The Case Against Privatizing Human Care Licensing

A Position Statement of

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Consumer Protection Through Prevention

National Association for Regulatory Administration

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PREFACE

The National Association for Regulatory Administration (NARA) is dedicated to promoting excellence in human care regulation and licensing through leadership, education, collaboration and services. In carrying out its mission of "Consumer Protection through Prevention," NARA periodically issues Position Statements on regulatory policy and practices essential for advancing the effectiveness of out-of-home human care regulatory programs and consumer safety.

This Position Statement explains why NARA strongly opposes efforts to privatize the licensing and regulation of human care facilities. While there are numerous definitions of the privatization concept, this Statement uses the term "privatize" to refer to both:

- The complete and permanent turning over of government responsibility and accountability for carrying out a discrete service to the private sector, under which government ceases to perform the service altogether; and
- The partial and temporary turning over of a discrete government service to the private sector through outsourcing (contracting), under which government retains ultimate responsibility and accountability.

Further, this Position Statement distinguishes between the regulatory and non-regulatory functions of human care licensing. NARA strongly opposes the privatization of the ***regulatory*** functions of the licensing process—that is, rulemaking, inspection, enforcement and administration of due process appeals—while recognizing that certain ***non-regulatory*** or support functions of the licensing process may be appropriate for privatization.

NARA wishes to acknowledge the efforts of the following NARA members whose conceptual thinking, writings and research formed the basis of this Position Statement opposing privatization of the human care licensing function:

- NARA founding member Gwen Morgan, M.S, Massachusetts, who serves as Founding Director of the The Center for Career Development in Early Care and Education of Wheelock College;
- NARA Executive Director Pauline D. Koch, M.S., Delaware, NARA Past President and former Administrator of the Delaware Office of Child Care Licensing;
- NARA Past President Nicholas R. Scalera, M.S, New Jersey, current NARA Treasurer, Human Services Consultant and former Director of the New Jersey Division of Youth and Family Services; and
- NARA Past Vice President Carolynne H. Stevens, M.A, Virginia, current At-Large Member, NARA National Council and Director of the Virginia Division of Licensing Programs.

In addition, NARA wishes to express its appreciation to Ms. Koch and Mr. Scalera, who served as co-authors of this Position Statement.

Finally, NARA is pleased to acknowledge the contributions of the following NARA members for providing invaluable assistance to the authors in reviewing and commenting on earlier drafts of the statement:

- Abby J. Cohen, J.D., California, long-time NARA member, currently working as a Child Care Law and Policy Consultant;
- Karen E. Kroh, Pennsylvania, NARA Immediate Past President, NARA Consultant and former Licensing Manager, Pennsylvania Department of Public Welfare; and
- Harold S. Gazan, M.S.W., Michigan, At-Large Member of the NARA National Council, Human Services Consultant and former Director of the Michigan Bureau of Child and Family Services.

Sincerely,

J. Patrick Byrne, President
NARA

THE CASE AGAINST PRIVATIZING HUMAN CARE LICENSING

Since the 1980s, there has been a growing movement to redefine or privatize many of the traditional roles of government, including the responsibility for licensing human care facilities. More often than not, such privatization efforts have been undertaken to reduce the size of government and its corollary—to decrease government spending or save money. Regrettably, insufficient attention has been devoted to whether such major shifts in the traditional role and responsibility of government can be justified on policy, conceptual or efficiency grounds.

After carefully examining the pros and cons of this issue, the National Association for Regulatory Administration (NARA) concluded that government should retain direct responsibility for carrying out the *regulatory* functions of the human care licensing process – that is, rulemaking, inspection, enforcement and administration of due process appeals. There are numerous compelling reasons why government should not privatize its *regulatory* functions:

Reason #1: **The effort to protect vulnerable citizens from harm has always been—and should remain—a permanent responsibility of government since it is derived from the exercise of the police power vested in the US Constitution.**

Government has no greater responsibility than the protection of its vulnerable citizens. This is a responsibility that should never be treated lightly nor abdicated without a compelling reason. A major role of state government is the protection of children and vulnerable adults in day or residential care facilities through licensing and other forms of regulation. Licensing is derived from government's statutory authority to regulate, as an extension of the *"police power"* vested in the US Constitution. In essence, licensing is government regulation of any public or private enterprise that involves a public interest, carried out through the exercise of the *"police power" (The NARA Licensing Curriculum, 2000 Edition)*, which is generally defined as the power to legislate for the health, safety and welfare of the community *(Grubb, 1985)*.

Norris E. Class, generally regarded as the father of human care licensing in America, described the police power in the context of licensing, as follows:

> *The state has the authority to regulate private enterprise for the general welfare. First, the public becomes aware of an activity, such as the daytime care of children, the unregulated conduct of which is not in the public interest. Legislation is then enacted to prohibit the activity generally, and an administrative agency is designated to permit the activity specifically, through the issuance of licenses. This is the administrative lifting of a legislative prohibition—the essential feature of any licensing operation (Class, 1968).*

In essence, licensing is consumer protection through prevention. It seeks to reduce risks and prevent harm to consumers of the service. In that sense, licensing is clearly a legitimate role of government that is implemented through the exercise of the police power. Any regulatory statute or method is subject to challenge for exceeding the specified legal limits *(Grubb, 1985)*.

In reality, for more than a century, the United States has not had unfettered "free enterprise." Rather, industries such as railroads and other major industries have been kept in the private sector, but regulated by government in the public interest. Licensing and other forms of regulatory administration are essential aspects of government's responsibility for consumer protection.

Reason #2: **The privatization of government responsibility in the decades of the 1980s and 1990s has not proved to be as effective or as successful as its proponents had originally claimed.**

In 1994, Garvey and DiIulio noted that advocates of privatization in the 1980s produced evidence that privatization of certain government functions to for-profit firms improves performance and saves money. However, they went on to say that the case has proved weaker or at least less universally appropriate than it originally appeared. Efforts initially were confined to contracts for functions such as trash collection and heating system management but gradually included more complicated functions, such as running prisons. The privatization supporters advocated taking on more functions thought to be *"inherent in the idea of the sovereignty of the public, and, necessarily subject to political control."* They added, *"But the conviction has grown that legitimate, important reasons remain to keep public agencies in control and make them as efficient as private firms"(Garvey & DiIulio, 1994, p. 25).*

In addition, efforts to privatize education have had mixed support. Advocates have maintained that privatized, publicly funded schools bring the efficiency of the marketplace to public education, making them more accountable, cost effective and innovative. Opponents have countered that privatization runs the risk of further stratifying communities along economic, social and racial lines. Further, opponents have warned that privatization decisions must be well-reasoned, supported by research, accompanied by legislated legal guidance, evaluated for effectiveness, guided by meaningful input from its key stakeholders and subject to cost-benefit analysis *(Russo & Harris, 1996).*

Privatization of the adult and juvenile prison systems has been on the increase. As of 1998, there were 132,346 beds in 186 facilities under contract or construction as *"private secure adult facilities in the United States, United Kingdom and Australia." (www.ucc.uconn.edu/-logan 1999).* Although no definitive studies have yet been completed, some problems have begun to surface regarding the effectiveness of privatizing juvenile correctional facilities. As with a number of other states, Louisiana experimented with privately run juvenile prisons, but the results were largely unsatisfactory.

On September 9, 2000, an article in *The New York Times* reported an agreement by the state in Federal District Court to make *"sweeping changes in the way it runs its juvenile prisons..."* as settlement to several lawsuits, including one by the United States Department of Justice. The Department had charged that juvenile inmates in privately run prisons in Louisiana *"were being deprived of food, clothing and medical care and were routinely beaten by guards."* The Justice Department investigators had found serious deprivation and an incident of physical abuse of teenage inmates in one prison.

The ***Times*** article further stated, *"Louisiana had tried to privatize its juvenile prisons to cut costs, but the effort raised questions about whether for-profit corporations could operate prisons more efficiently than state governments without skimping on essential services and training."* As a part of the agreement, all juvenile prisons in Louisiana are once again government operated. *(Butterfield,* The New York Times*, 2000)*

Reason #3: **The experience of government privatization initiatives in the regulation of human care facilities has been mixed at best and inconclusive at worst.**

From 1997-1999, newspaper articles and editorials were peppered with stories about state initiatives to privatize child protective functions, child care benefits for families on welfare and the working poor and child welfare functions. In an article in *The Courier-Journal* dated February 5, 1999, the Kentucky Cabinet for Families and Children was soliciting comments on a legislative initiative intended to privatize Kentucky's foster care, adoption and other child welfare programs, including child-abuse prevention. In the article, Barbara Schmidt of the Child

Welfare League of America (CWLA), noted that states have had mixed results with privatization. She added that one of the most important measures to determine state success with privatization is the state's goal for the initiative—whether the state is trying to improve services or cut costs. *(Gerth,* The Courier-Journal**,** *1999).*

In a November 24, 1997 article in *The New York Times,* Connecticut's initiative as the first state to privatize its entire program of child-care benefits for families on welfare and the working poor was reported to be in trouble. The state was threatening to terminate the contract *"because the troubled system it was hired to fix has only become worse. Hundreds of families have waited for months without receiving aid they were promised, the company has been unable to process a deluge of paperwork and its phone lines have been overloaded with pleas for help,"* according to state officials. The article went on to state that privatization had its limits. *"Turning over a service to a private contractor isn't any guarantee that it's going to be any better than having state employees do it,"* according to Janet L. Van Tassel, executive director of the Legal Resource Center of Connecticut *(Rabinovitz,* The New York Times, *1997).*

There is little documented information on privatization initiatives in human care licensing. In March 1997, NARA circulated a Privatization Survey to all of its members in the United States and Canada. Responses were received from 12 programs in eight states and one province. No examples of true privatization were reported.

However, the survey found that eight of the 12 programs were outsourcing some functions in their administrative services, provider training and technical assistance, but not the regulatory function. Only one state, Alaska, reported outsourcing a limited amount of its licensing workload for a *"compelling reason,"* the difficulty of providing timely service in distant, sparsely settled communities.

Two states, New Jersey and Virginia, use privatization outsourcing for a voluntary registration program for family child care homes. Both utilize private agencies under contract with the states to conduct pre-registration inspections, while registration issuance and ultimate enforcement are reserved to the states. Both states' programs were initiated and authorized in laws adopted by their respective state legislatures. Virginia reported problems in consistency, as well as concerns among contractors caught in a cost squeeze between what providers were willing to pay and expenses incurred by the contractors *(Stevens, 1997).*

Gormley, in his analysis of the privatization experiences of New Jersey, Wisconsin and Indiana in the regulation of family child care homes, reviewed the programs using established criteria to determine if privatization was justifiable and desirable. He concluded: *"There is little evidence that the privatization of child care regulation saves money and little evidence that privatization encourages reluctant family day care providers to accept some regulation. On the other hand, private regulators seem to be achieving reasonably high compliance levels, and their greater vulnerability to lawsuits has not yet caused problems."*

Gormley found that the New Jersey and Wisconsin family child care home initiatives, as voluntary regulatory programs, seemed to be justifiable and desirable, when measured against his criteria for each, provided that the contract agencies were given good access to child protective services information and that lawsuits were not filed against the private agencies. Gormley further concluded that, since licensing of family child care homes in Indiana is mandatory, that state's privatization initiatives were not desirable. He stated, *"It would, however, be a mistake to extend regulatory privatization to mandatory licensing. When regulation is mandatory... the government must be able to act authoritatively, consistently, and legitimately. The best way to do that is for the government to act directly and not through a private contractor." (Gormley, 1996, 257-258).*

In 1996 Scalera wrote: *"In the rush to privatize, public officials, non-profit and for-profit providers must exercise caution so as not to ignore and/or fail to consider seriously the premises, assumptions, rationale, cost-benefits and expectations on which the decision to privatize the regulation of family child care homes is based. Little or no substantive research has been conducted to analyze the impacts and implications of this major change in government's traditional role in licensing a wide variety of human care programs and activities. The virtual stampede toward privatization as a panacea for many of government's ills is galloping ahead at a staggering rate, without sufficient attention to whether it is the right thing to do and without careful consideration of alternative approaches." (Scalera, 1996).*

Reason #4: **Privatization compromises equity, uniformity and fairness in the application of licensing law and rules that are guaranteed under the 14th Amendment to the US Constitution.**

Licensing is inextricably linked to the right of due process, which has been defined simply as "fair play." Common law principles convey a property right with the issuance of a license to an applicant. In keeping with that, licensing agencies have an obligation to provide due process rights in exercising their licensing authority. This right is derived from the 14th Amendment to the US Constitution, which was ratified on July 28, 1868. It states:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (US Constitution).

Privatization of the licensing authority would likely require states to contract with more than one private entity. This would increase the risk of inconsistent interpretation and application of the rules and likely result in lack of uniformity in enforcement of the law and rules, in violation of the guaranteed Constitutional right to equity and fairness.

Reason #5: **Private entities are much further removed from the sources of political power and, thus, not as politically accountable for their actions as are state governments.**

Government agencies, with statutory authority to issue licenses, are accountable when problems occur in the regulatory system that result in abuse or insufficient or inadequate protection of consumers. With only delegated authority to recommend licenses, but not to issue them, private entities would not be held to the same level of accountability, thereby compromising the protection and well being of consumers.

Reason #6: **Government has had a long history of administering the regulatory function of human care licensing and, thus, has gained a solid base of knowledge, experience, and expertise in exercising this responsibility, while private entities have not.**

Government has traditionally carried out the regulatory function of human care licensing. As a result, government agencies have developed the regulatory philosophy, experience, knowledge, staffing capacity and systems to carry out effectively the inspection, enforcement and due process appeal components of the licensing process. By contrast, the vast majority of private entities have not administered regulatory functions and, thus, have not had the opportunity or sufficient time to gain the knowledge, experience and expertise to exercise this responsibility.

In light of this, delegating the regulatory responsibility to private agencies may pose a greater risk of harm to the very consumers that licensing is designed to protect—namely, providers, children, adults and their families. In addition, if these regulatory functions are split between government and private entities, there is a higher likelihood that inconsistencies and inefficiencies will result. Further, it may subject the consumer to greater confusion.

Reason # 7: Private agencies carrying out government functions are subject to legal liabilities and potential for costly lawsuits.

An article in *The National Law Journal* on October 2, 2000 addressed this issue directly. The article, entitled *"Perils of Privatization,"* noted that, *"…by stepping into the government's shoes, or even partnering with the government, private companies and individuals take on enormous responsibilities. These responsibilities may include compliance with a broad range of civil rights obligations otherwise applicable only against the state… leading to potentially far-reaching liability exposure." (Walker and Hardee,* The National Law Journal, *2000).*

The authors, Samuel D. Walker and N. Christopher Hardee, said the law *"that gives rise to possible liability for constitutional violations is 42 U.S.C. 1983."* This law, commonly referred to by lawyers as Section 1983, was adopted in 1872. It *"provides, in broad and sweeping terms, that '[e]very person who, under color of… law, subjects or causes to be subjected any… person… to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'"*

Walker and Hardee further stated that, *"if a violation is found, potential exposure under the law is significant. Sec. 1983 can give rise to two types of costs—damages awards and litigation costs. In addition to the ordinary litigation costs, a successful plaintiff in a Sec. 1983 case is entitled to attorney fees. These fees can be substantial. Punitive damages are also available and may be awarded based on the same conduct that gives rise to underlying liability."*

An article in the October 23, 2000 edition of *The National Law Journal* cited two federal court rulings in New York that *"have opened up private companies to liability when they violate people's constitutional and civil rights while acting on behalf of government agencies."* The article, written by Mark Hamblett and Michael Riccardi, noted:

"In the first case, a Brooklyn district judge ruled that a private company that assists law enforcement officials in a "patent abuse" of police authority may be liable for damages under 42 U.S.C. 1983. Mejia v. City of New York, No. 96-CV-3007. In the second case, the US Court of Appeals for the 2d Circuit held that a private corporation running a prison halfway house under color of federal law may be sued for violating an inmate's rights. Malesko v. Correctional Services, Corp., No. 99-7995." (Hamblett and Riccardi, The National Law Journal, *2000).*

As the above cases indicate, private entities acting on behalf of the government would incur increased legal liabilities and could be exposed to costly lawsuits by aggrieved parties. Private agencies that assume responsibility for the licensing of human care facilities would be confronted with these real risks.

Reason # 8: A privatized licensing system would not possess the same full or limited sovereign immunity protection available to state government.

For reasons similar to those documenting the increased risk of legal liability, Walker and Dundee stated:

"At the same time, immunity protection afforded to the government will often not be available [to private entities or individuals]…" acting on behalf of the State. They added: *"…the Supreme Court has generally rejected efforts by private actors to invoke immunity defenses in Section 1983 suits… In Richardson v. Mc Knight, the court rejected immunity for prison guards who were employed by a private corporation operating under contract with the state to manage a correctional center."*

They concluded: "Accordingly, there is considerable uncertainty about whether and under what circumstances… [immunity] defenses will be recognized." *(Walker and Hardee,* The National Law Journal, *2000).*

Further, lawsuits filed against private entities acting on behalf of the state might result in unwanted and inappropriate court involvement and influence in the licensing process. If, in an effort to resolve this issue, government tried to confer its immunity to non-governmental entities, it would likely raise serious and troublesome questions and concerns about government's legal authority for doing so. By comparison, such lawsuits would not affect government agencies since they possess legal immunity protections.

Reason # 9: A government-operated licensing system, with a centralized, statewide regulatory staff, would be more efficient and might be more cost beneficial to operate due to economies of scale than would a privatized system that utilized numerous contract agencies, each with its own administrative and direct care staff.

Even if a single private entity were to administer a centralized, statewide system, its operational costs would likely be higher than those of government, since even the largest private entities lack government's purchasing volume and power to secure needed goods and equipment at the most competitive rates. Also, a privatized licensing system would still require a greater level of government monitoring and technical assistance and, thus, would likely have a higher net cost to operate.

Further, government agencies would need sufficient staff resources to execute and monitor contracts, to provide technical assistance to the regulatory programs and to implement effective quality control mechanisms to ensure consistency and uniformity in the application and enforcement of licensing rules.

Reason # 10: A privatized licensing system would place one private business under the regulatory control of another private business.

If the regulatory functions of the licensing process were privatized, the result would be one privately operated service delivery system being held accountable by a privately operated regulatory agency—raising serious conflict of interest and ethical issues. This would create a contradictory blend of government regulatory authority and private service delivery—a mixture with the potential to disrupt the careful balance of power that currently exists between government and the private sector.

Reason # 11: A privatized licensing system would add enormous political vulnerability to both government and the private entity in the event of tragedy.

There are well-developed government regulatory systems that protect consumers and bring consumer confidence to the market. Tragedies causing serious harm or death to citizens often result in public and political outcries for greater levels of safety protections, which are typically followed by increased demands for government regulation and pleas for additional public funds to strengthen and enhance the licensing agency's capacity to carry out its responsibilities to protect the public from harm. State legislatures have often responded to such requests, since the public expects and has come to rely on consumer protection from its government. A privatized licensing system would not likely generate the same response from citizens or legislators and, as a result, the consumer protection effort could be jeopardized.

Reason # 12: Government regulation is essential to ensure public accountability for privately operated human service programs under contract with government.

The delivery of human care service has long been a highly privatized industry. For decades, government agencies have contracted with private, community-based agencies to administer a wide variety of services to needy children and vulnerable adults. But the privatized human service delivery system has always depended on public controls, made possible by 100 years of government regulation. Government regulation of a private enterprise remains the most effective way to protect children and vulnerable adults from the risk of harm. *(Morgan, 1995, Scalera, 1996).*

Conclusions:

For the reasons noted above, NARA strongly opposes the privatization of the ***regulatory*** functions of the licensing process—the rulemaking, inspection, enforcement and due process appeal functions. These ***regulatory*** functions, with administrative and community support, can be most effectively performed by government and should remain a government responsibility. It is patently inappropriate to delegate the ***regulatory*** functions of the human care licensing process to the private sector.

Of equal importance, NARA strongly believes that government licensing efforts, to be effective, must be sufficiently funded and well coordinated with other parts of related regulatory and non-regulatory systems to assure that children and vulnerable adults will receive care that is safe, appropriate, affordable, and nurturing. To that end, NARA urges government leaders to provide the resources needed by regulatory agencies to implement effective licensing programs and to exercise with unwavering vigilance their responsibility to enforce the law. Only then can the public feel confident that government is meeting its solemn duty to protect its most vulnerable citizens.

However, NARA acknowledges that the ***non-regulatory functions*** of the licensing process may be appropriate for privatization or outsourcing. While government has performed all of these components effectively and efficiently, some or all of these functions are already being performed by private agencies under contract with government, such as colleges and resource and referral agencies. The ***non-regulatory functions*** that NARA believes may be successfully privatized include the following:

- Educating families/parents on the use of the regulatory system as a consumer rights program.
- Providing consumer education and bringing consumers into partnership with regulatory agencies.
- Providing consumers with information and referral to regulated programs offering services in their community.
- Providing training to help human care providers meet licensing staff qualifications and to prospective licensees in how to secure and retain a valid license to operate.
- Disseminating information to families/parents on the licensing office's assessment of programs' compliance with licensing rules.
- Providing on-going support and technical assistance to licensees and provider associations.
- Carrying out accreditation "readiness" and facilitation projects.
- Providing training for licensing staff in human care programming.
- Developing administrative support mechanisms for the licensed community.
- Assisting in licensing rule research and formulation.
- Carrying out and keeping updated research on consumer, parent and family needs and preferences and on current costs and fees *(Scalera, 1996, Morgan, 1995).*

In 1992, Osborne and Gaebler had this to say about privatization:

"Conservatives have long argued that governments should turn over many of their functions to the private sector—by abandoning some, selling others, and contracting with private firms to handle others. Obviously, this makes sense, in some instances.

"Privatization is one arrow in government's quiver. But, just as obviously, privatization is not the solution. Those who advocate it on ideological grounds—because they believe business is always superior to government—are selling the American people snake oil. Privatization is simply the wrong starting point for a discussion of the role of government. Services can be contracted out or turned over to the private sector. But governance cannot.

"We can privatize discrete steering functions, but not the overall process of governance. If we did, we would have no mechanism by which to make collective decisions, no way to set the rules of the marketplace, no means to enforce rules of behavior. We would lose all sense of equity and altruism: services that could not generate a profit, whether housing for the homeless or health care for the poor, would barely exist." (Osborne and Gaebler, 1992)

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