

SUBJECT: Exempting MHMR community centers from restraint of trade provisions.

COMMITTEE: Public Health — committee substitute recommended

VOTE: 5 ayes — Berlanga, Hirschi, Glaze, Maxey, Rodriguez

0 nays

4 absent — Coleman, Delisi, Janek, McDonald

WITNESSES: For — Betty Hardwick, Texas Council Risk Management Fund

Against — None

BACKGROUND: Part of the responsibilities of the Texas Department of Mental Health and Mental Retardation (TxMHMR) is to contract with community mental health and mental retardation centers (CMHMRCs) to help clients make a transition from an institution to residential life and to provide vocational training, home-based care and other services.

Texas has 35 such centers, which receive a yearly allocation of nearly \$300 million from TxMHMR as well as federal and local funds. The centers are classified by state law simultaneously as units of local government, agents of the state and public nonprofit entities.

Restraint of trade prohibitions, also known as antitrust laws, are set out in Chapter 15 of the Business and Commerce Code. These provisions are designed to prevent the creation of monopolies or any other combinations that might inhibit competition by allowing entities that would like to compete to sue for either damages or injunctive relief. Antitrust laws are based on the belief that competition is beneficial because it helps the market to determine prices for goods and services and forces competitors to try to improve their products. The state and its agencies generally are exempt from antitrust restrictions.

DIGEST: CSHB 553 would designate all functions performed by community centers as governmental and provide CMHMRCs the same exemption from restraint of trade provisions (Business and Commerce Code sec. 15.03) as other state departments and agencies. The bill also would specify that a community centers may perform only those functions defined in its center plan. CSHB 553 would only apply to conduct occurring after the effective date of the bill, September 1, 1995.

SUPPORTERS SAY: CMHMRCs are units of state government and should be treated as such under state law. Current law simultaneously considers local governmental units as agents of the state and public nonprofit entities. This dual designation creates confusion. Defining as governmental all of the actions within a center's plan, which must be approved by the TxMHMR board, would help alleviate confusion and allow centers to take advantage of other protections.

Designation of the activities at CMHMRCs as governmental would confer immunity protection from tort liability on officers, employees and volunteers. Specific language protecting these individuals was included in the bill as it was filed. That language was deleted in the committee substitute so that it would not conflict with similar provisions in HB 383 by Junell, part of the tort reform package.

The provision regarding the restraint of trade is designed to bring CMHMRCs in line with other state agencies. All state agencies, as well as the state itself, are exempted from the provisions prohibiting restraint of trade. Without such an exemption, any function of the state or state agencies, such as police and fire protection, the courts and regulatory agencies, would be subject to competition, which would create confusion about where authority lies. CMHMRCs logically should have the same status as other state agencies.

CMHMRCs also need protection from highly questionable lawsuits alleging restraint of trade. For instance, a private health center, Concho Residential Services, Inc., has filed a restraint of trade suit against the local CMHMRC in San Angelo, costing nearly \$300,000 and perhaps an additional \$200,000 to defend. While this money comes from the insurance pool fund into

which all CMHMRCs must pay, the state would still benefit by clearing up the language in the statute to resolve the issues involved.

There is no evidence to indicate that the state centers perform any worse than the private centers. The private centers merely claim they are losing money.

Under federal antitrust law, organizations that receive state and/or federal money, like the CMHMRCs, are exempted from antitrust suits. The current trend in antitrust law is to reshape state provisions to make them more like the federal provisions. This bill is a step in that direction.

HB 553 would work in tandem with other proposed legislation. No conflict or duplication exists between this bill and HB 2377 by Delisi, referred to House Public Health Committee, which would implement recommendations of the Texas Performance Review relating to conflicts of interest. TPR determined that there may be a conflict of interest in the referral and provider functions of CMHMRCs, and recommended setting up a separate authority board to administer the referral division completely separate from the care provider division. While HB 2377 would work to eliminate the possible conflicts, CMHMRCs still might be subjected to various suits until that procedure is fully in place.

Similarly, HB 1698 by Maxey, reported favorably from the House Human Services Committee, would not directly conflict with this bill. HB 1698 would require the referral division of a CMHMRC to provide a patient, or the patient's legal guardian, with a full range of care options, including private facilities. While HB 1698 would also help to eliminate possible conflicts, it would not save any money by stopping these expensive suits.

Charges that CMHMRCs should remain subject to restraint of trade provisions because administrative remedies through TxMHMR are inadequate should be addressed by other legislation that would rework those administrative procedures. All this bill purports to do is save these valuable providers of care to mentally ill and mentally retarded Texans a tremendous amount of unnecessary expense in defending frivolous litigation.

OPPONENTS
SAY:

This bill is an example of a particular special interest trying to exempt itself from reasonable antitrust provisions that others must follow. CMHMRCs are clearly not state agencies — TxMHMR contracts with them to provide services. These centers administer policy for an entire region as well as run a provider service. They are thus inherently subject to conflicts of interest when they refer patients to their own facilities.

Often the only recourse for private providers is antitrust law. The administrative procedures through TxMHMR are inadequate to fairly resolve these actions because TxMHMR itself supports the referral procedure as a way to let the agency retain full control over the system and curb private competition.

The TPR recommendations and proposals such as HB 2377 or HB 1698 are direct results of the known conflict of interest in this system of allowing CMHMRCs to refer patients to themselves. While CSHB 553 might not directly conflict with the other bills, it is clearly instituting a different policy. Competition for care providers should be encouraged, yet CSHB 553 would severely restrict competition by institutionalizing a formal monopoly structure for private centers.

NOTES:

The original version of HB 553 would have exempted officers, employees and volunteers of community centers from civil liability for acts performed within the scope of their duties. CSHB 553 removed this liability provision.

SB 467 by Moncrief, identical to HB 553, has been referred to the Senate Health and Human Services Committee.