

June 23, 1986

REPORT TO THE HONORABLE MAYOR AND CITY COUNCIL
CHILD CARE FUNDING OPTIONS

In a memorandum of May 27, 1986 the Manager posed series of questions arising from seven options regarding the City's ability to fund child care centers. On April 15, 1986 this office provided a Report to the Public Services and Safety Committee regarding potential City liability due to lack of certain insurance coverage for these agencies. (Copy attached.) In early May the Public Services and Safety Committee directed that a task force be formed to look at a series of options regarding the liability problems of day care centers. The task forces actions resulted in the memorandum listing seven options for our analysis regarding relative liability.

In our April 15, 1986 memorandum we indicated that the question of liability is a question of fact and therefore it is a question which will go to the jury. We also indicated that the risk of liability for funding the agencies under the current system was not insubstantial. This analysis is in three parts, first an analysis of the various options, second a ranking of the options and third a brief analysis of Proposition 51. Beginning with our analysis of the options, they are analyzed in the order they have been presented:

Option one involves funding the Ocean Beach and South YWCA Centers at their current allocations. This option is the current situation and for the purposes of our later comparison will involve the "worst case" analysis. All of our evaluations are based upon the hypotheticals provided. We also assume certain facts in our analysis. If the actual facts are different then the result may differ as well.

Option two involves a reduction of the City funding to a point where the City is funding less than 50% of the total funding of the agencies. The City's liability as outlined in our prior memorandum may be very slightly reduced in that the City has less responsibility for the agencies' actions since it is only a partial funding source of the agency. The problems of liability

for negligent contractor selection remain the same. The City would still be under a duty to monitor the contractor's performance to assure contract compliance. We do not feel this option provides a significant decrease in the City's risk.

Option three involves the creation of a new nonprofit

corporation which would receive the City's contribution. The corporation would in turn allocate the funds to the two child care facilities pursuant to our directions. We assume that the corporation will indemnify the City of San Diego. We will also assume that the purpose of this indemnification will be to place a litigation shield between the City of San Diego and any potential plaintiff.

The indemnification of the City of San Diego by the nonprofit corporation is only as good as the corporations' assets plus whatever insurance it has to fulfill its duty under the indemnification agreement. Given the current insurance problems, the agency probably will have no ability to obtain insurance, and the agency (we further assume) will have no assets. Therefore the indemnification by a nonprofit agency will not be a significant deterrent to the City's liability. It is also true that since we mandate that this corporation select the contractor, we would not escape liability for the negligent selection of the contractor. The City would still be required to monitor the contractor's performance to assure that public funds are properly expended. Alleged failure by the City to adequately monitor can lead to allegations of liability as well.

Option four involves the City's entering into a contract with the State of California so that the State of California could accept City funds. The City would stipulate that the funds be allocated to the designated child care facilities. If the State of California, pursuant to Government Code section 895.4, is willing to totally indemnify the City of San Diego, we are in favorable liability position regarding this option. The State has significant assets and the ability to defend us from any plaintiff who would bring an action. The only potential liability for the City would arise from the negligent selection of the contractor, assuming that action was somehow outside of the indemnification agreement.

Option five involves a situation where the City would enter into a contract with the San Diego Regional Employment and Training Consortium (RETC) whereby RETC would accept the City funds and in turn reallocate them to the two designated day care centers. As in option four, we assume that the contract would

have RETC indemnifying the City of San Diego regarding this agreement. This option has implementation problems. Under section 21 of the Joint Powers Agreement creating RETC, RETC is responsible for its actions as a quasi independent agency. In that capacity RETC has a duty to defend and indemnify the City and County, however it should be noted that RETC has no assets to pay a significant judgement. This problem is recognized in the

Joint Powers Agreement. Section 21 goes on to say that if liability to RETC arises from an agreement with one of the parties to the Joint Powers Agreement (i.e. the City or County), then that party will bear the cost. The result of this provision would mean that the City will still be ultimately liable for the judgement against RETC. Additionally, this option has the same problem as the prior two options involving the City's designation of a contractor for the receipt of funds and the liability which flows from that selection.

Option six involves the City's entering into a contract with RETC whereby RETC would accept the receipt of City funds and would issue vouchers to the parents enrolled in job training programs who are in need of child care services. These vouchers would allow the parents the option of seeking child care from any source they choose. Under this option the City would be in favorable liability situation; RETC would not be selecting the provider, the City would not be selecting the provider, only the parent would be selecting the provider. The only criteria for the receipt of the funds would be that the services be provided by licensed day care centers. Since there is no selection, inspection, monitoring or representation by the City that the child care centers are a safe place for the children, our liability position is favorable.

Option seven involves two parts. Both options involve the elimination of direct cash subsidies for the operation of the agency. These options involve a lease or gift of the property to the centers. The outright gift of the property to the agency would create questions regarding compliance with our assurances to the Department of Housing and Urban Development (who provided the purchase money for the property) as well as problems regarding City Charter section 93 and monitoring activities which are beyond the scope of this memorandum. For the purpose of analysis, the liability issues of the two options are similar; therefore we will analyze the second part of the option. This option involves the use of the property at \$1.00 per year. This is currently done with some other agencies under existing City policies and procedures. Since the City is not actively involved in funding the agency and the monitoring that goes with direct

funding, our liability is reduced. The City would still be required to see that the public purpose is fulfilled by the agency in accordance with the \$1.00 per year lease. Our monitoring activity, however, will be significantly less, therefore our responsibility to the public and any assumptions of the public that we control the agency are less. The City will still be required to monitor the agency to assure that the

conditions imposed by the Department of Housing and Urban Development regarding the services to low/moderate income individuals are maintained. This monitoring is not as likely to produce liability as the monitoring required with the direct funding of the agency's services.

In addition to our analysis of the risk, you asked that we rank the options in order of degree of liability. The following is a ranking and a summary reason why they are so ranked.

Option		
Ranking	Number	Description Reason
1	1	Current situation Worst case.
2	3	Nonprofit Corporation Since the agency has no ability to defend the City this is the same as option one.
3	2	Reduced funding This would only slightly reduce our liability primarily in the area of noneconomic damages.
4	7	\$1.00 year lease Since our role as a landlord would be more limited, our liability would be further reduced.
5	4	Contract with State We are protected by the state and its assets. There is still a slim possibility of liability for negligent selection of the contractor and the possibility the State may seek to avoid the hold harmless.

Option		
Ranking	Number	Description Reason
6	6	Grant to RETC This is ranked highest because the program design reduces liability and no artificial barriers to liability are necessary.

NOTE: Option 5 is not analyzed because it would appear to be inconsistent with RETC's Joint Powers Agreement and therefore would not be feasible.

Further, you asked for an analysis of the impact of Proposition 51 on the situation presented by the day care

centers. On June 3, 1986 the voters approved Proposition 51 which limited the liability of defendants in certain multiple defendant litigation situations. The measures' impact is summarized in the Legislative Analysis as follows:

Proposal

This measure changes the rules governing who must pay for non-economic damages. It limits the liability of each responsible party in a lawsuit to that portion of non-economic damages that is equal to the responsible party's share of fault. The courts still could require one person to pay the full cost of economic damages, if the other responsible parties are not able to pay their shares.

In the circumstances presented in most child sexual molestation cases, the non-economic damages are a large part of the claim. However, significant expense can be the medical bills for treatment of the emotional damage. Under Proposition 51 the City's liability for non-economic damages would be proportional to the City's percentage of fault as found by the jury while the City would be jointly and severally liable for all economic expenses.

Respectfully submitted,
JOHN W. WITT
City Attorney

JKR:mem:358(x043.1)

Attachment

RC-86-17