data to the judiciary, public and private agencies, the department, and members of the public;*" **Neb. Rev. Stat. 43-1308 (d)** "*Promote and encourage stability and continuity in foster care...*" [also §43-1303 (1) discussed above]

Goal 1: Provide data, evaluate the data, identify issues, and provide recommendations in an Annual Report as required by State law.

Objective 1: Assure completion of the 2007 Annual Report and summaries for each branch of government.

Objective 2: Assure the report includes issues identified by local boards (such as case management issues, contract issues, delays to permanency, GAL issues, and placement issues, young children's issues, etc.), the importance of oversight, IV-E funding issues, proactive measures taken by the FCRB to advocate for individual children, and other FCRB activities, efficiencies, and beneficial activities.

Objective 3: Distribute the annual report to the Governor; the DHHS Director, Administrators, and Supervisors; the legal system, the Legislature, the press, and the public. Include with the report and summaries a cover letter describing statistics of interest, such as to senators the number of children in the counties of their district.

Goal 2: Provide statistics, data, and analyses requested by the Governor, senators, the Supreme Court, the judiciary, other state and governmental agencies, advocacy groups, researchers, the press, and the public. Update these individuals and groups on trends and continuing issues as necessary.

Objective 1: Provide statistics and/or analyses in response to 100 data requests.

Objective 2: Provide individual judges with statistics and lists on the children in their jurisdictions.

Objective 3: Board members and staff will speak to focus groups, community organizations, service clubs, college classes, and the press on issues affecting children in out-of-home care.

Goal 3: Share information from special studies and reports with the appropriate parties.

III. Review children's cases and advocate for their best interests

Goals pursuant to **Neb. Rev. Stat. §43-1308 (1)** “...the state board or designated local board shall: (a) Review at least once every six months the case of each child in foster care placement ...; (b) Submit to the court having jurisdiction over such child ... its findings and recommendations ... (d) Promote and encourage stability and continuity in foster care ...”, and **Neb. Rev. Stat. §43-1314.01 (1)** “The State Foster Care Review Board shall be responsible for the conduct of periodic reviews which shall be identified as reviews which meet the federal requirements for six-month case reviews pursuant to the federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272...”:

Goal 1: Review children's cases based on the State Board's priority list.

Objective 1: Assign 5,000 children's cases for review, including alternates in case children return home, per the State Board prioritization schedule.

Objective 2: Conduct 3,600 reviews of children in out of home care, using the State Board's prioritization schedule.

- In 2007, the Board lost two full-time and one part-time review specialists through attrition. Due to budgetary constraints, the Board is unable to fill those positions. (see separate section on funding) It is estimated that each full-time review specialists can complete 330 reviews per year (110 per board). With current staff, 3,600 reviews should be conducted.

Objective 3: Create a special report about 500-800 children who have been in foster care for two years or more in order to advocate for the best interest of children in out-of-home placements. Identify the barriers to permanency for the children in the study. Distribute the report and findings to the Governor, DHHS, members of the Legislature, the courts and legal system, and other interested individuals and groups.

Objective 4: Assure that notifications and reports are issued according to state and federal mandates. (An estimated 25,200 notifications and about 25,200 reports).

Objective 5: Assure that data is collected and verified during the review process.

Objective 6: Recruit, train, and support community volunteers who serve on local foster care review boards. Facilitate the donation of at least 27,000 hours of service by local board members during 2008.

Objective 7: Work to obtain staff necessary to conduct reviews to meet state and federal mandates. (see separate section on funding)

Goal 2: Establish FCRB participation in the Governor's case review process.

Objective 1: Establish participation in Eastern and Southeast service areas.

Objective 2: Continue participation in the Central and Western areas.

Goal 3: Attend and participate in court hearings.

Objective 1: Attend and participate in 700 court hearings.

- Each full-time review specialist is required to attend and participate in at least four court hearings per month. Each part-time review specialist is required to attend and participate in at least three court hearings per month. With the current staff, review specialists should attend at a minimum of 700 court hearings.

Goal 4: Advocate for individual children's best interests (in addition to items 1-4 above).

Objective 1: Describe the Board's top concerns in the recommendation report issued to all legal parties following case review, and provide recommendations to address the issues identified.

Objective 2: Staff cases and/or contract DHHS caseworkers, supervisors, legal staff, adoption workers, or administrators, as well as guardians ad litem, investigators, or prosecutors on behalf of an individual child to help implement solutions to the issues identified with the child's case. Flag cases of significant concern for the DHHS Director's attention or the attention of DHHS area administrators.

Objective 3: Utilize, when necessary, an attorney to represent the FCRB at the child's court hearing to help implement solutions to the issues identified with the child's case.

Objective 4: Encourage increased DHHS participation in reviews.

Objective 5: Respond to case concerns brought forward by State Senators on behalf of their constituents, and other special requests received.

Goal 5: Communicate child welfare system issues with the parties able to affect change and others who need to understand the issues.

Objective 1: Work with the legal system on issues identified with pre-hearing conferences, aggravated circumstances, permanency hearings, guard ad litem representation, stability in placements, and other issues they can impact.

Objective 2: Work with DHHS on joint education programs on aggravated circumstances and permanency hearings.

Objective 3: Work with DHHS to address child welfare issues.

Objective 4: Work to identify children with developmental disabilities and review as many as possible to assure their safety and well-being.

Objective 5: Participate on the Through the Eyes of a Child Teams. Provide data and lists useful in measuring progress.

Objective 6: The FCRB Director will meet with at least 20 senators to provide data of their area, to communicate child welfare issues, to discuss potential legislation affecting the child welfare system, or to discuss the Board's funding needs..

Objective 7: The FCRB Director will update the Governor, the Chief Justice, the legal system, DHHS administrators, and the Attorney General on issues affecting the child welfare system.

Objective 8: The FCRB Director will create news releases as necessary.

Goal 6: Research and monitor potential legislation affecting the FCRB or children in out-of-home care and communicate the State Board's position on the legislation.

Objective 1: The Director and staff will contact and/or respond to senators questions regarding foster care.

Goal 7: Revise the FCRB Rules and Regulations and go through the promulgation process.

IV. Work to restore funding for staff to facilitate tracking and review to meet state and federal mandates

For statutory references see items I-III above.

Goal 1: Secure funding for five and two-thirds review staff positions, one trainer, and one staff assistant.

Objective 1: The Director will meet with the members of the Legislature's Appropriations Committee, Health and Human Services Committee, and Judiciary Committee to provide data of their area, to communicate child welfare

issues, to discuss potential legislation affecting the child welfare system, or to discuss the Board's funding needs..

Objective 2: Communicate the need for additional staff to the Governor and the Legislature.

V. Promote stability in foster care placements and ensure that children are placed in safe and appropriate placements.

Goals pursuant to **Neb. Rev. Stat. §43-1308(1)(b)** “...*The findings and recommendations shall include...whether the current placement is safe and appropriate...*”, **Neb. Rev. Stat. 28-711 (1)** “*When any ... social worker, or other person has reasonable cause to believe that a child has been subjected to child abuse or neglect or ... being subjected to conditions or circumstances which reasonably would result in child abuse or neglect, he or she shall report such incident...*” **Neb. Rev. Stat. §43-1308 (1) (d)** “*promote and encourage stability and continuity in foster care by discouraging unnecessary changes in the placement of foster children and by encouraging the recruitment of foster parents who may be eligible as adoptive parents.*” and statutes previously cited:

Goal 1: Identify issues related to safety, appropriateness, and stability of foster care placements, and communicate these issues to all legal parties.

Goal 2: Assure that if a staff member has reasonable cause to believe that a child has been subjected to abuse or neglect in their out-of-home placement, that a child abuse report is made as required by statute, and that the staff person advocates for the child to be in a safe placement, contacting the DHHS supervisor if not satisfied with progress, and contacting DHHS administrators if not progress is not made.

Goal 3: Communicate placement issues in the Annual Report, through meetings with DHHS Service Administrators and Protection and Safety Administrators, and through meetings with other legal parties to children's cases.

Goal 4: Encourage DHHS to create specialized case management for cases of young children (newborn through five years old) and their siblings. The specialized units should have reduced case loads and focus on expediting permanency for young children. Monitor the effectiveness of the units.

Objective 1: Communicate the need for specialized case management for young children to DHHS administration..

Objective 2: Communicate the need for specialized case management for young children through the Annual Report.

Objective 3: Communicate the need for individual child visits.

Goal 4: Participate in NFAPA regional conferences and educational programs when invited, providing information regarding the FCRB to foster parents, adoptive parents and relatives.

Objective 1: Participate in conferences as invited.

Objective 2: Continue communication with NFAPA about the work of the FCRB.

Goal 5: Encourage persons interested in becoming foster parents to contact appropriate parties, in partnership with DHHS..

Goal 6: When Board members and staff speak to focus groups, community organizations, service clubs, college classes, and the like on issue affecting foster care, include the continual need for foster parents and respite care providers.

VI. Visits to foster care facilities

Goals pursuant to **Neb. Rev. Stat. 43-1303 (3)** “...*The state board may visit and observe foster care facilities in order to ascertain whether the individual physical, psychological, and sociological needs of each foster child are being met*”, **Neb. Rev. Stat. §43-1308(b)** “*The findings and recommendations shall include ... whether the current placement is safe and appropriate...*”:

Goal 1: Conduct informational visits to foster care facilities.

Objective 1: Conduct informational visits to at least 12 foster care facilities.

Goal 2: Conduct child-specific visits to foster care facilities.

Objective 1: Visit at least 100 children through child-specific visits.

Objective 2: Train at least 10 additional board members in the Omaha and Lincoln area to complete child-specific visits.

Objective 3: Obtain donations for materials related to child-specific visits.

Goal 3: Establish protocols for joint DHHS-FCRB unannounced visits to facilities.

Objective 1: Work with DHHS, child-caring agencies and child-placing agencies to establish protocols for joint DHHS-FCRB unannounced visits to group homes, shelters, and specialized facilities.

VII. Work with DHHS to increase accountability in placements and services

Goals pursuant to **Neb. Rev. Stat. §43-1308 (d)** "*Promote and encourage stability and continuity in foster care...*": and pursuant to the statutes listed under items I-III.

Goal 1: Advocate for oversight of services and placements for children in out-of-home care.

Objective 1: Document concerns where they exist and report the concerns to the proper authorities.

Objective 2: Communicate with DHHS administration the identified issues regarding contract services and placements.

VIII. Communicate with DHHS

Goals pursuant to **Neb. Rev. Stat. §43-1308 (d)** "*Promote and encourage stability and continuity in foster care...*" and pursuant to the statutes listed previously.

Goal 1: Meet with DHHS in the Eastern and Southeast Service areas to ensure children's files are available and contain case plans, accurate information, complete documentation, and homestudies.

Objective 1: Document concerns where they exist and report the concerns to the proper DHHS administrators.

Objective 2: Implement the Governor's reviews.

Goal 2: Continue discussion with DHHS administrators on issues such as better identification of children and families for IV-E funding; better initial placements for children entering foster care; other placement concerns including the need for coordination between resource development workers and caseworkers, joint facility informational visits, etc.

Goal 3: Invite the DHHS Director and/or administrators to update the State Board as needed.

IX. Provide educational programs

Goals pursuant to **Neb. Rev. Stat. §43-1303 (2) (a)** "*establishment of training programs for local board members...*"

Goal 1: Provide educational programs for local board members and other child welfare professionals.

Objective 1: Provide educational programs for local board members and other child welfare professionals regarding the juvenile justice legal system, substance abuse issues, and

developmental disabilities, in the Central-Western, Eastern, and Southeast Service Areas.

Objective 2: Co-sponsor with DHHS a legal training, including aggravated circumstances, for FCRB staff, local board members and DHHS staff in Lincoln and Omaha.

Goal 2: Assist in educational programs for other child welfare professionals.

Objective 1: Assist in providing a program on aggravated circumstances for the judiciary, prosecutors, and others in the child welfare system.

X. Maintain partnerships

Goals pursuant to **Neb. Rev. Stat. §43-1308 (d)** "*Promote and encourage stability and continuity in foster care...*" and pursuant to the statutes listed under items I-III.

Goal 1: Partner to address issues of concern and to raise awareness of the need for additional foster parents with other organizations.

Objective 1: Continue to partner with individuals and organizations such as:

- the Governor,
- the Nebraska Legislature,
- the Attorney General,
- the Supreme Court,
- the Supreme Court's Commission on the Courts,
- the Department of Health and Human Services,
- the National Association of Foster Care Reviewers,
- the Juvenile Court Judges Association,
- the County Judges Association,
- the County Attorneys Association,
- CASA's,
- Guardians Ad Litem,
- the Friends of Foster Children Foundation,
- the Nebraska Foster and Adoptive Parents Association (NFAPA),
- schools,
- treatment providers,
- the Governor's Commission for the Protection of Children, and
- Other child advocacy or child welfare professional organizations and individuals.



STATE OF NEBRASKA
Office of the Attorney General

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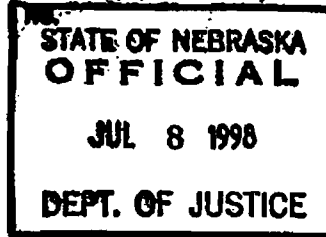
JUL 08 1998

FOSTER CARE REVIEW BOARD

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

98029



DATE: July 6, 1998
SUBJECT: Authority of the Foster Care Review Board to conduct visits and inspections of foster care group homes and methods to enforce such authority
REQUESTED BY: State Foster Care Review Board
WRITTEN BY: Don Stenberg, Attorney General
David Tarvin, Assistant Attorney General

You have requested our opinion as to whether Neb. Rev. Stat. § 43-1303(6) allows the State Foster Care Review Board ("Board") to conduct visits and inspections of foster care group homes. Specifically, the Board is seeking access to the OMNI group home facilities ("OMNI"). According to your letter, OMNI has contracted with the Department of Health and Human Services ("Department") to provide a therapeutic environment for a number of foster care children. Recently, the Board has received a number of allegations that OMNI has provided improper care for many of the youth in their homes. The Board wishes to tour OMNI's facilities to see if the allegations are true and to ensure that the needs of the children in OMNI's care are being met. OMNI has refused to allow the Board to tour any of OMNI's facilities and has stated that the Board must schedule in advance any visit the Board wishes to make.

We conclude that § 43-1303 does give the Board the authority to conduct visits and inspections of these group homes, and that any group homes must allow such inspections. We also conclude that the Board may conduct such visits and inspections unannounced.

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydziejek
Dale A. Comar
Suzanna Glover-Estrich
Royce N. Harper
Lauren L. Hill

Jay C. Hineley
Amy Hollerbeck
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
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Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Nelson
Donald J. B. Miller
Ronald D. Moravec
Fredrick F. Neid
Marie C. Pavot

Paul N. Potodie
Mark D. Raffety
Carla Heatherahew Risko
Robert B. Rupe
James D. Smith
James H. Spears
Mark D. Starr

Martin Swanson
David R. Tarvin, Jr.
Timothy J. Texel
John R. Thompson
Barry Wisid
Terri M. Weeks
Melanie J. Whitmore-Mantzios
Linda L. Willard

You also ask how the Board should proceed to enforce its authority under this statute. We conclude that the proper method of enforcement is to request that the Department initiate a license suspension or revocation of any group home that does not comply with § 43-1303.

DISCUSSION

The Board was created in 1982 by the passage of LB 714, the Foster Care Review Act. The purpose of the Act was to provide for periodic review of "cases of children who have resided in public or private foster care for a period of more than six months to determine what efforts have been made by the supervising agency or child-caring institution to carry out the plan for rehabilitation or permanent placement." Introducer's Statement of Intent on LB 714, 87th Neb. Leg., 2nd Sess. (January 19, 1982). As stated by this office in a previous opinion, the goals of the Act were to correct two problems. First, a number of foster care children were being "lost in the system". Second, there were concerns that neither the social service agency nor the courts were adequately monitoring the progress of children placed in foster care. See Op. Att'y Gen. No. 93-084 (October 18, 1993). In essence, the Board was set up as an independent reviewer of the system.

Neb. Rev. Stat. § 43-1303 (Cum. Supp. 1996) sets out various duties and responsibilities of the Board. These include gathering data and making reports on children in foster care, reviewing the activities of local review boards, keeping a statewide register of all children in foster care, establishing training and procedures for local review boards, evaluating judicial and administrative data on foster care, and making reports and recommendations to the Department and to each court having the authority to make foster care placements.

In conjunction with their duties, § 43-1303 states that, "[t]he state board may visit and observe foster care facilities in order to ascertain whether the individual physical, psychological, and sociological needs of each foster child are being met."¹ No other statutes or regulations address this specific statutory provision.

¹ The Board cited this language as part of subsection (6) of 43-1303. In actuality, the language is not a part of (6) but instead follows (6).

Nebraska Law states that in construing a statute, a court must determine and give effect to the purpose and intent of the legislature as ascertained from the entire language of the statute considered in its plain, ordinary and popular sense. *Nickel v. Saline County School Dist. No. 163*, 251 Neb. 762, 559 N.W.2d 480 (1997). A court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than construction that defeats it. *Southeast Rural Volunteer Fire Dept. v. Department of Revenue*, 251 Neb. 436 (1997). When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged in to ascertain their meaning. *Estate of Muchemore*, 252 Neb. 119, 560 N.W.2d 477 (1997). It is not within the province of a court to read a meaning into a statute which is not there, or to read anything direct and plain out of a statute. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

In reading this language in its plain and ordinary meaning, we believe that no other conclusion can be reached but that the Board is allowed to visit and observe foster care facilities to ensure the needs of the children at those facilities are being met. OMNI's position appears to be that § 43-1303 does not require OMNI to allow such visits and inspections by the Board. However, such an interpretation would read into the statute a requirement that is not there - that the Board may visit and inspect *only with the permission of the foster care facility*. Such an interpretation would defeat the purpose of the statute, which is to enable the Board to make an independent determination as to whether the children are receiving the proper care. Thus, OMNI and other group homes are required under this statute to allow visits and inspections by the Foster Care Review Board.

Implicit in this opinion request is also the question as to whether such visits must be announced. Again, we look to the plain, ordinary meaning of the statutory language, as well as to the objectives to be achieved by the statute. First, there is no requirement in the statutory language itself that the visits be announced. Second, the purpose of the visits is to allow the Board to determine if foster care children are receiving proper care. If all visits must be announced in advance, then any facility which was not providing foster care might be able to hide those problems temporarily, thus defeating the purpose of the visit. Of course, some problems, particularly long-term problems, may not be so easy to disguise. However, it is important for the Board to be able to

see any problems which may exist so that it may make complete, accurate, and correct reports to all social services agencies and to each court dealing with the placement of children. Thus, § 43-1303 allows the Board to conduct both announced and unannounced visits.

The Board next asks what action it can take in order to gain access to OMNI's facilities. We believe that the best course of action would be to report OMNI's refusal to allow the inspections to OMNI's licensing agent and to request that an action to suspend or revoke OMNI's license be initiated unless it agrees to allow the inspections.

Neb. Rev. Stat. § 71-1902 states:

Except as otherwise provided in this section, no person shall furnish or offer to furnish foster care for two or more children from different families without having in full force and effect a written license issued by the department upon such terms and conditions as may be prescribed by general rules and regulations adopted and promulgated by the department.

Neb. Rev. Stat. § 71-1904 states in part:

The department shall adopt and promulgate rules and regulations pursuant to sections 71-1901 to 71-1906.02 for (1) the proper care and protection of children by licensees under such sections, (2) the issuance, suspension, and revocation of licenses to provide foster care

The regulations promulgated by the Department pursuant to these statutes are located in 474 NAC Chapter 6. 474 NAC 6-003 contains provisions related to foster care home licensure. 474 NAC 6-005 relates to licensing group homes and child caring and child placing agencies. Since OMNI is a group home, it is subject to the requirements of § 6-005.

474 NAC § 6-005.03 states:

Persons, other than a parent, who place, assist in placing, advertise a child for placement, or give the care and custody of any child to any person or association for adoption or otherwise, except for

temporary or casual care, must obtain a license to place children. See also 474 NAC 6-003.03.

474 NAC 6-003.03 states:

A license is required when the business is exercising the care, supervision, custody or control over children, age 15 or younger, from more than one family, for compensation or hire. This care must be in lieu of the care or supervision normally exercised by parents in their own home.

To provide day care for children in a foster home, the provider shall obtain a separate day care center license or day care home registration.

Each applicant/licensee shall comply with all applicable federal, state, and local subdivision laws, ordinances, and regulations.

As a group home, OMNI falls into the requirements of § 6-003.03 and is required to comply with all state laws and regulations. Thus, OMNI would be required to comply with § 43-1303, and it would be the obligation of the Department to take the necessary steps to ensure compliance. The following regulations set out the procedure to be followed by the Department.

Non-Compliance with Requirements is set out in 474 NAC 6-005.13 by reference to 6-003.15 which states: "The licensing agent shall notify the applicant/licensee in writing of any points of non-compliance with licensing requirements."

In the absence of satisfactory corrective measures by the licensee, there is a procedure for denial, revocation, or suspension of a license. See 474 NAC 6-005.18 which refers to 474 NAC 6-003.21 which states: "The decision to deny, revoke or suspend a license is made by Central Office Staff based on documentation and recommendation provided by the licensing agent." Subsections 21A and 21B provide a procedure for revocation and suspension of a license. 21B provides that the licensing agent shall recommend revocation for non-compliance after written notice and 21C provides for suspension that is necessary following a report of neglect or abuse.

It appears from the regulations that the proper course for the Board would be to notify OMNI's licensing agent that OMNI is not

State Foster Care Review Board
July 6, 1998
Page -6-

complying with one of its license requirements, i.e. allowing the Board to inspect the facilities as mandated by § 43-1303. At that point, the licensing agent is required to recommend suspension or revocation to the Department. The general rule in Nebraska is that the use of the word "shall" is considered mandatory and is inconsistent with the idea of discretion. *Shepherd v. Equal Opportunity Commission*, 251 Neb. 517, 557 N.W.2d 684 (1997). At that point, the Department will need to review the recommendation.

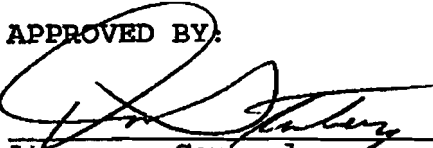
Sincerely,

DON STENBERG
Attorney General

for Charles E. Lowe
David R. Tarvin, Jr.
Assistant Attorney General

32-3-7.3

APPROVED BY:



Attorney General

Nebraska's

Lost

Children

We Accept Responsibility

*We accept responsibility for those
who never get dessert,
who have no safe blanket to drag behind them,
who watch their parents watch them die,
who can't find any bread to steal,
who don't have any rooms to clean up,
whose pictures aren't on anybody's dresser,
whose monsters are real.*

*And, we accept responsibility for those whose
nightmares come in the daytime,
who will eat anything,
who have never been to a dentist,
who aren't spoiled by anybody,
who go to bed hungry, and cry themselves to sleep,
who live and move but have no being.*

*We accept responsibility for children,
who want to be carried and for those who must,
for those we never give up on and for those who
don't get a second chance.
For those we smother...and for those who will grab
the hand of anybody kind enough to offer it.
We accept responsibility.*

Adapted from Ina J. Hughs, *The Oklahoma Observer*

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For the child welfare system

A Publication by the Foster Care Review Board - February 2004

"If we're doing something wrong, we're adults who'll admit it, we'll try to fix it, we'll try to find it, deal with it. But when these kids don't even come across our radar screen, you worry."

Governor Mike Johanns

Nebraska's
Lost
Children

Children's Deaths: A Dark Time for Nebraska

For years, the Foster Care Review Board (FCRB) has raised concerns about Nebraska's child welfare system,* and routinely made recommendations for improvements. Concerns have included:

- Most people call Child Protective Services(CPS) to report child abuse; however, law enforcement is the first responder to calls. In some cases there is a lack of communication between these co-managed systems;
- Law enforcement officers, the first wave of child protection in Nebraska, have little or no training on how to evaluate a child's immediate risk for harm;
- Over burdened workers are unable to give all cases adequate attention;
- An unwieldy computer system; and
- Many abuse and neglect reports are not prioritized, investigated or appropriately evaluated for child's safety. In some cases there is *no* response to serious allegations - even to reports made by medical professionals.

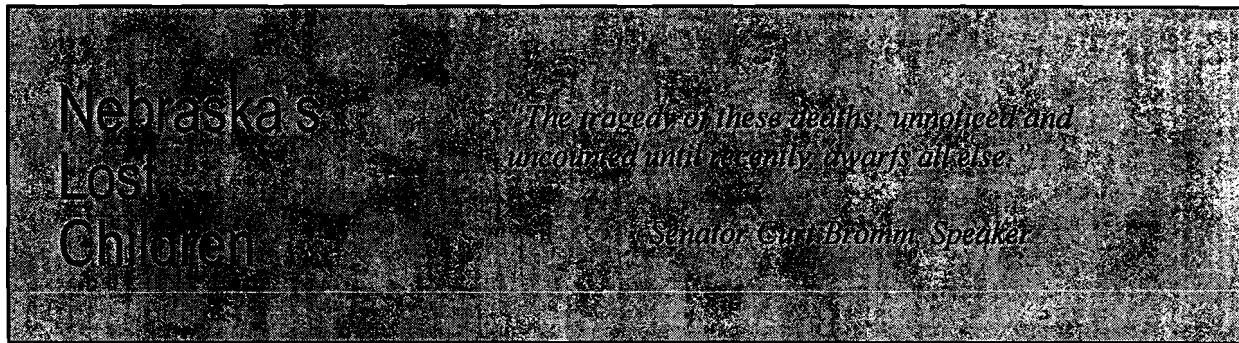
These are some of the problems which have contributed to Nebraska children, not only being abused and neglected, but being killed. In 2003, FCRB concerns about children's safety increased dramatically as news reports carried more and more stories of deaths of children. The case that moved the Board into assertive action was the murder of Diana Molina, a toddler in Grand Island.

In July 2003, Diana's father stripped her naked, soaked her with ice cold water, and forced her to stand on a box in front of a fan. He punched, kicked and repeatedly lashed her with a belt. The two-year-old was brutally murdered while her mother and other relatives stood by.

The Research

FCRB Executive Director Carol Stitt and staff - primarily Omaha Review Specialist Supervisor Tammy Peterson - began to search for information on children's deaths over a period of years. They were shocked by the high number, the violence and suffering endured by the children, the number known to the child welfare system, and the number of reports to the Child Protective Services (CPS) division of the Department of Health and Human Services which were not accepted or investigated.

* The core entities of the child welfare system are Child Protective Services, the Department of Health and Human Services (DHHS), law enforcement, county attorneys, and the judiciary. In the broad sense, it includes educators, daycare providers, physicians, therapists, and other adults who come into contact with children all of whom are obligated to report suspected abuse. For children known to the system, it also includes DHHS contractors (who are responsible for the safety of children in their placements including during visitation and while transporting), *guardians ad litem*, parental attorneys, foster parents, group homes, and specialized facilities.



The research, combined with that later conducted by the *Lincoln Journal Star* and *Omaha World Herald*, revealed that since 1997, at least 33 children had been killed at the hands of their fathers, mothers, mothers' boyfriends, stepfathers, other relatives, or by a foster parent. And, the number of deaths has been increasing annually at an alarming rate. In 2003, eleven children were killed. In 2002, eight children were killed, and in 2001 five met untimely deaths. Five children were killed in 2000, two in 1999, one in 1998, and one in 1997.

Of the 33 children killed:

- 27 (82%) were newborn through five years old.
- 14 (44%) were not known to the system before their deaths.
- 19 (58%) had been reported to either CPS or law enforcement.
- 3 (9%) were wards of the court at the time of their deaths.

The Board's research shows that CPS is not appropriately assessing and responding to calls. Many reports made prior to children's deaths should have triggered investigations. These statistics show that CPS and law enforcement must be more attentive to, and ensure timely action on, all reports. The high number of deaths among newborns through five-year-olds indicates that particularly close scrutiny must be given to reports related to the very young who are at the greatest risk of injury and death from abuse.

After meeting with the Board regarding the children's deaths, the Governor Johanns agreed to spearhead the effort to examine and improve upon the child welfare system, and he allowed the Board to examine the 22,648 intake reports recorded on the N-FOCUS system from July 2002 to July 2003. The Board conducted research on a sample of 6,000 of these child abuse or neglect calls, and found that even though 40% of the calls should have had further action, only 25% of the calls actually had follow-up.

The known statistics and facts are heart wrenching and a shameful revelation. The individual stories and faces of these vulnerable innocents tell an even more poignant and ghastly story: a story of lost potential and broken promises, a story of holes in a safety net that are literally large enough for children to fall through to their deaths.

Nebraska can, and must, do better by its children. We must work harder to prevent physical, emotional and psychological harm from abuse and neglect. And, we cannot pretend that a child's death is an aberration...the statistics belie that illusion. With the commitment of policy makers and citizens alike, we can and must reform our child welfare system to ensure that no other child experiences the horror suffered by "Nebraska's Lost Children." ■

Protecting children is paramount to the level of civility by which a society is judged. We'll continue to do all we can to prosecute this type of crime and work to help prevent these horrible tragedies.

Jon Bruning, Nebraska Attorney General

Nebraska's Lost Children

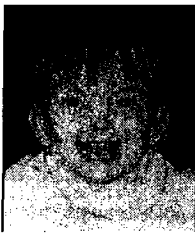
Nebraska's Lost Children

Following are the children identified by the FCRB, *Lincoln Journal Star* and *Omaha World Herald* who have died, from 1997 through 2003, not from illness or by accident, but due to physical brutality at the hands of fathers, mothers, mothers' boyfriends, stepfathers, other relatives, or a foster parent. Of these 33 children, 27 (82%) were under the age of five at the time they were murdered, and 14 (44%) were known to the system prior to their deaths. Those cases having had some Child Protective Services (CPS) or law enforcement involvement are indicated with an asterisk.

2003

Ameel Eagle Feather-Boston, 11 weeks, Omaha. The bruised infant died Nov. 30 from several skull fractures. His father, Edward Boston, has been charged with felony child abuse resulting in death.

***Alexandria Springer**, 21 months, Omaha. Died Aug. 27 after being admitted to the emergency room with head-to-toe bruises, a swollen brain stem and bleeding from her ears. Previously, Alexandria's mother's rights to two other children had been terminated due to neglect.



Authorities received three reports regarding Alexandria's welfare prior to her death. Her mother's boyfriend, Ronald Phelps, was booked on suspicion of child abuse resulting in death.

***Vanessa Casillas**, 13, North Platte. Died Aug. 8 from a fall down a grain elevator after drinking. CPS had received two reports prior to her death. Her 20-year-old cousin has been charged with felony child abuse, and two other youth were charged with felony child abuse, trespassing, and minor in possession.



Torrance Woods, 10 weeks, North Platte. Died Aug. 1 from head injuries and rib fractures. Her father, William Woods, was charged with felony child abuse of Torrance, and emotional abuse of Torrance's three-year-old brother. Woods faces 20 years to life.



Nebraskans Lost Children

"It's disgusting to see what's going on with children and abuse. If money is the answer, money is what we're going to look at."

*Senator Roger Wehrheim
Chair, Appropriations Committee*

2003 continued

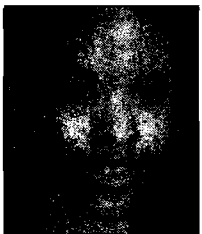
Diana Molina, 2, Grand Island. Murdered July 23. Because she wet the bed, Diana's father,



Germai Molina, allegedly stripped her naked, poured ice cold water over her body, and forced her to stand on a box in front of a whirling fan. He struck her with a belt up to 100 times, then punched and kicked

her to the floor. This extreme abuse took place continually over a period of 20 to 24 hours while the toddler's mother, Diana Molina, and other relatives stood by. Germai, previously known to area law enforcement, has been charged with first-degree murder. Diana's mother faces life in prison for permitting child abuse resulting in death.

***Rebecca Williams, 13, Omaha.** Found dead June 18, two weeks after being reported



missing. CPS had received two reports with allegations against her step-father. Although another 13-year-old is the primary suspect, a deputy said the "dysfunction in the home life had something to do

with what contributed to her death." No arrests have been made.

***Jayden Swartwood, 4, North Platte.** Died June 17. He was found barely conscious after



being trapped in a car trunk. Authorities determined Jayden crawled into the trunk while his mother slept, and accidentally locked himself inside. CPS had received three reports regarding

Jayden and his siblings, including one from a professional in the system who recommended immediate removal. His mother, Lynette Swartwood, received 18 months probation for misdemeanor child abuse. Two other children have been removed from the home.

James Dexter, 2, Omaha. Died June 13 from severe burns after being forced to sit in a tub of



hot water for five minutes. James' mother admitted that her boyfriend, John Horst, purposely scalded the toddler. Horst has been charged with felony child abuse.

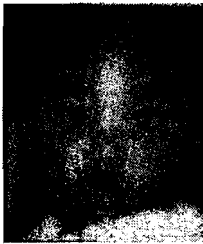
"If you are going to have Child Protective Services - if you are going to have a hotline - it needs to be more effective. You can't just have people call in and nothing's looked into and nothing's done."

Staci Wise, Jayciona Fleming's Foster Mother

Nebraska's Lost Children

2003 continued

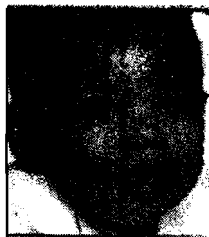
***Brianna Pope, 3, Omaha.** Died May 10 from chronic abuse. She suffered blunt trauma to her



chest, abdomen and extremities, was severely dehydrated, and had extensive bruising on her back and legs at various stages of healing. There was a history of law enforcement being called to the house for domestic

violence. Numerous relatives say they had called CPS expressing fears Brianna was unsafe. Leonard Burks, Brianna's stepfather, was charged with felony child abuse. The FCRB has asked the state Attorney General to consider upgrading the charges to first degree murder.

***Jayciona Fleming, 18 months, Omaha.** Died March 17 due to shaken baby syndrome. CPS



had received five calls reporting safety concerns. Four days prior to her murder, a CPS worker saw Jayciona and, noting facial injuries, suggested to her mother, Latonya Fleming, that she seek medical attention.

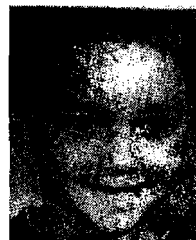
Later that day, a hospital requested placement for Jayciona because of her injuries: bruised

arms and thigh, red bumps on her head, cuts to her face, and a fading bruise over an eye.

Placement was secured, then canceled. Law enforcement, having no information on the mother's history (her previous involvement with CPS, and the fact that other children had been removed from the home), released Jayciona to the woman who would kill her. Her mother has been charged in her death.

Brendan Gonzalez, 4, Plattsmouth.

Disappeared in January. His body is yet to be



found. Brendan's father, Ivan Henk (a.k.a. Hank), confessed to murder while incarcerated for obstructing justice in the search for Brendan. He has been charged with his son's death.

Nebraska's Lost Children

Why after so many years and so much money and so many people doing so much work could it seem to be that things are worse? This is a soul darkening question.

Senator David Laddis

2002

Faith Klabunde, 18 months, Omaha. Died Dec. 17 from shaking, allegedly by her mother's boyfriend who denies wrongdoing. Hospital staff noted Faith had a bruise on her forehead and small bruises the size of a pencil eraser covered her body.



Her mother said Faith had fallen out of her crib and, since the incident, had been vomiting, sleepy, and nauseated. Faith's two siblings were placed in foster care.

***Brian Valdivia**, 11 weeks, Omaha. Died from shaken baby syndrome on Nov. 1. According to CPS's initial assessment, there was a long history of domestic violence. His mother was arrested.

Vivianna Muro, 8 months, Lexington. Vivianna was taken off life support Oct. 28 after it was determined she was brain dead. She also suffered 10 broken ribs and broken fingers. Her parents were arrested the day of Viviana's death, and her brother was placed in out-of-home care. An examination showed Viviana's brother also had a skull fracture of an undetermined age. Illegal drugs were found in the home. The parents have pleaded no contest.

Curtavious "CJ" Boykins, 2, Omaha. "CJ" was killed Aug. 16 at a birthday party by stray bullets fired in a gang-related shooting among attendees. The shooter, Demetrius Nelson, was identified by fellow gang members. Nelson pleaded no contest to second-degree murder and use of a weapon.

Taylor Haase-Cross, 3 months, Lincoln. Pronounced dead May 27. After his death, a nurse from the hospital advised the CPS hotline that Taylor had old and new bruises to the brain. His father, Bradley Haase, was sentenced up to 10 years for felony child abuse resulting in death.

Antonio Witherspoon, 13, was shot to death April 12 at a housing complex in Omaha. CPS closed the case one month after his death. It is suspected the shooting was gang related. No arrests have been made. In 1994, Antonio and his siblings were state wards, and his mother was placed on central registry as court substantiated neglect.

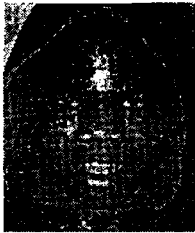
"It's frustrating because it seems like as a family you tried to do everything we could do other than kidnapping him and not letting him go back."

Deb Banik, Layne Banik's stepmother

Nebraska's Lost Children

2002 continued

***Darvell Gulley, 13, Lincoln.** A state ward for two years, Darvell died of asphyxiation after being physically restrained at a home run by Developmental Services of Nebraska. Over 160 complaints had been made against the facility. No citations were issued or criminal charges filed.



***Maximillian Ward, 3, Omaha.** Died in December after being put into scalding bath water as a form of punishment. His body was found in 2003 in a makeshift grave. CPS received two reports prior to Max's death alleging physical neglect by his mother, Tamecka Griffin. She is awaiting trial for child abuse. Timothy Sullivan, her boyfriend, was sentenced to 20 to 25 years.



Annette Hirsch, 2, Alliance. Died Feb. 26 from multiple blunt force injuries to the head after being hit causing her head to slam against a bathtub. Her grandmother, Michelle Hirsch, was sentenced to 25 to 30 years for manslaughter.

2001

Iycis Henderson, 11 weeks, Lincoln. Died Dec. 17 from shaking and beating. She had old bruises, a skull fracture, and severe bleeding in the brain. The father, who is the suspect, told authorities that Iycis fell out of her high chair, and stopped breathing.

***Layne Bryan-Banik, 3, Omaha.** Found dead in his home May 8 due to smothering. He also had fractures on an arm, an elbow, and a leg. Ricky Jim, his mother's boyfriend, was sentenced to 40 to 50 years. His mother, Candi Bryan, was not charged. Layne's family say they made repeated but futile efforts to get CPS or police involved, and related concerns to a doctor who did not call authorities. CPS says there are records of two reports, but not of the last made just prior to Layne's death.



Nebraska's Lost Children

"In every one of these deaths, there was an intake and investigative failure - That's what I saw."

- Doug Warner, Saotis Bluff, Deputy County Attorney

2001 continued

***Peyton Duane Kreikemeier**, 4 months, Plattsmouth. Died from shaken baby syndrome perpetuated by his day care provider, Terrie Hicks. Hicks was sentenced to 10 to 15 years.



***Quincey Simmons**, 3, Omaha. Died March 24 from blunt force trauma to his head at the hands of his foster mother, Monica Robinson, who is serving six to 15 years. There were prior investigations of the foster home. Robinson had specifically stated she wanted only males over age six placed with her. The FCRB submitted a letter to DHHS expressing concern with the home, and recommended there be no future placements. Quincey was placed with Robinson after the warning.



2000

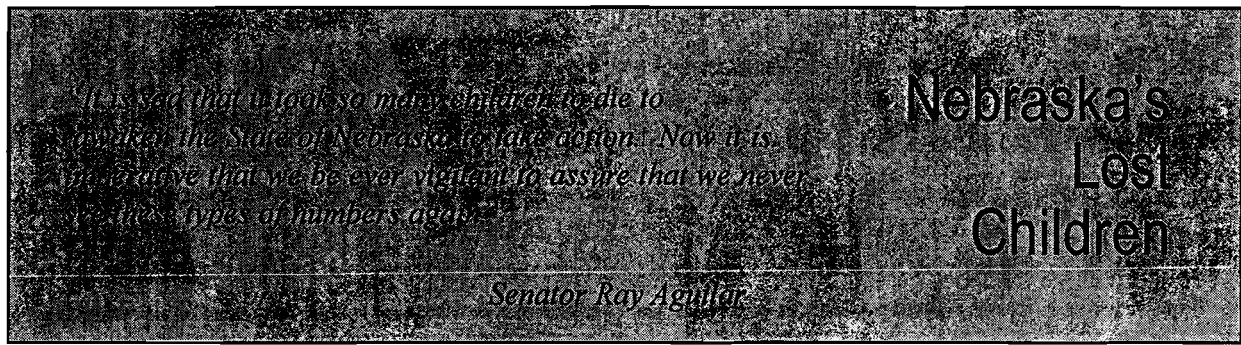
Timothy Stanley, 6 weeks, was taken off life support June 23 because of brain death caused by shaking injuries sustained June 11. His father, Edward Stanley, a senior Air Force airman at Offutt Air Force Base, was sentenced for involuntary manslaughter.

***Latara Chandler**, 13, Omaha. Killed Nov. 11 by her mother's boyfriend, Arthur Lee Gales, as was her brother. Gales and Latara's mother, Judy, had an argument the night of the murders. Judy was beaten and left for dead on railroad tracks. Latara was raped and strangled.



***Tramar Chandler**, 7, Latara's brother, was killed Nov. 11 by drowning in the bathtub. Arthur Lee Gales, his mother's boyfriend, was sentenced to death in the electric chair for the murders of Tramar and his sister Latara, and the attempted murder of their mother Judy. During the trial, prosecutors pointed out Gale's criminal history, including his 1987 conviction in Florida for armed sexual battery and armed robbery.





2000 continued

***Austin Jensen, 2, Omaha.** Murdered June 28 by his father, Justin Jensen. Jensen and Austin's mother, Crystal Granholm, had a violent relationship. Jensen killed both of his children and Crystal, then killed himself.

***Christian Jensen, 3, brother of Austin.** Murdered by his father Justin Jensen who had an extensive criminal history of violent acts back to age 16. A neighbor once confronted Jensen after Crystal said Jensen had choked her. Jensen's response was, "so?" It is suspected Jensen was on drugs at the time of the murders.

1999

Adam Gomez, 3, Scottsbluff. Killed and dismembered by his mother's boyfriend, Raymond Mata, in mid-March. Mata placed Adam's body parts in a freezer, in a dog food bag, and dog bowl. Mata was sentenced to death.



Jarmareilla Hicks, 9 months, Lincoln. Died March 14 from shaking. His father, Lyndell Wells, was sentenced to 20 to 22 years.

1998

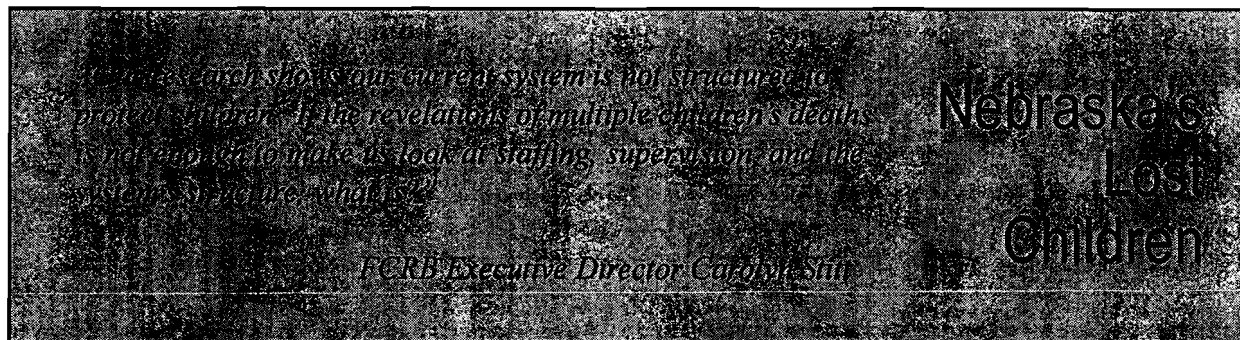
***Wyatt Campbell, 22 months, Lincoln.** Died from head trauma. His mother, Francisca Pleines, was convicted of criminal conspiracy, and her boyfriend, Vernon Hayes, of first-degree murder. Prosecutors said Pleines kicked and punched Wyatt in the head two days before he died, and that Hayes struck the boy in the head numerous times in the hours before he was taken to a hospital. A year prior to Wyatt's death, the state terminated Pleine's parental rights to another son. Pleines and Hayes were sentenced to 22 to 30 years.



1997

Lorenzo Salicido, 8 months, Kearney. Murdered by drowning in the bathtub. His twin siblings were placed in protective custody after Lorenzo's death. His father pleaded guilty to involuntary manslaughter, and sentenced 18 months to four years. He was paroled and deported in January 2002. ■

Information from FCRB, *Lincoln Journal Star*, Sept. 6, 2003, reporter Margaret Reist, and *Omaha World Herald*, Sept. 6, 2003, reporters Jeremy Olson and Karyn Spencer. Edited and reprinted from "Looking Out for the Children," Fall, 2003.



The Board Calls for Major Change to Ensure Children's Safety and Well Being

In light of 33 children having died and ongoing research of 22,648 intake reports, the Board's fears for children's safety has reached an unprecedented level. How many children are suffering and in danger due to intake and investigation breakdowns?

The Board's recent research on "Janet's" case illustrates the system's failure to protect children:

- The first call regarding the 11-month-old "Janet" was from daycare reporting the child's mother was "drunk and smoking pot." The call was screened out "for referral."
- There were at least **eight additional reports over the next 30 months alleging the mother's drug use and deteriorating behavior. All calls were screened out.**
- Finally, after the tenth report, law enforcement took the child from her mother. Four-year-old "Janet" had been left with various people throughout her childhood, was shoeless and homeless, and her mother apparently was continually on drugs.

The Board is calling for reform, and recommending a redesign of the system, including the creation of Investigation and Prosecution Centers to address top concerns:

- Poor intake screening and investigation of the intakes.
- Little or no supervision of decisions.
- Inadequate safety evaluations.
- Failure to communicate with law enforcement regarding many cases.

These concerns would be addressed by the single-managed, adequately staffed Centers which would:

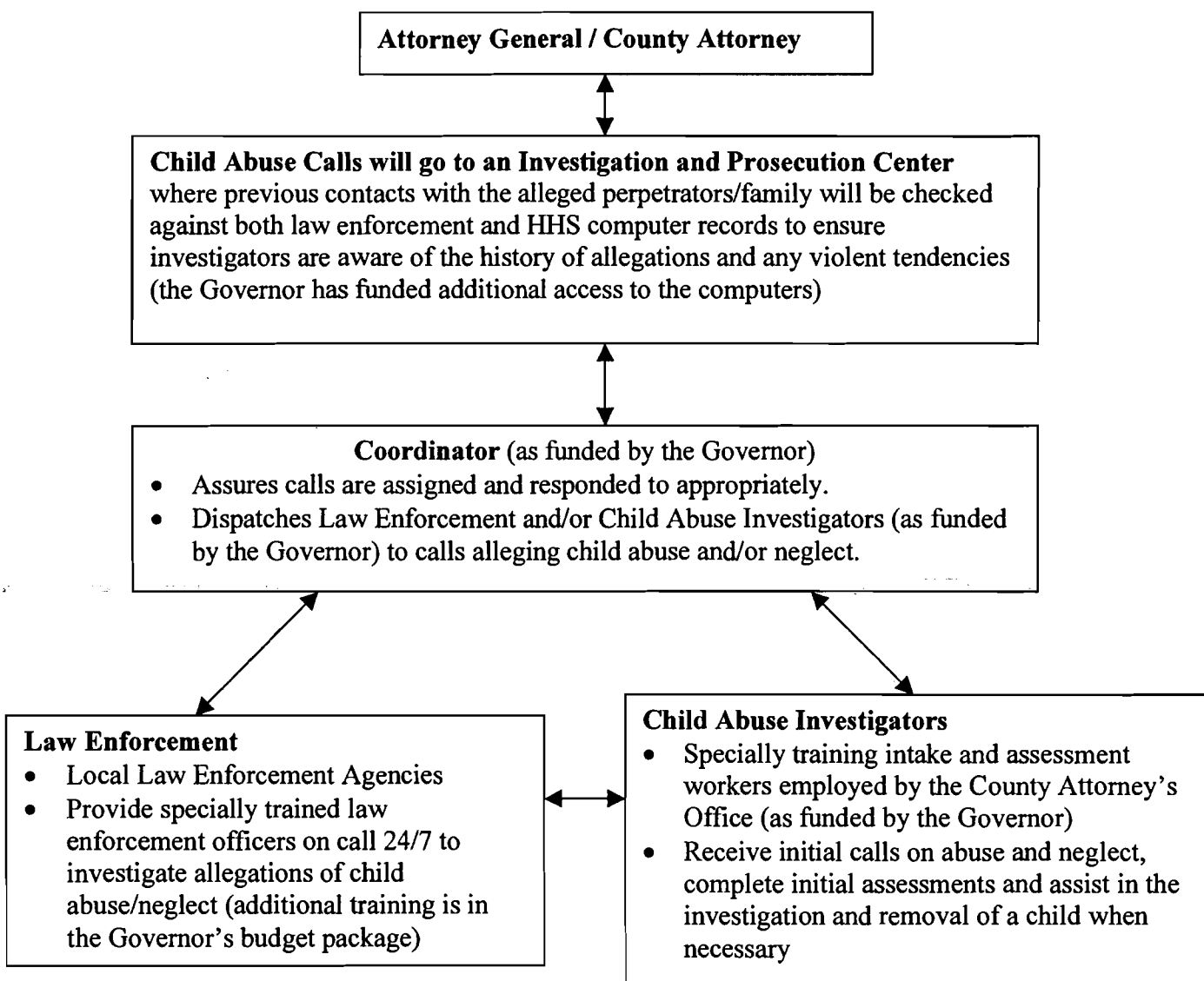
- Receive and immediately evaluate calls alleging abuse or neglect.
- When appropriate, dispatch specially trained staff to investigate allegations.
- Have a Center Coordinator to review intakes and assure appropriate action is taken.
- Have law enforcement officers and child abuse investigators conducting joint investigations in cases involving serious bodily injury, death of a sibling, or sexual abuse.
- Initiate juvenile court proceedings for children removed from the home.

The flow chart on the following page illustrates how calls would be handled and clear lines of authority. The operation of these pilot centers has not been funded. ■

Responsible Accountability =
Child Investigation and Prosecution Centers

Investigation and Prosecution Centers Key Responsibilities:

- The center receives calls alleging abuse or neglect, which are immediately evaluated;
- When appropriate, specially trained staff investigate the abuse or neglect allegations;
- The Center Coordinator reviews all intakes to assure appropriate action is taken;
- In cases involving serious bodily injury, death of a sibling, or sexual abuse, joint investigations occur with law enforcement and child abuse investigators from the centers; and,
- The center initiates juvenile court proceedings for children removed from the home.



Nebraska's Lost Children

It will take a combination of many remedies to create a cure to the current problems in the child protection system.

Hon. John Icenogle, District Court Judge

Additional Recommendations to Protect Children

1. Prevention

Implement additional prevention services statewide to stop potential abuse or neglect, and reduce the number of children who must be removed from their homes. Such measures should include home visitations targeting newborns to age 5 year olds, and well baby checks.

14 of the 33 children killed (42%) were not known to the system before their deaths

2. Intensify Prosecutions for Serious Abuse

Increase prosecution of caregivers accused of the most serious allegations leading to children being removed from the home. This would enable the court to act on the conditions that placed a child in jeopardy.

Approximately 25-33% of the children entering care have endured serious physical abuse, caregiver neglect resulting in serious physical harm, first degree sexual abuse, and/or abuse resulting in death of a sibling

3. Specialized Case Management

Implement specialized case management for young children and children who have experienced severe or chronic abuse, building on the successes of the current ICCU¹ Units. Reduce caseloads of specialized caseworkers, enabling them to pursue intensive supervision of cases, and ensure that each child's developmental and safety needs are met. Enhance caseworker supervision to increase caseworkers' ability to create positive outcomes for children.

¹ ICCU units are HHS Intensive Care and Coordination Units, with specialized case management for difficult cases.

3 of 33 children killed (9%) were wards of the court at the time of their deaths

4. Workers

Additional intake and investigative workers are needed to reduce caseloads and allow for collaboration with local law enforcement; victim and perpetrator interviews; collateral contacts; data collection and input; preparation of reports; filing affidavits; and, attending court. Additional supervisors would help ensure that risk factors are accurately rated on calls and provide needed monitoring of cases.

The failures of the current child protection system are evidenced by the numerous horrible and tragic deaths of helpless children. We call upon policy makers to make our children a priority, and to create, appropriately fund, and monitor a system that lives up to its name.

KayLynn Goldner, FCRB State Board Chairperson

Nebraska's Lost Children

5. Service Contracts

End the practice of HHS contracting for visitation, transportation, and family support. The dollars saved should be used for case managers and case aides.

6. Foster Placements

Develop additional foster placements and retain quality foster parents by providing ongoing support, training, services and increased communication.

7 Restraints

Continue to implement measures to monitor and reduce the number of restraints that children experience while in state custody.

1 of 33 children was killed by caregivers during a restraint ■

It's Time to Protect Children

All have been shocked and revolted by the recent revelation that since 1997, 33 children, 11 during 2003 alone, have been killed at the hands of their fathers, mothers, mothers' boyfriends, stepfathers, other relatives, and even a foster parent. The majority were newborns to age five. Adding to the horror of their brutal deaths is the fact that among the 11 cases in 2003, 6 could have been saved if Nebraska had a child protection system that was sufficiently funded, appropriately staffed, and suitably focused.

Since Nebraska has learned of these tragic deaths, the Governor, Department of Health and Human Services director, the state Attorney General, the legislature, the judiciary, the press and the public have made their message clear that it is time to protect children.

Never before have so many agreed that broad and substantial change is essential. While we mourn the loss of innocent lives, and weep for their pain and suffering, we must seize the unprecedented opportunity to create a system worthy of its name; a system that truly protects children. ■

Nebraska's Lost Children

Nebraska Foster Care Review Board

521 South 14th Street, Suite 401

Lincoln, NE 68508

(402-471-4420

1-800-577-3272

February 2004

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COPY

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

OMNI BEHAVIORAL HEALTH,)
a Nebraska Corporation, on behalf)
of itself and all of its clients;)
WILLIAM REAY, President of OMNI)
BEHAVIORAL HEALTH;)
DAVID and WENDY KROM,)

Plaintiffs,)

vs.)

NEBRASKA FOSTER CARE REVIEW)
BOARD, an administrative)
agency of the State of Nebraska;)
CAROLYN K. STITT, Individually)
and as Executive Director of the)
NEBRASKA FOSTER CARE)
REVIEW BOARD; and)
BURRELL WILLIAMS, individually and)
as Chairman of the Board of the)
NEBRASKA FOSTER CARE REVIEW)
BOARD,)

Defendants.)

Case Number: CI 06-4633

DEPARTMENT OF JUSTICE

FEB 29 2008

STATE OF NEBRASKA

ORDER

Omni Behavioral Health, William Reay, the president of Omni, and David and Wendy Krom, have filed this action for declaratory and injunctive relief seeking to restrain the Nebraska Foster Care Review Board ("Board") and its

agents or representatives from conducting inspections of group homes or foster care facilities until certain conditions are satisfied.

Omni is a Nebraska corporation that operates group home facilities for the care of children. Omni has contracted with the State of Nebraska to provide these services and is paid by the State to do so. The Kroms are licensed foster care providers who are under a contract with Omni.

The Board was created by legislation in 1982. It is responsible for reviewing the case plans for children who have been placed in foster care. NAC Title 162, 1-002, defines the purpose of the Board as follows:

The Foster Care Review Board was established as an independent agency to periodically review the case plans of children in foster care. The purpose of the review is to assure that appropriate goals have been set for the child, that realistic time limits have been set for the accomplishment of these goals, that efforts are being made by all parties to achieve these goals, that appropriate services are being delivered to the child and/or his or her family, and that long-range planning has been done to move the child to a permanent home where he or she can grow and thrive.

The Foster Care Review Board is mandated to maintain a tracking system of all children in out-of-home placement in the State. The tracking system is to provide information about the number of children entering and leaving care as well as any other data regarding needs and trends in foster care.

The Foster Care Review Act provides that "[t]he state board may visit and observe foster care facilities in order to ascertain whether the individual physical, psychological, and emotional needs of each foster child are being

met." NEB. REV. STAT. § 43-1303 (3) (Reissue 2004). The Board, or local board, also is charged with reviewing every foster care placement every six months and submitting a report and recommendation to the court having jurisdiction of the child including "whether the current placement is safe and appropriate." NEB. REV. STAT. § 43-1308 (Reissue 2004). Section 43-1303 (2) provides that the Board "may adopt and promulgate its own rules and regulations." (emphasis added).

The plaintiffs contend that any visits by the Board violate their Constitutional rights under the Fourth and Fourteenth Amendments, as well as Article I, Sections 3 and 7 of the Constitution of the State of Nebraska, because the Board has not adopted any rules setting forth the scope or manner of such visits, although Omni has requested the Board to do so. In support of their contention, the plaintiffs rely upon *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), *United States v. Biswell*, 406 U.S. 11 (1972) and *New York v. Burger*, 482 U.S. 691 (1987).

The plaintiffs also contend that local boards created pursuant to the Act may be made up of unqualified persons and that visits to facilities by such board members may be harmful to the foster care children. It is alleged that the Board made several visits to Omni's facilities in 1998 and Omni believes further visits may occur in the future. Omni has advised its foster care providers to refuse any site inspections by the Board. Omni further alleges

that it was slandered by Stitt in 2004 and that the actions of the Board tortiously interfere with Omni's business relationship with the State of Nebraska.

The defendants have filed a motion for summary judgment basically contending that the potential for visits by the Board do not violate any rights of the defendants, that Omni lacks standing to assert any rights on behalf of the foster children and that the defendants are immune from suit by reason of sovereign immunity.

Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996); *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996). Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997); *State Farm v. D.F. Lanoha*

Landscape Nursery, 250 Neb. 901, 553 N.W.2d 736 (1996).

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Melick, supra*. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Melick, supra; Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997).

This court's order dated May 10, 2007 denying the plaintiffs' request for a temporary injunction discussed the cases relied upon by the plaintiffs to support their assertion that the anticipated visits/inspections by the Board violate their Constitutional rights. In *Colonnade Catering Corp. v. Unites States, supra*, the Court upheld the suppression of liquor seized by federal agents without a warrant. When the owner refused the agents entry to a store room, they broke the lock and seized the liquor. The federal statute at issue provided that any retail liquor dealer who refuses to admit the appropriate official to enter the premises and inspect the same can be fined \$500.00. The Court noted that where Congress has authorized inspections but does not set forth the rules for such inspection, the Fourth Amendment applies. The Court held that Congress only authorized a fine, not warrantless forcible entries, and, therefore, the entry

was unlawful.

In *United States v. Boswell, supra*, the Court upheld the warrantless inspection of a licensed gun dealer's books and the search of his storeroom. The statute in question authorized agents of the Secretary of Treasury to enter the premises of any licensed gun dealer during normal business hours to inspect records, documents, firearms and ammunition. The Court noted the need for such inspections in enforcing the regulation of firearms and ammunition. The Court found that a valid statute that limits the time, place, and scope of the inspection of business premises was not violative of the Fourth Amendment. The Court noted that "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Id.* at 316.

Under the so-called "*Colonnade-Boswell*" doctrine the owner of commercial premises in a closely regulated industry has a reduced expectation of privacy. In *New York v. Burger, supra*, the Court set forth a three part criteria that must be satisfied, namely, (1) a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made, (2) the warrantless inspection must be necessary to further the regulatory scheme, and (3) the statute's inspection program in terms of the certainly and regularity of its application must provide a constitutionally adequate substitute for a warrant. *Id.* at 702-03.

Here, there is no doubt that (1) and (2) are met. The state has a compelling interest in the children who have been placed in the care and custody of the Department of Health and Human Services and an inspection of their living conditions is essential. However, Section 43-1303(3) contains no specific language as to the time or scope of the visits.

This court questions whether the requirements applicable to gun dealers, liquor dealers, mine operators or motor vehicle salvage records are applicable to laws relating to the welfare of children. As much as Omni desires to be considered and treated as a typical regulated industry, it is not. Simply put, it is a business that has contracted with the State of Nebraska to provide services for children that have been placed in the care and control of the state. It must be presumed that when Omni entered into such agreements, it was fully aware of the statutory requirements relating to visits and inspections and accepted such conditions. This also would be true for Omni's foster care providers who are similar to subcontractors. If they do not like the statutory conditions or requirements, they have two choices. One, do not enter into the contract or two, seek legislative action.

The visits here do not constitute "warrantless administrative searches" as categorized by Omni, such as searches related to businesses that are closely regulated by governments. The visits here are in furtherance of the responsibility of the state to assure appropriate care and services for children who are in the state's care. In fact, the state, including the Board, would be remiss if no visits

were conducted and would be subject to criticism and possible legal liability if the Board failed to carry out the visits and inspections provided by statute.

Omni argues that its facilities may house "private placement youth," that is, children who are not under the custody of the state, as well as state wards, and that the warrantless inspections could have a detrimental effect on these children. However, the evidence shows that any so-called private placements are negligible. Again, Omni has a choice. It is free to offer its services solely to private placement clients and avoid the perceived issues with the Board.

As noted above, there have been no inspections of Omni facilities for a number of years. Omni, in the 1990's, objected to such inspections and refused to permit representatives of the Board to visit. The Board did not attempt to press this issue at that time. It has now come to an impasse apparently because of certain orders entered by several highly regarded and competent judges of the Separate Juvenile Court for Douglas County, Nebraska containing the following, or similar, provisions:

IT IS FURTHER ORDERED that the child/children's placement shall be available for and cooperate with announced as well as unannounced visits by the case manager, guardian ad litem, CASA and the Foster Care Review Board.

In effect, by filing this action, the plaintiff's are attempting to collaterally challenge the authority and jurisdiction of these judges. This court is not inclined to question or jeopardize these orders and, in fact, will not do so. These judges have the difficult job of dealing with complicated family matters and with

children, many of whom have experienced serious emotional trauma. These judges would be derelict in their duties if they failed to require that the placement of such children be reviewed and inspected to insure that the welfare of the children is maintained.

In addition, to the "closely regulated industry" exception, the Supreme Court has also allowed warrantless searches if circumstances surrounding the inspection create "special needs" in which the warrant requirement becomes a burden and hampers the purpose of the search. The "special needs" doctrine was created from a number of cases which involved random drug testing.

"In each of those cases, [the Supreme Court] employed a balancing test that weighed the intrusion on the individual's interest in privacy against the "special needs" that supported the program." *Ferguson v. City of Charleston*, 532 U.S. 67, 77 (2001). "In each of those cases, the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." *Id.* at 79. "Under our precedents, if there was proper governmental purpose other than law enforcement, there was a 'special need,' and the Fourth Amendment then required the familiar balancing between that interest and the individual's privacy interest." *Id.* at 81. (citing *Chandler v. Miller*, 520 U.S. at 325 (Rehnquist, C.J., dissenting)).

The defendants' contention that they are immune by reason of sovereign immunity is unpersuasive. Although suits attempting to compel affirmative

actions by state officials are barred by sovereign immunity, actions against state officers to obtain relief from an invalid act or from an abuse of authority by such officer is not a suit against the state and not prohibited by sovereign immunity. *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999). It appears that the relief sought by the plaintiffs falls into the latter category. If what the plaintiffs seek is an order of this court requiring the Board to adopt rules and regulations, this would not be permissible. However, this is not the case here.

The defendants' contention that the plaintiffs lack standing to bring this action on behalf of the foster children is meritorious. Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004). The plaintiffs cannot bring this action under the guise that they are seeking to protect the interest or welfare of the affected children. They do not stand *in loco parentis* to such children. The plaintiffs' reliance on *Planned Parenthood Minnesota v. Ronnds*, 467 F.3d 716 (8th Cir. 2006) is misplaced. The issue addressed in that case was the First Amendment right of the physicians against compelled speech, not a claim on behalf of the women. Omni itself, of course, has standing to question the validity of the inspections, as do the Kroms. This court is at a loss to determine what legal interest Reay as an individual or as an officer of Omni has in this case. Any legal interest of his is that of Omni.

The "special needs" doctrine appears to be applicable here. The inspections

under the Foster Care Review Act do not serve a law enforcement purpose. Clearly, the state's interest in ensuring proper care of the children placed with the Department of Health and Human Services outweighs the privacy interests of the plaintiffs. As note above, the relationship between the plaintiffs and the state is a contractual one that assumably was entered into freely by the plaintiffs. The plaintiffs were aware of the statutory provision authorizing inspections when they entered into the agreements with the state. After freely doing so they now wish to have this court interfere with the agreements and the statutory scheme. Further, although Omni complains that the Board has failed to adopt appropriate rules and regulations, the evidence shows that Omni itself had been uncooperative in moving forward on such a process.

Often, judges and lawyers make legal issues more complicated than is necessary. We get caught up in subtleties and analogies that are not appropriate to the specific issues presented and fail to consider the broader implications of the dispute. For example, this case primarily is not one based on sovereign immunity or "warrantless administrative searches" but a direct challenge to the purpose and duties of the Board and the ability of the courts to insure that children under their jurisdiction are receiving appropriate care and services.

To summarize, this court finds that the visits and inspections by the Board are not "searches" subject to the Fourth Amendment but are specifically authorized by statute, that Omni and the foster care providers were aware of such statutory provisions when they contracted to provide such services and

cannot seek a modification by judicial intervention, that, in effect, the issues raised by the challenge to the visits is an impermissible collateral attack on the orders of certain courts of this state, and the plaintiffs have no standing to represent the foster care children. Therefore, the complaint for declaratory and injunctive relief as to the visits by the Board must be dismissed.

This leaves the claims of Omni that the actions of the Board constitute a tortious interference with the business relationship between it and the State of Nebraska and that Stitt libeled Omni. However, there is no prayer for relief concerning these allegations in the complaint. Generally, a party cannot interfere with its own contract. See *Holloway v. Skinner*, 38 Tex. Sup. J. 582, 898 S.W.2d 793 (1995); *Pruitt Corp. v. Stanley*, 270 Ga. 430, 510 S.E. 2d 821 (1999); *Trail v. Boys & Girls Clubs*, 845 N.E. 2d 130 (Ind. 2006). Both the Board and the Department of Health and Human Services are agencies of the State of Nebraska and this court doubts whether one state agency can be deemed to have interfered with a contract between another agency and a third party. Further, as noted, the only relief sought by the plaintiffs is declaratory, injunctive and other equitable relief. The plaintiffs have not sought any relief at law for damages based on the alleged tortious interference with a business relationship or the inference that Stitt libeled Omni.

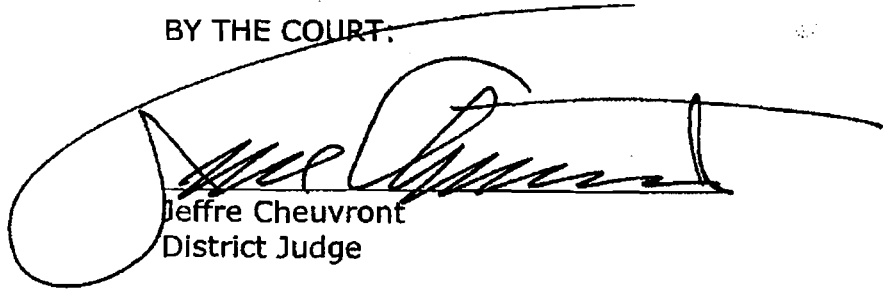
There are no genuine issues of material facts present here. The issues are legal and this court finds that the plaintiffs have no legal basis to support their claims. The motion for summary judgment should be sustained and the

complaint dismissed.

IT IS ORDERED that the motion for summary judgment be sustained and the complaint dismissed at plaintiffs' costs.

Dated February 28, 2008.

BY THE COURT.



Jeffrey Chevront
District Judge

From: "Stitt Carolyn" <carol.stitt@fcrb.ne.gov>
 "Pauline Williams" <pauline.williams@fcrb.ne.gov>,"Tammy Oswald" <tammy.oswald@fcrb.ne.gov>,"Diana
To: Haney" <Diana.Haney@fcrb.ne.gov>,"Ben Gray" <benjamin.gray@fcrb.ne.gov>,"Anna Nelson"
 <Anna.Nelson@fcrb.ne.gov>,"jennifer jolley" <jennifer.jolley@fcrb.ne.gov>
Cc: "Stacey Sothman" <stacey.sothman@fcrb.ne.gov>,
Date: 08/22/2008 04:34 PM
Subject: Thanks from Carol Stitt

Good Afternoon!

Thank you so much for meeting with me yesterday. I want to reiterate my sincere thanks for your work on behalf of Omaha's abused and neglected children and your work to complete the Special Study. Our data collection tool is done and we are starting to enter the data. Our report will be given to the Governor on October 31, 2008. I will be sure to give you the preliminary data as it is analyzed.

The way the Review Board is working with DHHS and the Judiciary is changing very quickly right now. And as I have said, our opportunity to work to help foster children has never been stronger. When things move this quickly, communication sometimes doesn't quite keep up and as a result I have realized that there may have been some misunderstandings regarding directives recently.

I would like to remind everyone that according to the Communication Protocol issued by the State Board,

"The Program Coordinator and/or Director shall have monthly contact with each front line employee, including review specialists and staff assistants. The purpose of these contacts is to strengthen communication and update all staff on issues the agency is addressing statewide"

and,

"If any Foster Care Review Board employee or local board member has a concern with a Review Specialist Supervisor, that concern shall be addressed with the Program Coordinator and/or the Director."

and,

"If any Foster Care Review Board employee or local board member has a concern with the Executive Director, that concern shall be addressed with the Executive Committee of the State Board ."

Therefore, please feel free to communicate with me. You may call, you can send a confidential email, or if you would feel more comfortable you may fax to my home fax machine (402.471.8328). Ron Albin is the contact for the Executive Committee. He can be reached at 402.371.2529, or PO Box 1326 Norfolk, NE 68702.

I will be sure to send out an email with any directives that I give concerning workload issues, staff participation in the Governor Reviews,

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participation in trainings, etc. If you ever have questions please feel free to call me. Likewise, feel free to call if something will be difficult for your schedule.

I met with Stacey yesterday and one thing she has asked me to help her with is to reiterate to you how important it is to follow our agency policy concerning timeframes. These timeframes are outlined on in the Review Specialist Manual.

"3.9.2 When the Recommendations are due:

It is essential that your recommendations be timely and accurate. State law requires that the FCRB's recommendations be received by the court within 30 days from the date of the board meeting. **This is 30 days--not 30 working days.** If your finished recommendations have not been processed and sent out within this time, the FCRB is out of compliance with state law. This obviously does not reflect well on our agency since we advocate strongly for timeframes, timely court hearings, etc. Moreover, your recommendations are more likely to have a positive impact on the case when they reflect current case developments and concerns.

NOTE: If a court hearing is scheduled for a case shortly after the board meeting, contact your supervisor. The priority will be getting the recommendation to the court and legal parties prior to the hearing. When necessary, the office can FAX the recommendation out.

Bearing this in mind, you are to have your finished recommendations sent to your supervisor within FIVE STATE WORKING DAYS of the date of your board meeting."

and,

"3.9.7 Recommendation Reviewed by Supervisor:

Soon after receiving your set of recommendations, your supervisor will review each case. After reviewing the cases, your supervisor will give you direct feedback about your recommendations. This is an important check and balance system to make sure all areas/findings listed on the board signature sheet have been covered. It will aid your supervisor to have as complete notes as possible taken on the board finding sheet during the board meeting.

The supervisor reviews your work to assure that no inappropriate information is sent out in a recommendation, such as information regarding an ongoing investigation; and to make sure that every paragraph is documented as the recommendation is a court document. Your supervisor may require you to make the changes. Extensive changes will be considered as a redo."

To assist Stacey, I would like you to sign and date your agendas,

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indicating when the recommendations were submitted to Stacey, and we will monitor how these are met.

I have also asked Stacey to follow the guidelines for reading recommendations.

I would like to emphasize how important it is to make sure that our recommendations are issued to the legal parties prior to court hearings. It is disappointing to have so much work go into the review process and then to miss court. Please give Stacey a heads up on upcoming court dates, to make sure she has time to review your work and send it on to Lincoln for processing.

I have asked Stacey to hold individual staff meetings every other week rather than weekly. If you have questions or case concerns you can bring those to Stacey at anytime. At the individual case staffing, be prepared to talk about your schedule, cases of concern, etc. for about 45 minutes to an hour. This should free up her schedule to focus on recommendations and attending board meetings.

I will be meeting with Todd Landry on Monday to discuss the format that Governor Reviews will follow across the State. Our experience yesterday and your insight will be helpful in developing this process. When this process is determined, I will be sure to share that with you. One proposal is to do as they are doing in Lincoln - where one review specialist is assigned to one DHHS group. This helps the review specialists know what to plan for when attending these staffings monthly.

Our next State Board Meeting is on September 5, 2008. In that meeting I will request permission for staff to work at home one day a week if they choose to do so. There are laptops in the Omaha office that will help facilitate this.

As we discussed, for the September 26th anniversary event, I will be asking the State Board for compensation for those who wish to attend. Thank you for sharing the date of our 25th Anniversary Event with your local board members.

The State Board has formed a committee on technology. The supervisors became aware of a review tool during the federal CFSR audit, this tool helps create an end report. We are currently looking into the feasibility of using the tool or something similar. (We need to figure out hardware) Please feel free at any time to offer suggestions on ways we may be able to better use technology.

Thank you again so much for all your work. We are in a unique position to help children and I thank you for looking out for them each and every day. You are appreciated.

Just so you are aware, the Executive Committee of the State Board was sent this e-mail first and Ron Albin approved that this be sent to the Omaha Staff.

Carolyn K. Stitt, Executive Director
Foster Care Review Board
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The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing.

Albert Einstein

***AN ANALYSIS OF THE OMBUDSMAN REPORT
OF SEPTEMBER 5, 2007,
OF ALLEGATIONS AGAINST CAROL STITT***

By Christine P. Costantakos, J.D.

This paper presents an analysis of the publicized Report of the investigation of Carolyn Stitt, the Executive Director of the Nebraska State Foster Care Review Board, which investigation was performed by the Nebraska Public Counsel, also known as the "Ombudsman." This investigation was undertaken with respect to the written allegations of "wrongdoing" submitted to the Ombudsman by then-employee Tammy Peterson, and brought by Ms. Peterson under the State Government Effectiveness Act, also referred to as the "Whistleblower Act," and found at Neb. Rev. Stat. §§81-2702 to 81-2711.

At the outset, it is important to identify certain basic legal tenets that inform this analysis. First, the Public Counsel, i.e., the "Ombudsman," is an officer of the Legislative branch of Nebraska State government. See State ex rel Shepherd v. Neb. Equal. Opp. Comm., 251 Neb. 517, 557 N.W.2d 684 (1997). The Ombudsman is nominated and appointed, his or her salary is set, and he or she may be removed from office by the Legislature. The Ombudsman also must report to the Legislature and exercises and performs only those duties provided by the Legislature. See Neb. Rev. Stat. §§81-8,241; 81-8,242; 81-8,251.

Second, the Public Counsel may conduct a preliminary as well as a formal investigation after receiving a written allegation of "wrongdoing" from an employee under the State Government Effectiveness Act. See Neb. Rev. Stat. 81-2704. "Wrongdoing" is a specialized term of art, which is defined as any action taken by an agency or employee which (a) is a violation of any law; (b) results in gross mismanagement or gross waste of funds, or (c) creates a substantial and specific danger to public health or safety. See Neb. Rev. Stat. 81-2703(5).

Third, any employee of a State agency who has disclosed or submitted information or allegations of "wrongdoing" under the State Government Effectiveness Act is entitled to broad protections against adverse personnel action taken against the employee as the result of such disclosure of information or submission of allegations of wrongdoing. See Neb. Rev. Stat. §81-2705. The term "personnel action" is defined broadly in Neb. Rev. Stat. §81-2703(4) to encompass virtually any action in the workplace which might adversely affect the employee.

Fourth, the employee protections of the State Government Effectiveness Act do not confer a presumption of credibility upon the complainant employee. Nor do they vitiate the credibility of the agency, or the director or chief operating officer of the agency that is the subject of the allegations. On the contrary, the Ombudsman has authority to conduct a preliminary investigation to determine whether "reasonable grounds" exist to support the employee's allegation, and if such reasonable grounds are found to exist, then to proceed with a full and formal investigation. See Neb. Rev. Stat. §81-2704(1) and (3).

Fifth, the fact that the Ombudsman may elect to dispense with a preliminary investigation for any number of reasons, including the fact that "the complaint is trivial, frivolous, vexatious, or not made in good faith..." recognizes the reality that employee complaints against employers sometimes result from improper motivations, personnel grievances, or personal differences. See Neb. Rev. Stat. §81-2704(1)(c). For that matter, any employee found by the Ombudsman to have intentionally misused the State Government Effectiveness Act may be subject to disciplinary action by the director or chief operating officer of the agency. "Intentional misuse" of the State Government Effectiveness Act clearly includes attempts to treat personnel grievances as an allegation of wrongdoing. See Neb. Rev. Stat. §81-2710. By implication, the existence of these statutory provisions makes it incumbent upon the Ombudsman to be knowledgeable about the personnel status of the complainant employee, to rule out a personnel grievance as the motivating factor for the complaint, and to ascertain the credibility of the complainant employee, especially if the Ombudsman is privy to information that has bearing on the employee's reputation or capacity for truthfulness.

Sixth, the Ombudsman is required to be "well-equipped to analyze problems of law, administration and public policy." See Neb. Rev. Stat. §81-8,242.

Seventh, the Ombudsman must be free from partiality and bias. No person can serve as the Public Counsel within 2 years of the last day on which he served as a member of the Legislature, or while he is a candidate for or holds any other state office, or while he is engaged in any other occupation for reward or profit. As a further measure designed to prevent against bias, the Ombudsman "shall not be actively involved in partisan affairs" during his term of office. See Neb. Rev. Stat. §81-8,242.

Eighth, when the Public Counsel concludes his formal investigation of a complaint filed under the State Government Effectiveness Act, he is required to prepare a report of his findings. See Neb. Rev. Stat. §81-2704. If the report concerns the director or chief operating officer of an agency which is the subject of the allegation, the report shall be transmitted to the Governor, or to the appropriate board or commission that has governing authority over the director or chief operating officer. Such report is to be retained in the files of the Public Counsel. See Neb. Rev. Stat. §81-2704(5). However, there is no statutory authority under the State Government Effectiveness Act for the Ombudsman to release to the media an investigative report regarding a whistleblower complaint. The only exception to this appears to be in that situation where the contents of the report indicate that a "wrongdoing" exists or has occurred, in which case the report of the Public Counsel shall become a matter of public record at the time it is transmitted to the Governor, or to the appropriate board or commission that has governing authority over the director or chief operating officer. See Neb. Rev. Stat. §81-2704(5).

Ninth, the Report of the Ombudsman is not subject to review by any court. See Neb. Rev. Stat. §81-8,253. In short, neither the complainant employee nor the administrative agency or administrative official have any right to appeal the opinions, findings, conclusions and recommendations of the Ombudsman. This particular factor imposes upon the Ombudsman an exceptionally high duty to exercise the greatest care and scrutiny in investigating complaints, and to render his findings, conclusions, and recommendations with the greatest degree of accuracy, comprehensiveness, and impartiality, in order to maintain public trust and confidence in the office of the Ombudsman.

The investigation conducted by the Public Counsel, i.e., "Ombudsman," in the case involving Tammy Peterson and Carol Stitt was conducted pursuant to the provisions of the Nebraska State Government Effectiveness Act, namely Neb. Rev. Stat §81-2701 through 81-2710. (See Ombudsman's Report, at p. 1) As such, the Ombudsman acknowledges that an attempt was made to determine whether any of Ms. Peterson's allegations against Ms. Stitt might qualify as "wrongdoing" within the meaning of the State Government Effectiveness Act. "Wrongdoing" under the Act is defined as any action by an agency or employee which:

- (a) is a violation of law;
- (b) results in gross mismanagement or gross waste of funds; or
- (c) creates a substantial and specific danger to public health or safety.

The Ombudsman found that none of Peterson's allegations against Stitt constituted "wrongdoing" as defined in Neb. Rev. Stat. §81-2703(5). It is apparent from his Report that the Ombudsman reached his conclusions in two steps. After a preliminary investigation, the Ombudsman determined that none of Peterson's allegations constituted any manner of "wrongdoing" in the forms of "gross mismanagement or gross waste of funds" or "a substantial and specific danger to public health or safety." However, the Ombudsman noted that there were 3 of Peterson's allegations that *might* involve a violation of law, and therefore conducted a formal investigation on those 3 allegations, after which he determined that there was no wrongdoing in the form of a violation of law.

There are three significant area of concern regarding the Ombudsman's handling of this matter: 1) the manner in which the Ombudsman reached certain factual findings and conclusions with respect to his formal investigation is characterized by a confirmatory bias in favor of Peterson and a prejudice against Stitt, 2) the Ombudsman completely failed to assess Peterson's credibility and reputation for truthfulness in rendering his factual determinations, and 3) the Ombudsman improperly released his Report of his whistleblower investigation to the media without any legal authorization under the State Government Effectiveness Act.

1. The Ombudsman's Findings in His Report are Characterized By Confirmatory Bias in Favor of Peterson and a Prejudice Against Stitt

The Ombudsman elected to conduct a formal investigation upon Peterson's allegations that, in his opinion, *might* constitute 3 "violations of law." These are re-stated here verbatim, but not in the same order as they are identified at page 2 of the Report:

1. Whether Ms. Stitt attempted to, or conspired to, publicly disclose confidential information about wards of the State in violation of Neb. Rev. Stat. §43-3001, or other similar statutory provisions (This issue related to Ms. Peterson's account of having been asked by Ms. Stitt to reveal confidential information about youths in foster care to a television reporter by way of an untraceable phone call in 2006.)
2. Whether Ms. Stitt used or authorized the use of, resources of the Foster Care Review Board for the purpose of campaigning for or against the nomination or election of a candidate in violation of Neb. Rev. Stat. §49-14,101.02(2). (This issue relates to Ms. Peterson's account of Ms. Stitt having directed certain Foster care Review Board staff to attend a Tom Osborne for Governor campaign event held on April 28, 3006.)
3. Whether Ms. Stitt used or authorized the use of resources of the Foster Care Review Board in a manner other than in accordance with the prescribed procedures, in violation of Neb. Rev. Stat. §49-14,101.01(1). (This issue related to Ms. Peterson's account of a licensed mental health professional hired by the agency who had allegedly been providing therapy to agency staff members at ms. Stitt's direction.)

1. **Whether Ms. Stitt attempted to, or conspired to, publicly disclose confidential information about wards of the State in violation of Neb. Rev. Stat. §43-3001, or other similar statutory provisions (This issue related to Ms. Peterson's account of having been asked by Ms. Stitt to reveal confidential information about youths in foster care to a television reporter by way of an untraceable phone call in 2006.)**

The gist of Peterson's allegation is that Stitt directed her to call a news reporter from an untraceable telephone in order to reveal confidential information about State wards. Peterson stated that shortly after receiving this directive from Stitt, Peterson called Kathleen Stolz, the Program Coordinator for the Foster Care Review Board, and was advised by Stolz that Peterson should not make the call

to the reporter. Peterson denies that she ever made the call, but stated that she let Stitt think she had made the call.

This area of the Report is seriously flawed in two major respects: the manner in which this specific issue was characterized by the Ombudsman as a possible violation of law, and the Ombudsman's reliance upon incompetent and insufficient evidence to support his conclusion that the substance of Peterson's allegations are true.

First, the manner in which this issue is framed as a legal issue by the Ombudsman sets up a "straw-man," only to be knocked down later in the "Analysis" portion of the Report. As one who has a statutory duty to be "well-equipped to analyze problems of law," the Ombudsman knows perfectly well *prior to* the writing of his Report, that there is no such crime of "attempted public disclosure of confidential information" or of "conspiracy" to publicly disclose confidential information in relation to either Neb. Rev. Stat. §§43-3001 or 43-1310. Therefore, why did he frame Peterson's confidentiality allegations as a question of whether Ms. Stitt *might* have committed these "crimes," which he clearly knows are non-existent? Why did the Ombudsman choose to set up this issue as an inquiry into whether Stitt broke the law by "attempting" or "conspiring" to publicly disclose confidential information in violation of Neb. Rev. Stat. §§43-3001 or 43-1310, when he knows that both criminal attempt and criminal conspiracy **do not apply** to either of those 2 statutes? The singular effect of identifying the issue in this manner is to cast Ms. Stitt in a prejudicially bad light, through the use of innuendo and legal jargon that tends to confuse and mislead the public into believing that a violation of law *might* have been committed by Ms. Stitt. This is no small concern in view of the fact that the Ombudsman elected to release his whistleblower Report to the media.¹

Why was it necessary for the Ombudsman to sensationalize the issue by painting it as a "possible criminal violation" consisting of an "attempt" or "conspiracy" by Stitt to violate the confidentiality statutes, when no such violations are possible under these laws? Given these legal realities, the Ombudsman's *preliminary*

¹ Indeed, the Ombudsman's characterization of this issue was not without significant impact in shaping adverse public opinion regarding Stitt. In calling for Stitt to be fired after he read the Ombudsman's report, State Senator Ernie Chambers stated, "As I read that report, there was evidence of misconduct of the type...to warrant termination in my opinion," referring, in part, to the fact that the Ombudsman determined that Stitt directed an employee to provide confidential information to a news reporter. See Omaha World-Herald, September 7, 2007. State Senator Gwen Howard, also, informed the Omaha World-Herald that she was concerned about the allegations regarding confidentiality, emphasizing that "confidentiality is not negotiable," despite the fact that Stitt was found not to have committed any wrongdoing or violated any law on that issue. See Omaha World-Herald, September 7, 2007.

investigation quickly should have determined that there were **no “reasonable grounds”** to proceed with a formal investigation upon this allegation of “wrongdoing” in the form of a violation of law.

Second, it is apparent from the factual summary contained within his Report, that the Ombudsman relied upon little more than sketchy statements in forming his conclusion that the substance of Peterson’s allegations concerning the confidentiality issue were true, while inexplicably disregarding evidence that specifically rebutted Peterson’s story. Notable in the Ombudsman’s summary of this issue is the fact that Peterson is unable to recall the date when Stitt supposedly requested her to call the news reporter. Instead, she offers to the Ombudsman what she describes as a “guess,” that she was directed by Stitt to make the telephone call in the summer of 2006. Nor can Peterson recall the names of the foster children or the case involved.

On the other hand, Stitt herself denied both orally and in writing the allegation that she ever attempted or conspired to disclose confidential information about any wards of the State. The Report refers to the fact that Stitt specifically denied Peterson’s allegations:

“While Ms. Stitt did say that she herself had contacts with a number of reporters over the years, she said that those contacts did not involve the disclosure of confidential information, and she adamantly denies ever asking Ms. Peterson to leak such information.”
(Report, at p. 15)

The Report also recites Stitt’s concern that she might be able to respond more specifically to this allegation, if she were provided with the date and the name of the case that Peterson claimed was involved. (Report, at p. 15) But there is no indication in the Report that the Ombudsman ever pursued this information, or that Stitt was ever provided with such information.

Instead, the Ombudsman simply chose to disregard Stitt’s specific denial of Peterson’s allegation. The Ombudsman accepted the truthfulness of Peterson’s allegations, explaining in the Report that he based this conclusion upon the statements of 2 “key witnesses” whose statements he found to corroborate Peterson’s allegations.

One of these “key witnesses” is Pitt, an ex-employee of the FCRB, whose statement to the Ombudsman advises that she was contacted by Peterson shortly after Peterson received the directive from Stitt to place the call to the news reporter. However, Pitt cannot even identify the year this event supposedly took place:

“I do not recall the day or time or season when this all took place.”

The other "key witness" is Stolz, the Program Coordinator for the Foster Care Review Board, whom Peterson alleges that she called to report the improper request by Stitt. According to Peterson, Stolz advised her not to make contact with the reporter. Stolz, whose ability to recall events in detail is apparent throughout the Report, stated:

"I do not recall any conversation with Ms. Peterson where she mentioned being ordered or directed to contact a news media reporter to divulge confidential information or ordered or directed to contact a news media reporter via a pay phone."

(Report at p. 15)

One might think that between Pitt's and Stolz's responses, that would have resolved the matter. It did not. Instead, the Ombudsman concluded:

"In the opinion of the Ombudsman's office, there is **significant credible evidence** that the substance of Ms. Peterson's allegations in regard to this issue are true."

(Report at p. 16)

What is this evidence? The fact that Pitt's story seems to "fit" with Peterson's looms large in the mind of the Ombudsman:

"Of particular importance, of course, is the evidence that Ms. Pitt has provided that tends to corroborate Ms. Peterson's own allegations with an account of having been told the same story contemporaneously by Ms. Peterson."

(Report at p. 16)

Pitt, is of course, the person who cannot remember the day, the time or the season when all of this supposedly took place. Notwithstanding the severity of this testimonial infirmity, the Ombudsman found the evidence supplied by Pitt to be not only significant, but also "credible." Yet, there is absolutely nothing in the Report to indicate that the Ombudsman made any effort whatsoever to ascertain Pitt's credibility as a witness, such as inquiring as to whether Pitt and Peterson are friends; whether Peterson and Pitt communicated with each other about this matter prior to Pitt's submission of her written and oral statements to the Ombudsman; or whether Pitt harbors any sense of animosity or disgruntlement about Stitt, in light of the fact that Pitt is a former employee of the FCRB. Nor is any reason whatsoever identified in the Report for the Ombudsman's outright rejection of Stitt's credibility. This is troubling, in light of her many years of service and dedication to the cause of foster children, their safety and their integrity, and despite the fact that she provided the Ombudsman with a specific denial of Peterson's allegations.

But the most amazing leap of all concerns the statements of Stolz. Stolz clearly stated that she does not recall receiving any telephone call from Peterson regarding the topic of Stitt's having directed Peterson to contact a news reporter and disclose confidential information. However, Stolz offered to the Ombudsman details regarding one telephone call which she did, in fact, receive from Peterson relating to the subject of confidentiality of information concerning State wards. Stolz related to the Ombudsman the following account: that in late 2006 in or early 2007, Peterson called Stolz to inform her that **Stitt** was scheduled to meet with a news reporter from Omaha; that Peterson was concerned that information about a specific case would be discussed during the meeting; that Stolz advised Peterson that the FCRB cannot give child specific case information to the media, as it would be a violation of confidentiality. At this point in the investigation, any reasonable person might have concluded that perhaps this was the telephone call to which Peterson was referring in her complaint, and under the most benign interpretation, Peterson might have been mistaken in her recollection of these events, just as she was regarding other facts and events.

But this was a road left unexplored by the Ombudsman. Instead, based upon the fact that Stolz confirmed the existence of one telephone call in which Peterson had expressed concern regarding the possible disclosure of confidential information to the media—**by Stitt**—the Ombudsman concluded that it is likely that Peterson did, in fact, call Stolz some other time, under the circumstances described in Peterson's allegations. This is an exceptional reach beyond fact and logic. Yet it is marshaled as support for the Ombudsman's finding that Stitt did, in fact, direct Peterson to divulge confidential information about State wards to a television news reporter.

Note that the Ombudsman relies upon the integrity of Stolz's memory of the late 2006 or early 2007 telephone call received from Peterson regarding **Stitt's** meeting with the reporter. The integrity of Stolz's ability to recall detail is used to by the Ombudsman to establish that there was "precedent" for such telephone calls from Peterson. But with no apparent reason, the Ombudsman wholly discounts Stolz's recollection insofar as her recollection *specifically negates* Peterson's account. The Ombudsman's Report equates Stolz's very specific statement that she has no recollection of ever having received a telephone call from Peterson regarding Peterson's having been directed by Stitt to contact a news media reporter to divulge confidential information or to contact a news media reporter via a pay phone, with the likelihood that Stolz apparently "forgot" about that particular call from Peterson. This shift is very subtle:

"In other words, it would at least appear that Ms. Peterson had contacted Ms. Stolz to express her concerns about the disclosure of confidential information by Ms. Stitt on one occasion that Ms. Stolz could recall. Thus, even if Ms. Stolz did not remember having received the specific call that Ms. Peterson described, Ms. Stolz's evidence at least confirms that this was an issue that Ms. Peterson expressed concerns about in the past,

and that a call like that described by Ms. Peterson would not have been unprecedented.”

(Report at p.17)

Upon the basis of mangled logic and reliance upon “evidence” that would never be admissible in the most inferior tribunal, the Ombudsman concludes that “there is *significant credible evidence*” to support Peterson’s allegations that Stitt directed her to divulge confidential information. While the Ombudsman was forced to conclude that Stitt did not break the law regarding this issue, it is clear that he regards her innocence as the result of “legal technicalities about inchoate offenses.” (See Report at p. 17) Unfortunately, had the Ombudsman been “well-equipped to analyze problems of law,” as he is required to be, he never would have portrayed this issue as one of a “possible law violation” in the first place.

The finding that Stitt directed Peterson to divulge confidential information about State wards is critical to the Ombudsman’s ultimate recommendations. Without it, the investigation ends, with Stitt having been cleared of all “wrongdoing,” but taking with her a couple of cautionary directives from the Ombudsman that the FCRB enact better guidelines regarding the use of agency consultants, and that greater vigilance be exercised concerning political activity, and the attendance of foster children at public events.

However, with the finding that Stitt directed Peterson to divulge confidential information regarding State wards, the Ombudsman is able to promote further investigation of Stitt by the FCRB with respect to this very same matter, by concluding that “the evidence in this case is indicative of possible violations of Foster Care Review Board regulations.” (Report at p. 19) One agency regulation is cited, namely, Title 162-NAC1-004. However, the provisions of 162 NAC 1-004 are substantially identical to Neb. Rev. Stat. §43-1310:

“162 NAC 1-004 Confidentiality

All records and information regarding foster children, their parents or relatives and their foster care situations shall be deemed confidential. Unauthorized disclosure of such confidential records and information or any violation of confidentiality shall be a Class III Misdemeanor.”

Neb. Rev. Stat. §43-1310

All records and information regarding foster children, their parents or relatives in the possession of the state board or local board shall be deemed confidential. Unauthorized disclosure of such confidential records and information or any violation of rules and regulations of the Department of Health and Human Services or the state board shall be a Class III Misdemeanor.”

For the Ombudsman to suggest that Stitt may have committed a "possible violation" of FCRB regulation 162 NAC 1-004 regarding confidentiality is unconscionable, and creates a never-ending circle. First, the Ombudsman clearly found that **there was no violation regarding Neb. Rev. Stat. §43-1310**. §43-1310 includes not only a prohibition against unauthorized disclosure of confidential information, but also a prohibition against violating the "rules and regulations of the...state board." However, the Ombudsman found that neither Stitt nor Peterson violated that law. Second, §43-1310 and 162 NAC 1-004 are substantially identical in their prohibition against unauthorized disclosure. If Stitt did not make an unauthorized disclosure of confidential information under §43-1310, then she did not do so under the agency regulation, which is nearly a mirror counterpart of the statute.

The Ombudsman has recommended that the issue of Stitt's possible violation of this agency regulation be submitted for further fact-finding by the FCRB. This recommendation hangs entirely upon the Ombudsman's "factual finding" that Stitt directed Peterson to disclose confidential information, which Peterson denies doing. One has to ask--what it is that the Ombudsman hopes to accomplish by promoting further investigation of Stitt for a "possible violation" of an agency regulation that is virtually identical to the statute upon which he just found no violation? Of course, if Stitt were found by the Board to have violated this agency regulation, then she would be exposed to criminal liability for a Class III misdemeanor.

2. Whether Ms. Stitt used or authorized the use of, resources of the Foster Care Review Board for the purpose of campaigning for or against the nomination or election of a candidate in violation of Neb. Rev. Stat. §49-14,101.02(2). (This issue relates to Ms. Peterson's account of Ms. Stitt having directed certain Foster care Review Board staff to attend a Tom Osborne for Governor campaign event held on April 28, 3006.)

The gist of Peterson's alleged violation of law is that Stitt ordered or directed certain staff members of the FCRB to attend a political campaign event which took place on a State holiday in 2006 for Tom Osborne, then a candidate for political office; and whether Stitt directed staff members of the FCRB to invite foster children to attend the event.

For purposes of the above-referenced statute, the term "public resources" means personnel, property, resources, or funds under the official control of a public official or public employee. See Neb. Rev. Stat. §49-14,101.02(1). It is also clear that a public employee is free to campaign for or against a candidate when no public resources are used, but such an employee is prohibited from engaging in such campaign activity "while on government work time or when otherwise engaged in his or her official duties." See Neb. Rev. Stat. §49-14,101.02(8).

The Ombudsman found that no FCRB staff members received a direct order from Stitt to attend the campaign function, nor was any staff member who did not attend the event punished in any overt way. The Ombudsman concluded that Stitt committed absolutely no violation of law regarding this issue:

“As has been noted, Neb. Rev. Stat. §49-14,101.02(2) provides that public officials and employees may not ‘use or authorize the use of public resources’ for campaign purposes. In this case, while it is clear that many Foster Care Review Board staff did attend the campaign event, it is also clear that the campaign event in question was held on April 28, 2006, which was the Arbor Day holiday for state employees. There is no evidence to indicate that the Foster Care review Board employees who were in attendance at the event were compensated for their time, or that any of those employees were reimbursed for mileage traveled to the event. Even Ms. Peterson concedes that there was no compensation or reimbursement paid to the Foster Care review Board staff who attended the campaign function. In light of these facts, the Ombudsman’s office concludes that there is **no evidence of a violation of §49-14,101.02(2) in this case.**” (Report at p.13)

However, even in the face of his finding of “no evidence,” the Ombudsman opines:

“In the opinion of the Ombudsman’s Office, the idea of using Foster Care Review Board staff as resources for the purpose of “inviting” foster parents and children to the campaign event **came perilously close to being a use of ‘public resources’ for campaign purposes in violation of §49-14,101.02(2).**” (Report at p.14)

The Report expresses the Ombudsman’s disgust at the fact that foster children were invited by FCRB staff members to attend the event, pointing out that “there is something distasteful about the image of foster children, who have no power to say ‘no,’ being taken away from their play time or their school work to be used in a campaign event for a candidate who their natural family might not support.” (Report, at pp. 13, 14)

The assumptions inherent in this condemnation are flawed and not supported by the evidence. First, that foster children were somehow “made” to attend the campaign event against their will and against the political wishes of their parents. Yet, the Ombudsman’s Report quotes directly from Stitt’s letter in which she stated that she had encouraged some of her staff to consider **inviting foster parents and children to this event.** (Report, at p. 10) Foster children are State wards who are in the temporary legal custody of the Nebraska Department of Health and Human Services, which in turn, places them with approved foster parents under a contract. No foster parent would be required to accept such an

invitation received from a staff member of the Foster Care Review Board. On the other hand, foster parents do have a degree of latitude as to the types of social events and activities to which they can and often do choose to bring their foster children. Foster children sometimes come to court (which proceedings are open to the public), they sometimes attend Adoption Day (even when they are not the ones being adopted), and they sometimes participate in social events hosted by other State agencies and child advocacy groups. Where there is doubt on the part of the foster parents as to whether or not a foster child should attend any event, they typically consult with the foster child's legal custodian, the Nebraska Department of Health and Human Services, through its assigned case manager.

The second flawed assumption is that the purpose of inviting foster children to attend this campaign event was to bolster the campaign of the political candidate. Whether Stitt ever made any attempt to explain to the Ombudsman her reasons for suggesting that foster parents and children be invited to the campaign event is not apparent from the Report, although her reasons recorded by the media were non-political.² Even from the facts in the Report, there were a number of reasons why foster parents and children might welcome an invitation to attend the event. According to the evidence summarized in the Report itself, Tom Osborne had expressed an interest in issues involving foster children and had made statements about "meth parents." Attendance at the event by foster parents and children could have been educational and also could have provided an opportunity for them to convey their questions or concerns to someone who could resonate with those concerns. Finally, there are other reasons why foster children would have found it desirable to attend the event, if only to meet this distinguished Nebraskan, given his years of public service, his football legacy, and his mentoring program for troubled youth. These factors tend to negate the Ombudsman's narrow conclusion that the invitations extended to foster parents and children by Foster Care Review Board staff members were for campaign purposes.

Third, there is absolutely no evidence—from Peterson or anyone else—that any foster parents or foster children who did attend the event were publicly identified as being foster children.

- 3. Whether Ms. Stitt used or authorized the use of resources of the Foster Care Review Board in a manner other than in accordance with the prescribed procedures, in violation of Neb. Rev. Stat. §49-14,101.01(1). (This issue related to Ms. Peterson's account of a licensed mental health professional hired by the agency who had**

² "I really believed that these children would be thrilled to meet Coach Osborne," she said. "It was a great opportunity to meet a leader of great stature who prioritized fixing a broken (foster care) system. I in no way regret inviting them." Omaha World-Herald, September 7, 2007.

allegedly been providing therapy to agency staff members at ms. Stitt's direction.)

The gist of Peterson's allegations of wrongdoing on this issue are: 1) that Stitt used the services of one Nancy Thompson, a licensed mental health professional who is under contract with the Foster Care Review Board to work as a "consultant" for the Board, in order to provide personal counseling for Stitt; and 2) that Stitt mandated that Peterson and other Foster Care Review Board staff personnel submit to Thompson for counseling on personal issues; and 3) that the Foster Care Review Board paid for all of Thompson's counseling services for Stitt and her staff members.

Because Stitt provided receipts proving that she personally paid for counseling services with Thompson, the Ombudsman found no violation of law on this specific allegation. Based on the fact that Thompson herself provided evidence that the "consultation" services that she provided to FCRB staff focused upon issues such as communication skills, assertiveness, and other related "professional issues," and that her services did not address "personal issues" or "early childhood issues" with FCRB staff, along with the fact that Thompson's contract did not define the term "consultation," the Ombudsman concluded that the facts in the case did not support any allegation of wrongdoing, specifically regarding the use of FCRB resources in a manner other than in accordance with prescribed procedures in violation of Neb. Rev. Stat. §49-14,101.01(1).

Despite having determined no wrongdoing on these allegations, the Ombudsman recommended that an agency consultant not be used in the manner Thompson was used by FCRB staff, "unless and until such a use had been approved by the Foster Care Review Board itself. (Report, at p. 9) However, it is apparent that in 1999, the Foster Care Review Board did, in fact, approve the contract under which Thompson would provide "consultation on issues affecting staff." (Report, at p. 7). If the contract failed to define precisely what was meant by "consultation," then any fault (if indeed there is one) is to be directed at the members of the Foster Care Review Board who voted to approve the contract, and not at Stitt, for each Board member would have had an opportunity to review the terms of Thompson's proposed contract prior to voting to approve it.

4. The Ombudsman's Investigation Thoroughly Failed to Assess Peterson's Credibility in Connection with her Allegations of Wrongdoing Against Stitt

In any case where the Ombudsman receives allegations of wrongdoing under the State Government Effectiveness Act, he may elect to dispense with a preliminary investigation for any number of reasons, including the fact that "the complaint is trivial, frivolous, vexatious, or not made in good faith..." See Neb. Rev. Stat. §81-2704(1)(c). Furthermore, any employee found by the Ombudsman to have intentionally misused the State Government Effectiveness Act may be subject to

disciplinary action by the director or chief operating officer of the agency. "Intentional misuse" of the State Government Effectiveness Act clearly includes attempts to treat personnel grievances as an allegation of wrongdoing. See Neb. Rev. Stat. §81-2710. Not only do these statutes recognize the reality that employee complaints against employers sometimes result from improper motivations, personnel grievances, or personal differences, so also does the Ombudsman:

"There have been many instances over the years where the Public Counsel's Office has been approached by State employees who were already in trouble with their boss, and who wanted to qualify for legal protection against the impending personnel action by, in effect, becoming whistleblowers after the fact. Clearly, however, this situation does not meet the expectations of the Act."

-Marshall Lux, Ombudsman, from the 2005 Annual Report of Ombudsman, at p. 18

Was Peterson "in trouble with her boss" at the time she filed her whistleblower complaint? The Ombudsman's Report is silent on this issue. Yet, if in fact, she were in the midst of a personnel action before making her allegations, and if information regarding any such personnel action had been supplied to the Ombudsman, this factor would be extremely relevant for the Ombudsman in order to assess whether her motivation in making the allegations of wrongdoing against her boss was for the purpose of avoiding the effect of any pending personnel action.

Furthermore, the Ombudsman has noted that Peterson's statements should be considered in the context of her employment history.³ This is a veiled reference to Peterson's credibility. If so, what is her employment history, and why is there no reference to it in the Report, despite the fact that the Ombudsman believes that her statements need to be interpreted in that specific context? For example, if Peterson's employment history contains information to establish that she is—or is not—truthful, why is there no mention of that in the Report?

The inconsistencies in Peterson's statements that cast doubt upon her credibility are either glossed over or resolved by the interventions of the Ombudsman himself. Peterson asserted that former co-employee Pitt did not attend the Osborne campaign function. But when interviewed, Pitt told the Ombudsman that she did attend the event. However, the Ombudsman reconciled this discrepancy for Peterson by giving her the benefit of the doubt: "It is possible that Ms. Peterson confused Ms. Pitt with Ms. Lauritsen, who is one of the Foster Care Review Board's staff who did not attend." (Report at p. 12) Peterson stated that

³ See "Stitt Deserves Support," *Public Pulse*, Omaha-World Herald, September 23, 2007.

Stitt told her to call a news reporter and leak confidential information about State wards. Peterson merely guessed that this occurred in the summer of 2006, but could not name the case or the foster children allegedly involved. When Stolz advised that Ombudsman that she did receive a telephone call from Peterson in late 2006 or early 2007 in which Peterson expressed concern about the fact that **Stitt** was planning on meeting with a reporter, the Ombudsman reconciled the problem again for Peterson by determining that Stolz must have forgotten about the prior call from Peterson in the summer of 2006. When Stitt specifically denied that she ever directed Peterson to disclose confidential information regarding State wards, the Ombudsman chose to disregard Stitt's refutation. Why? Peterson accused Stitt of obtaining personal counseling from therapist Thompson, which counseling was paid for by the Foster Care Review Board. When Stitt satisfied the Ombudsman that she personally had paid for these services, why didn't the Ombudsman subject Peterson's credibility and motivation to most rigorous scrutiny? Why were the scales of this investigation tipped in favor of Peterson at every area where doubt had to be resolved? It is evident that this Ombudsman has formed a preconceived attitude about those who invoke the whistleblower law:

"Whistleblowers have many forms of motivation, but most of them, in my experience, have been motivated by a sense of outrage at what they see as wrongful action in their agency."

-Marshall Lux, Ombudsman, from the 2005 Annual Report of Ombudsman, at p. 22

In a perfect world, Peterson was motivated by some sense of outrage at what she had seen as wrongful action within her agency. But when the Ombudsman himself indicates that Peterson's statements are to be considered in light of her employment history—when the Ombudsman himself repairs the factual discrepancies and inconsistencies within her statements—and at the same time discounts Stitt's specific denials, ignores her request for more factual details of Peterson's accusation, and thereby prevents Stitt from offering any explanation or defense to Peterson's damning allegations—the Ombudsman is conducting neither a full nor a fair investigation.

Both Neb. Rev. Stat. §§81-2704(1)(c) and §81-2710 make it incumbent upon the Ombudsman to be knowledgeable about the personnel status of the complainant employee, to rule out a personnel grievance or vexation as the motivating factor for the complaint, and to ascertain the credibility of the complainant with respect to her factual statements, especially if the Ombudsman is privy to information that has bearing on the employee's reputation or capacity for truthfulness. The Report does not indicate that the Ombudsman assessed any of these matters before concluding the truthfulness of Peterson's statements, particularly those statements regarding the confidentiality issue. If Peterson was not truthful, then the Ombudsman could have determined that she intentionally misused the State

Government Effectiveness Act and she would have been subject to disciplinary action by the director or chief operating officer of the agency. Even if Stitt disclosed background information to the Ombudsman that bears on Peterson's credibility, such fact does not appear in the Report. Stitt cannot now defend herself from the serious and adverse consequences of the Ombudsman's finding that she directed Peterson to disclose confidential information, because as a former employer, Stitt is silenced by law from publicly releasing such information about her former employee.

5. The Ombudsman's release of the whistleblower investigation Report to the media is not authorized under the State Government Effectiveness Act

Peterson's allegations of wrongdoing regarding Stitt were submitted to the Ombudsman pursuant to the Nebraska State Government Effectiveness Act (i.e., the "Whistleblower Act"). This is clearly acknowledged at the beginning of the Report:

"This Report is concerned with the Ombudsman's investigation of the allegations of a whistleblower. The investigation was conducted pursuant to the Nebraska State Government Effectiveness Act, Neb. Rev. Stat. §81-2701 through 81-2710." (Report, at p.1)

Accordingly, the Ombudsman's investigation and the preparation and transmission of his investigative Report in this regard are governed by Neb. Rev. Stat. §81-2701 through 81-2710. When the Ombudsman concludes his formal investigation of a complaint filed under the State Government Effectiveness Act, he is required to prepare a report of his findings. See Neb. Rev. Stat. §81-2704(3). If the report concerns the director or chief operating officer of an agency which is the subject of the allegation, the report must be transmitted to the Governor, or to the appropriate board or commission that has governing authority over the director or chief operating officer. See Neb. Rev. Stat. §81-2704(4). In addition, the employee who made the allegation of wrongdoing is entitled to receive notification of the fact that the Ombudsman has terminated the investigation. See Neb. Rev. Stat. §81-2704(6)

There is no statutory authority in the State Government Effectiveness Act for the report of the Ombudsman to be released to the media. In other words, while there is no explicit statutory prohibition against releasing the whistleblower report to the media, there is also no express permission to do so. The fact that the statute specifically identifies the persons and entities to whom the Ombudsman may transmit his Report would seem to exclude the transmission to all others. The only exception to this would be involving that situation where the contents of the report indicate that a "wrongdoing" exists, or has occurred, in which case the report of the Public Counsel becomes a matter of public record at the time it is transmitted to the Governor, or to the appropriate board or commission that has

governing authority over the director or chief operating officer, (unless the Ombudsman determines that its release would impede an ongoing investigation). See Neb. Rev. Stat. §81-2704(5). In such a case where "wrongdoing" exists or has occurred, the media would have access to the whistleblower report as a matter of public record.

In this case, the Report did, in fact, concern Stitt, who is the director of the agency which is the subject of Peterson's allegations. Therefore, under the State Government Effectiveness Act, the only persons or entities to whom the Ombudsman was authorized to transmit the Report of his investigation were the Governor, the Governor's authorized representative, or the appropriate board that has governing authority over Stitt.

Because the Report found that there was no "wrongdoing" that exists or that had occurred with respect to all of Peterson's allegations, there was no legal basis for the Ombudsman's Report in this whistleblower case to have been made a matter of public record. On the contrary, such a report is to be "retained in the files of the Public Counsel." See Neb. Rev. Stat. §81-2704(5). Additionally, there is no statutory authority granting the public access to the whistleblower files of the Public Counsel where no "wrongdoing" has been found. Nevertheless, with no statutory authority to do so under the State Government Effectiveness Act, the Ombudsman freely released the Report of his investigation of Stitt to the media.

While the Public Counsel has statutory authority to release to the media his "conclusions and suggestions" resulting from his "suitable investigation" of a complaint initiated by "any person concerning an administrative act," this provision is not a part of the Whistleblower Act, but appears to relate to complaints other than those brought by a State employee under the Whistleblower Act. See Neb. Rev. Stat. §§81-8,247; 81-8,250. Because the provisions of the State Government Effectiveness Act, i.e., the Whistleblower Act, relate specifically to a complaint brought by a State employee, those provisions would appear to govern the manner in which the Ombudsman's Report in this whistleblower case should have been transmitted. Even if the Ombudsman has discretionary authority to release this whistleblower investigative Report to the media under the other provisions of the Public Counsel statutes that do not relate directly to the State Government Effectiveness Act, why did he chose to exercise his discretion in a manner so adverse to Stitt, especially when he found no evidence of wrongdoing on all of Peterson's allegations?

Even though the Report in this case concludes that there is no evidence of wrongdoing with respect to all of Peterson's allegations, the Ombudsman's report did render a factual finding that Stitt, the highest ranking officer of the State Foster Care Review Board, directed another employee to break the law by disclosing confidential information about foster children. The Ombudsman is very mindful of the potential for embarrassment that the publication of an adverse factual finding can have on an employer in a whistleblower case:

"The process which seems to be so daunting to the whistleblower, can also be quite intimidating to the employer, particularly where the employer is faced with the prospect that it may ultimately be embarrassed by the findings of the Public Counsel's Office or by the conclusions of a hearing officer or judge."

-Marshall Lux, Ombudsman, from the 2005 Annual Report of Ombudsman, at p. 23

Conclusion

The Ombudsman's investigation of this matter was characterized by a confirmatory bias with regard to Peterson's allegations, a failure to fully and fairly investigate the matter, and by an equally prejudicial attitude aimed against Stitt. The "factual finding" that Stitt directed Peterson to disclose confidential information about State wards rests upon nothing even resembling competent evidence. The Ombudsman's assertion, based on this "factual finding" that Stitt might have violated an agency regulation virtually identical to the law she was found not to have violated, does not proceed from sound legal analysis. If anything, it is an assertion designed to keep her in a negative public light. Stitt has absolutely no legal redress regarding the conclusions and recommendations of the Report, no way to rectify their impact of embarrassment and damage to her in the public eye, and no way to exact fairness and impartiality from the Legislature's officer, who is at all times legally bound to act with fairness and impartiality in such an investigation.

In any event, the manner in which this investigation, findings and recommendations were conducted and prepared in this case suggest that Stitt would be at peril if she were required to face this same Ombudsman in any further or future agency matters or complaints involving her or her agency.

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COPY

October 24, 2007

Senator Mike Flood
State Capitol, Room 2103
Lincoln NE 68509

RE: Ombudsman's letter of response 10-19-07

Dear Senator Flood:

Thank you for your letter to me of October 15, 2007, and for your interest in the process surrounding the Ombudsman's investigation of Carol Stitt under the State Government Effectiveness Act. I have received a photocopy of the Ombudsman's October 19, 2007 2-page letter to all Senators. As per your letter of October 15, 2007 I have reviewed the Ombudsman's response, and offer you my thoughts regarding that response.

The Ombudsman's letter of October 19, 2007 fails to adequately respond to the concerns raised in my Analysis in the following respects: 1) The letter completely sidesteps the problem of the "legal issue" which was framed by the Ombudsman and used to justify the formal investigation of wrongdoing for a possible violation of law on the issue of confidentiality; 2) The letter fails to address the lack of reliability and credibility of the witnesses and the lack of competent evidence used by the Ombudsman to support his factual findings, and 3) The letter fails to provide any statutory or legal basis under which the Ombudsman was authorized to release the Whistleblower Report to the media. These concerns are addressed in detail below.

1. **Was A Formal Investigation Of "Wrongdoing" Regarding A Violation Of The Law Of Confidentiality Justified?**

The Ombudsman's 10-19-07 letter characterizes the concerns of my Analysis as a mere disagreement about factual conclusions:

"For the most part, Ms. Costantakos' critique of our investigative Report is based on her disagreement with our factual conclusions."

A significant portion of my Analysis of the Ombudsman's Report centers on the Ombudsman's erroneous and misleading framing of a legal issue that was identified as one of the subjects of the formal investigation, namely, a potential criminal violation on the part of Stitt relating to the unauthorized disclosure of confidential information regarding State wards. After having conducted a preliminary investigation upon the

information supplied by Peterson, the Ombudsman elected to proceed with a full and formal investigation upon three issues, including an issue relating to possible violation of confidentiality laws, identified in the Report in the Ombudsman's own words:

"Whether Ms. Stitt attempted to, or conspired to, publicly disclose confidential information about wards of the State in violation of Neb. Rev. Stat. §43-3001, or other similar statutory provisions." (Report of Ombudsman at p.2)

It is undisputed that Peterson never disclosed confidential information to any news reporter. But whether one can commit the crime of "attempted disclosure" of confidential information, or "conspiracy to disclose" confidential information, is clearly **a legal issue, not a factual dispute**. In reporting the results of his formal investigation, the Ombudsman acknowledges that there is no such crime as "attempt" or "conspiracy" to disclose confidential information in violation of either Neb. Rev. Stat. §43-3001 or §43-1310. Why, then, did the Ombudsman in his Report present these as viable "legal issues" that justified a full, formal investigation of possible "wrongdoing" on the part of Stitt? The Ombudsman is statutorily required to be "well-equipped to analyze problems of law." An elementary understanding of the law would indicate that no such crime of "attempted disclosure" or "conspiracy to disclose" confidential information is possible, a fact he acknowledges in his Report, and a fact which should have been applied at the level of the Ombudsman's preliminary investigation. Instead, valuable taxpayer resources and time were absorbed in proceeding with a full and formal investigation on a matter that the Ombudsman well knew did not constitute a bona fide "legal issue" in the first place.

In this respect, the Analysis does not raise a mere "disagreement" about the Ombudsman's factual conclusions, but a serious concern about the legal basis upon which the formal investigation of alleged "wrongdoing" was predicated in the first place. If there is no such crime of "attempt" or "conspiracy" to disclose confidential information in violation of Neb. Rev. Stat. §43-3003 or §43-1310, then Stitt could not have broken the law in those respects. As a result, the Ombudsman was not justified in wasting taxpayer money and time to conduct a formal investigation to determine whether Stitt has committed these particular "crimes."

While the Ombudsman denies that there was an attempt to sensationalize the case, what other explanation can account for the fact that the Ombudsman elected to release his Report to the media, which Report suggested that Stitt might have committed these "crimes" of "attempt" and "conspiracy" to violate confidentiality, when he knew them not to be crimes in the first place? This, of course, placed Stitt under a cloud of suspicion, even though the Report later determined that she did not violate any law. The Ombudsman's October 19, 2007 letter completely sidesteps this very serious concern.

2. The Ombudsman's Response Fails To Address The Reliability And Credibility Of The Witnesses, And The Lack Of Competent Evidence Used To Support His Factual Findings.

In the Ombudsman's Report, he stated that there was "significant, credible evidence" that the substance of Peterson's allegations were true regarding her contention that Stitt directed Peterson to contact a news reporter and leak confidential information about State wards. The Analysis expressed concern that there is no indication that the Ombudsman made any effort to ascertain the credibility of the witnesses upon whose statements he relied to support this contention, nor is any reason identified in the Report for the Ombudsman's summary rejection of Stitt's and Stolz's denials of this contention. In his October 19, 2007, letter, the Ombudsman failed to respond to the very serious deficiencies in this evidence selected to justify his factual findings, including his finding that Stitt directed Peterson to break the law.

Since the time that I submitted my Analysis to you, I obtained a copy of the cover letter sent by the Ombudsman to the Chairman of the State Foster Care Review Board enclosing the Ombudsman's September 5, 2007 Report. I have enclosed a copy of that cover letter for you. Please note the following finding contained within the cover letter but which does not appear in the text of Ombudsman's Report itself:

"The Ombudsman's office assumes that the members of the Foster Care Review Board are aware of Ms. Peterson's employment history with the agency, and can consider her statements in the context of that history."

This is a veiled reference to Peterson's credibility. What is her employment history, and why is there no reference to it in the Report, despite the fact that the Ombudsman believes that her statements can be interpreted in that specific context? As the Speaker of the Legislature, I would encourage you to pursue answers to the following questions from the Ombudsman and Stitt, (as may be appropriate) with respect to the manner in which the facts of Peterson's complaint were investigated:

- 1 Was Whistleblower status properly accorded to Peterson?¹

¹ Not every complaint against an employer is brought in good faith, and use of the Whistleblower Act is not appropriate in where an employee attempts to treat personnel grievances as an allegation of wrongdoing. See §81-2710. The Ombudsman also recognizes that the Whistleblower Act cannot and should not be used by employees who are already in trouble in the context of their employment.

"There have been many instances over the years where the Public Counsel's Office has been approached by State employees who were already in trouble with their boss, and who wanted to qualify for legal protection against the impending personnel action by, in effect, becoming whistleblowers after the fact. Clearly however this situation does not meet the expectations of the Act."

16. In view of the fact that the Report of the Ombudsman is not subject to judicial review, what oversight is exercised over the investigations conducted by the Ombudsman's office, and what protocols and standards apply to such investigations?
17. How many Whistleblower investigative reports have been released by the Ombudsman to the media in cases where no "wrongdoing" was found (as defined in Neb. Rev. Stat. §81-2703(5))?

The Ombudsman has indicated in his October 19, 2007 letter that he believes that it would not be constructive for him to engage in a dialogue with me over the lack of reliability of the witnesses and the lack of competent evidence used to support his findings. That is understandable, given that I am not a public official but a citizen. However, I believe it would be very constructive for the Legislative leadership to engage in a dialogue with the Ombudsman about these particular evidentiary concerns.

3. **The Ombudsman's Response Fails To Provide Legal Justification For Release Of The Whistleblower Report To The Media.**

The justification offered by the Ombudsman for his decision to release his Report to the media is not sanctioned by law. The fact that the media were already aware of the fact that the Ombudsman was conducting a Whistleblower investigation initiated by a State employee does not authorize the Ombudsman to release that report to the media. Indeed, the investigative reports of Whistleblower complaints are to be retained in the files of the Public Counsel. See Neb. Rev. Stat. §81-2704(5). But there is one exception. The State Government Effectiveness Act ("The Whistleblower Act") at §82-2704(5) specifies when a Whistleblower report becomes a matter of public record:

"...If the contents of the Report indicate that a 'wrongdoing' [as defined under Neb. Rev. Stat. §81-2703(5)] exists or has occurred, the report shall become a matter of public record at the time it is transmitted to..." [the Governor or the agency's Board]

Thus, when there is a finding that a "wrongdoing exists or has occurred," the investigative report, as a matter of public record, would at that point be properly

media reporter via a pay phone," (Report at p. 15) the Ombudsman ignored her very specific recollection in this regard. When Stolz indicated that she had received a telephone call from Peterson in late 2006 or early 2007 in which Peterson expressed concern about the fact that Stitt was planning on meeting with a reporter, the Ombudsman again reconciled Peterson's memory problem for her by determining that Stolz must have forgotten about the prior call from Peterson in the summer of 2006.

distributable to the media. Yet, the Ombudsman concluded in his September 5, 2007 investigative report that no "wrongdoing" exists or had occurred. Then by what authority did he elect to release his report to the media?

The State Government Effectiveness Act clearly delineates the persons to whom a Whistleblower Report may be released. In this case, because the report concerned the director of an agency which was the subject of the allegation, the Ombudsman was authorized to transmit the report to the Governor or to the appropriate board or commission that has governing authority over the director or chief operating officer. See Neb. Rev. Stat. §81-2704(4). Because the Ombudsman's Report in this case indicated that there was "no wrongdoing" it did not become a matter of public record. The Ombudsman's argument that there is no express statutory prohibition within the Whistleblower Act against the release of the report to the public does not resolve this problem. On the contrary under ordinary rules of statutory construction, because the recipients of the Ombudsman's report are specifically designated, all others are excluded by implication. Furthermore, because the Whistleblower Act specifically provides that the Ombudsman's Report does not become a matter of public record unless there is a finding of 'wrongdoing' (as defined under Neb. Rev. Stat. §81-2703(5)), the Ombudsman lacked authority to release this Report to the media. Public interest and daily telephone calls from news reporters do not overcome the provisions of the Whistleblower Act.

Finally, you may be aware of the fact that even before his September 5, 2007 Report was issued, Mr. Lux made a public comment to the Omaha World-Herald, confirming the fact of his pending investigation, and noting at that time that none of the allegations had been referred to law enforcement.⁵ I am aware of no legal authority by which the Ombudsman may make public comment to the media pending a Whistleblower investigation. Nevertheless, this public comment placed Stitt in an interesting predicament. While the Ombudsman took the liberty of making a public comment to the media regarding the status of his investigation of Stitt, and, through innuendo, implied at least the potential for criminal charges, Stitt herself could not address the situation publicly, or respond to any of the allegations publicly without violating legally mandated confidentiality regarding her employee. This action operated to place the Executive Director of the Foster Care Review Board under a cloud of public suspicion even before the allegations had been investigated.

While the Ombudsman's 10-19-07 letter states that it would have been "utterly irresponsible" for him not to have released his Report to the public, given that he had concluded that Stitt engaged in "inappropriate actions," the proper legal standard for designation of the Report as a public record is not a finding of "inappropriate action," but a finding of "wrongdoing" as specifically defined under Neb. Rev. Stat. §81-2703(5). The

⁵ See Omaha World Herald, "Official On Vacation During Probe: Allegations Have Been made Against Sate Foster Care Review Board Director Carol Stitt," August 21 2007

Ombudsman's Report concluded that Stitt committed no wrongdoing, specifically that none of Peterson's allegations constituted any manner of "gross mismanagement or gross waste of funds;" or "substantial and specific danger to public health and safety" or a "violation of any law" on Stitt's part.

The Ombudsman's decision to release his Report to the media suggests a lack of responsibility, or at the very least, a very relaxed standard of confidentiality surrounding Whistleblower reports, even when there is no finding of wrongdoing. While the Whistleblower Act serves a very important public purpose by providing a protected venue for employees to lodge complaints against State agencies and employers concerning wrongdoing that might not otherwise be brought to light, there is good reason why the reports of these investigations do not become a matter of public record until and unless there is a finding of wrongdoing. The manner in which the Ombudsman selectively included and excluded certain information with respect to both his September 5, 2007 Report, and in his September 5, 2007 cover letter is troubling. There appears to be a tendency on the part of the Ombudsman to portray Stitt in a negative light in his communication released to the public, i.e., the Report. On the other hand, the Ombudsman's cover letter, which was distributed only to certain private recipients, portrays Stitt in a salutary light, and also goes to great lengths to identify mitigating circumstances, and to suggest that the complainant's statements can be understood in the context of her employment history. This inconsistency breeds damage to the reputation of a public official, and perpetuates a cloud of suspicion that could have been avoided if the Ombudsman had recognized that the report of his Whistleblower investigation properly becomes a matter of public record only where there is a finding of wrongdoing as defined by statute. Consider the following findings which are contained in the Ombudsman's cover letter of September 5, 2007 but which were carefully excluded from his Report:

"The Ombudsman's Office would also suggest that, as the Foster Care Review Board examines these several issues, the members of the Board should be mindful of the fact that Ms. Stitt has served in the capacity of Executive Director of their agency for more than twenty years, that she has built the agency up from almost nothing to the prominent status that it holds today and that she has demonstrated an obvious commitment to improving the foster care system in Nebraska. Additionally, we would urge that the members of the Foster Care Review Board be mindful of the fact that Ms. Stitt's job with the agency is both challenging and important, and that the demands and burdens of such a position can, at times, cause significant stresses that may result in lapses of judgment."

The foregoing findings appear significant to the Ombudsman's investigation, yet they were not included in the Ombudsman's Report. Why?

In my opinion, the Ombudsman's 10-19-07 letter fails to meet the substance of the serious concerns set forth in my Analysis of the Ombudsman's report of September 5, 2007. As a taxpayer and a voter, I believe that the credibility of government depends

upon the integrity of government, and the concerns identified in my Analysis remain unanswered questions.

Thank you for the opportunity to provide you with my thoughts regarding the Ombudsman's October 19, 2007 letter of response. I would welcome the opportunity to discuss this matter further with you, and with anyone else you would like to include, at your convenience.

Sincerely,



Christine P Costantakos