TEXAS HOME SCHOOL COALITION

VIA HAND DELIVERY

June 15, 2009

The Honorable Rick Perry
GOVERNOR OF TEXAS
State Capitol
P.O. Box 12428
Austin, Texas 78711

Re: Request for Gubernatorial VETO of SB1440

Dear Governor Perry:

On behalf of the Texas Home School Coalition's more than 150,000 supporters across Texas; and on behalf of a broad coalition of national and statewide organizations as indicated below, including constitutional and board certified family law attorneys, we write you today, to urge you to VETO Senate Bill 1440.[1] This VETO request is also supported by SB 1440 House Sponsor, Rep. Jerry Madden:

> "I would not have take[n] any amendment to SB1440 if I thought it in any way endangered the original contents of the bill. We did not catch the fact the bill had changed significantly from the Senate passed version and that is our fault. As [] always I appreciate you and your work and **expect the bill to be vetoed**." [EMPHASIS ADDED]. June 13, 2009 e-mail to Tim Lambert.[2]

We respectfully request the VETO of SB 1440, as it:

1. Circumvents Constitutional Protections in the Fifth Circuit's *Gates v. TDPRS* decision.
2. Entices State Actors to Violate Clearly Established Law, Subjecting Them to Personal Liability.
3. Allows DFPS to Violate Parental Rights.
4. Removes the "Good Cause" Standard Currently in the Texas Family Code.
5. Authorizes Medical and Other Confidential Records to be Given to Untrained Investigators.
6. Contains Weakened Evidence Standards.
7. Grants Sweeping Powers to Investigators Without Notice or a Hearing.
8. Lacks Parental Protections for Execution of Orders.
9. Emergency/Imminent Danger Situations Are Not At Issue, Not Affected by Veto of SB 1440.

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1 Tex. S.B. 1440, 81st Leg., R.S. (2009) (By: Watson (Sp: Madden) ("Relating to orders and judgments rendered by associate judges in child support and child protection cases and to the investigation of child abuse and neglect.")).

2 Other Members of the Texas Legislature have expressed similar positions. "I am sending a letter to the Governor to urge him to veto SB 1440-all of us missed a slight of hand bad amendment slipped in last minute." Senator Dan Patrick on Twitter (http://twitter.com/DanPatrick/status/2135067392).

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For numerous reasons, which we detail below, SB1440 – if allowed to become law – will further erode parents' right to autonomy to raise children without the undue interference of government and will violate constitutional protections for children.[3] This bill unconstitutionally restricts rights of parents and children and violates clearly established law laid out in *Gates v. TDPRS*, 537 F.3d 404 (5th Cir. 2008)("However, now that we have clearly established the law in this area, we expect that TDPRS, law enforcement agencies, and their agents and employees will abide by these constitutional rules…), and other precedent. As such, the outcome of this bill, if signed, is that state actors will have no qualified immunity protections when they are sued individually for acting under this law in violation of *Gates*. In fact, a DFPS Memo issued immediately following the release of the *Gates* opinion makes clear the agency is aware of the perils of further unlawful intrusions into the private realm of the family.[4] So, the effect of SB 1440 is that it entices state employees to violate federal law and then be held personally liable in their individual capacity for such violation. Additionally, this law will be struck down as a violation of constitutional protections and be a costly drain on taxpayers and an unnecessary embarrassment for Texas. We trust you will recognize the inherent danger of this Bill, as you have made clear your own support of parental rights.[5]

"One of the first rights to be recognized as fundamental was 'the liberty of parents and guardians to direct the upbringing... of children under their control.'"[6] It has been reaffirmed throughout the ensuing decades, a constant rock amidst the ebb and flow of constitutional jurisprudence.[7] Furthermore, "[t]he

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3 "'It is cardinal … that the custody, care and nurture of the child reside first in the parents.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). *Troxel* also recognized that 'the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court [of the United States].' *Id*." *In Re Derzapf*, 219 S.W.3d 327, 331-33 (Tex. 2007) (per curiam). See, *State v. Karlen*, 589 N.W.2d 594, 602-03 (S.D. 1999) ("[I]t is a basic provision of American jurisprudence that a statutory provision never be allowed to trump a Constitutional right. 'The Constitution is the mother law. …Statutes must conform to the Constitution, not *vice versa*.'") (quoting *Beals v. Pickerel Lake Sanitary Dist.*, 578 N.W.2d 134, 142 (S.D. 1998) (Sabers, J., dissenting and alternatively concurring in result)). Constitutionally protected fundamental rights, such as the presumption that fit parents act in the best interest of their children, cannot be subordinated to state statutes governing statutory presumptions. "It is axiomatic that a statute is trumped by a constitutional right." *Ferrara v. United States*, 384 F.Supp.2d 384, 425 (D. Mass. 2005) (citing *Marbury v. Madison*, 5 U.S. 137, 138, (1803); *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

4 DFPS MEMO, dated August 22, 2008, "TO: All CPS Personnel; FROM: Carey Cockrell, Commissioner and Joyce James, Assistant Commissioner, CPS, through Gerry Williams, General Counsel; SUBJECT: URGENT LEGAL ADVISORY FOR INVESTIGATIONS."

5 See, *e.g.*, transcript of the Governor's remarks, Parental Rights Rally, April 7, 2009.

6 Michael J. Minerva, Jr., *Grandparent Visitation: The Parental Privacy Right to Raise their "Bundle of Joy,"* 18 FLA. ST. U. L. REV. 533, 541 (1991), quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

7 *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Griswold v. Connecticut*, 381 U.S. 479, 495-497 (Goldberg, J., concurring) (1965); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977);

fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children."[8]

Senate Bill 1440 is an obvious effort to circumvent the reasonable protections provided parents in the Fifth Circuit's *Gates v. TDPRS* decision.[9] SB 1064 contains the flawed language that was amended onto SB 1440 on the last days of the 81st Texas Legislative Regular Session. A purported TDPRS memo on the bill – a copy of which we have obtained – confirms this concern, and attempts to equate the bill with Order in Aid of Investigation with a criminal search warrant. **EXHIBIT "A"**. However, as shown below, this Order provides DFPS with all the powers (and then some) of a search warrant without the protections (*i.e.*, motion to suppress) provided against the same. As written, this bill gives DFPS agents erroneous statutory authority to go back to the abusive business as usual that prompted the *Gates* case.

SUMMARY OF PROPOSED BILL

SB1440 states that a court may provide an order to assist an investigation, interview, or examination by granting Department of Family & Protective Services (DFPS) the following, if the parent or caregiver does not consent:

1. admission to the home, school or any place where the subject child may be;
2. transport of the child for purposes relating to an interview or investigation;
3. release of the child's prior medical, psychological, or psychiatric records;
4. medical, psychological, or psychiatric examination of the child.

Before the court may so order, DFPS must present an application supported by an affidavit that:

1. is executed by an investigator or authorized representative of the department; and
2. states facts sufficient to lead a person of ordinary prudence and caution to believe that:
(1) based on information available, a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect;
(2) the requested order is necessary to aid in the investigation; and
(3) there is a fair probability that allegations of abuse or neglect will be sustained if the order is issued and executed.

The court may grant the order, without prior notice or a hearing if it finds that the affidavit is "sufficient."

Santosky v. Kramer, 455 U.S. 745, 753 (1982); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-620 (1984); *id.* at 631 (O'Connor, J., concurring); *Bowers v. Hardwick*, 478 U.S. 186, 190-192 (1986); *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990).

8 *Pierce v. Society of Sisters*, *supra*, 268 U.S. at 535.

9 537 F.3d 404 (2008).

CONCERNS REGARDING SB 1440:

SB 1440 CIRCUMVENTS CONSTITUTIONAL PROTECTIONS & CLEARLY ESTABLISHED LAW IN THE FIFTH CIRCUIT'S *Gates v. TDPRS* DECISION.

SB 1440 should be vetoed because it violates constitutional protections, clearly established law and the decision in *Gates v. TDPRS*, 537 F.3d 404 (5th Cir. 2008). For example, it authorizes a state or government actor/agency to "transport" (Section 4(b)) a child without prior notice, without a court order, without parental consent with little more than an anonymous tip, under the dangerous standard of "based on information available" (Section 4(c-2)(1)). Such a transport of a child is considered a seizure by the Fifth Circuit ([a] person is "seized" under the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"—holding that removing a child from public school for a TDPRS interview is a seizure)(internal quotations omitted). SB 1440 (Section 4 (c-2)(1)) allows a "based on information available" standard to transport a child for an interview, examination or investigation. Such a broad standard could be met by a simple anonymous tip. In *Gates,* in regards to transporting a child from school to a central location for an interview without a court order, the requirement by the Fifth Circuit is a showing that (1) an anonymous tip must be "independently corroborated by government officials" or "shows significant indicia of reliability" or (2) "reasonable belief, based on first hand observations by a TDPRS employee, that the child has been abused and probably will suffer further abuse upon his return home at the end of the school day" such as "visual inspection of injuries that can be seen without removal of the child's clothing." *Id*. at 433 ('Just as "an anonymous tip, standing alone, is rarely sufficient to provide probable cause for a warrant," *Kohler v. Englade,* 470 F.3d 1104, 1110 (5th Cir. 2006), an anonymous tip regarding child abuse will rarely be sufficient to justify the seizure of a child'"). SB 1440 contains no such firsthand knowledge or corroboration by the government actor and thus is unconstitutional and fails to meet the clearly established standards set out in *Gates*.

SB 1440 ENTICES STATE ACTORS TO VIOLATE CLEARLY ESTABLISHED FEDERAL LAW, SUBJECTING THEM TO PERSONAL LIABILITY WITHOUT QUALIFIED IMMUNITY PROTECTION.

Gates laid out clearly established law in regards to constitutional protections for children and parents and any such violation will find no qualified immunity protection for state actors who will be subjecting themselves to personal liability and the state to costly litigation. The *Gates* case also makes it very clear that the courts should be involved in the process early. The intent of SB 1440 is to create numerous ways to avoid the courts, in direct opposition to the mandate by the Fifth Circuit.

> "Although we are affirming summary judgment against the Gateses, we are not necessarily endorsing all of the practices of TDPRS and Fort Bend as carried out in this case. Affirmance is required because the law in this area was not clearly established, and the government's interest in stopping child abuse, along with the doctrine of qualified immunity, tips the balance in favor of TDPRS, Fort Bend, and all of the individual defendants. However, now that we have clearly established the law in this area, we expect that TDPRS, law enforcement agencies, and their agents and employees will abide by these constitutional rules and seek to involve the state courts, who act as neutral magistrates in these complicated matters, as early in the process as is practicable. In that way, the government may ensure that everyone's interests are considered, and the least amount of harm will come to the children the government seeks to protect, as well as to their parents."
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> *Id*. at 438-9.

SB 1440 ALLOWS DFPS TO VIOLATE PARENTAL RIGHTS.

DFPS policy and procedure for investigation of allegations of abuse/neglect requires that an investigator enter and examine the home as well as interview and examine each child separately and without the parent or other family member present. Since many families have become aware of numerous examples of DFPS abuses (the *Gates* and *FLDS* cases are some of the most recent and well known) causing much harm to innocent families especially the children themselves, they decide not to not waive their constitutional rights by not voluntarily inviting DFPS investigators into their homes and giving them access to their children. This is particularly true of home school families whose children are not available to DFPS interview/examination without parental knowledge or consent as are children in traditional private and public schools.

It is not uncommon therefore, for parents who face investigations to ask for the specific allegations made against them and to offer alternative methods of cooperation. However, if DFPS has not already interviewed/examined the children the policy is to refuse to tell parents the allegations and demand entry to the home and access to the children threatening court action if they fail to do so.

Parents may offer to cooperate by allowing a third party to interview or examine their children, such as a family physician or other professional and give DFPS a report of their finding to assist with the investigation. While the present statute allows this, for non-serious allegations, DFPS policy, as is the experience of many family lawyers, is to refuse such a request and demand entry to the home and access to the children regardless of how trivial the allegation might be. In addition, DFPS questions asked of children and family members are a long list of questions that very often do not have any relationship to the allegations but are designed as a "fishing expedition" for any excuse to find something worthy of

accusing the parents of abuse or neglect. DFPS most often responds to offers of alternative cooperation by reporting the parent as uncooperative with an investigation and pursuing an *ex parte* hearing to prevent the judge from hearing the parent's offer of cooperation. In fact, this often happens even when parents are represented by legal counsel. The change in the law establishing *ex parte* hearings in statue will codify this practice that undermines innocent parents' constitutional rights as parents to protect their children.

These concerns and others are addressed below in greater detail.

"GOOD CAUSE SHOWN" STANDARD IS REMOVED IN SB 1440.

There are major practical and procedural concerns regarding this bill as written. First is that the "for good cause shown" standard is stricken, replaced by a "sufficient affidavit" standard. Texas Family Code Section 261.302 (Conduct of Investigation) states that an investigation *MAY* include a visit to the child's home, etc. [EMPHASIS ADDED]. If a parent refuses entry, DFPS must show the court good cause why it needs entry into the home. The "sufficient" standard does not require the request by DFPS to relate in any way to an allegation. This will allow DFPS to go on a fishing expedition because investigating the home makes the order "necessary to aid in the investigation."

DFPS takes an allegation as a mere starting point, but DFPS routinely uses the allegation, credible or not, as an excuse to demand a full investigation of the family's private life. How much food is in the pantry? How do your parents discipline you? Are there any guns in the house? The questions can be completely unrelated to an initial allegation but DFPS demands answers to these unwarranted question and many more – many of which can only be answered by invading the family's home.

Any resistance by the family to this fishing expedition gets them labeled "uncooperative" by the DFPS investigator and they are threatened with court action. SB1440 will codify and legitimize this coercive behavior. Moreover, the bill does not provide any recourse to an order obtained by an insufficient affidavit as is provided in Criminal Procedure and law such as motions to suppress. Therefore, to compare the order in aid of investigation to a search warrant falls short.

In all other areas of the law, victims are protected from trauma. This basic value should not be sacrificed for expediency.

MEDICAL AND OTHER PROFESSIONAL RECORDS GIVEN TO UNTRAINED INVESTIGATORS UNDER SB 1440.

Second, release of records to DFPS agents who are not trained to read them can be disastrous. The reading and interpretation of medical, psychological and psychiatric records requires special knowledge that DFPS investigators do not possess. Even practitioners with whom we have consulted, who review such records on a regular basis, never rely on their own understanding of what they are reading. Rather, they always rely on an interview of the doctor who created the records. For this reason, many

practitioners never allow DFPS access to client records. Instead, they allow DFPS investigators access to interview the professionals who created the records, which is sufficient for their investigative needs.

On more than one occasion, we have learned of DFPS investigators finding "evidence" of abuse from medical records where the doctor who created those records found no such abuse. For example, a DFPS investigator in one specific case improperly interpreted the mere mention of bruising on a newborn child. Failing to corroborate her suspicions with the medical practitioner or completing a full reading of the chart, she made formal allegations that the parents had injured their child. The doctor pointed out, however, that the records also showed – on a subsequent page – that the child had anemia and the bruising was caused by normal handling.

SB 1440 ALLOWS WEAKENED EVIDENCE STANDARDS.

The affidavit required by SB1440 may be executed by an investigator "or authorized representative of the department." Thus, the affidavit is not even required to be from a person who has any knowledge of the case.

Further, the affidavit is to be "based on information available"; not credible evidence, and not even corroborated allegations. A statement from the investigator is not even required, just "information available." In other words, the affidavit is to be based on the allegations called in to DFPS. These allegations can be anonymous, made by a well-meaning person who has no personal knowledge or clear understanding; or by someone using DFPS to settle a grudge against a parent; which happens too often.

Our concern is that if SB1440 becomes law, these affidavits will consist of nothing more than a "cut and paste" of the allegations, followed by a verbatim recitation of (c-2) (1), (2) and (3), and signed by – as permitted by the Bill – anyone who works for DFPS.

DFPS has stated that the Order in Aid of Investigation is no different than a criminal search warrant; and that it is based on a probable cause standard. However, the words "probable cause" appear nowhere in SB 1440. Also, case law is clear that a search warrant cannot be issued based on evidence that has not been corroborated by a police officer. The courts use a "totality of the circumstances" test to determine whether probable cause exists. An informer must assert personal knowledge that an illegal act has occurred. Otherwise, the police must do their own investigation to corroborate the information given them. See, *e.g.*, *Rojas v. State*, 797 S.W.2d 41 (Tex.Cr.App. (1990)). SB1440 requires no such corroboration. In fact, the standard it adopts appears to negate the basic requirements that must be met by a trained, licensed peace officer.

As the most persons are aware, the public is encouraged by various agencies in public service announcements to call DFPS if you even ***think*** abuse or neglect ***may*** be occurring. They are told to "Trust

your instincts." See, *e.g.*, the commercial run by the AdCouncil, which can still be seen on YouTube (search "*child abuse prevention – coffee shop*").

We know personally of one example where a DFPS investigation of a family was based on an allegation that the parents were starving their children. The basis? One of the children stated, around lunchtime in a public library, "Can we go now? I'm starving." This story might have been amusing had it not taken six months and thousands in attorney fees to end the matter. Countless stories just as dangerous and heartbreaking make it imperative that parents have the ability to resist unwarranted investigation methods. This bill severely limits that ability.

With this bill, DFPS investigators will be able to obtain entry into a family's home, etc. based on nothing more than the mere suspicion (or malice) of an anonymous stranger.

SB 1440 GRANTS SWEEPING POWERS TO INVESTIGATORS WITHOUT NOTICE OR HEARING.

Finally, and most troublesome, is that an order giving such sweeping power to a government agent, including the power to invade a private citizen's home, may be granted without prior notice or a contested hearing. Without such a hearing, the parents and their attorney have no ability to provide the court with the true facts.

The DFPS memo points out, correctly, that the Texas Family Code is silent as to whether the court may issue an Order in Aid of Investigation *ex parte,* and that *some* courts interpret this as giving them the right to issue *ex parte* orders. **EXHIBIT "A" at 1**. This bill would codify the practice and provide cover to those judges who ignore the Fifth and Fourteenth Amendments, which provide that a person shall not be deprived of any interest in liberty or property without due process of law.

If uniformity regarding the nature of hearings is desired, such uniformity should defer to the rights of the family and the recognition that the courts have long held parental rights to be one of the most fundamental constitutional rights. Moreover, it should be recognized that children are not "evidence" in the sense that contraband is evidence. A contested hearing would acknowledge this fact and would protect children against unwarranted and intrusive interrogations and examinations. Under no circumstances can such trauma be justified in cases where the child has not been abused or neglected by his parents. The codification of *ex parte* hearings based upon insufficient standards simply does not prevent or mitigate collateral damage to innocent parents and their families. At the very least, a contested hearing which results in access to the child can set appropriate conditions regarding how the child is accessed in order to minimize the natural fear and trauma a child would suffer by being taken by strangers without the knowledge of parents.

The DFPS memo argues that *ex parte* orders are necessary because such notice "would provide a parent … the opportunity to destroy evidence," etc. This argument assumes the guilt of the parent. We

must respectfully disagree. First, the order unwisely assumes that the child is "evidence". The child will not be destroyed, and if a judge, after a contested hearing, decides that the child should be interviewed, expert techniques can be employed to elicit evidence. Also, medical examinations can determine whether the child has been subjected to long term abuse even after time is taken for a fair and contested hearing. Second, parents have no access to original medical records held by medical practitioners and cannot destroy them. Furthermore, because medical professionals have a duty to report abuse, DFPS already has access to the actual medical professionals. A process which disregards the rights of parents and the emotional impact upon children is not needed in order to get medical information.

Finally, if the memo is referring to tangible evidence in the home-- other than the child—rather than utilizing an order in aid of investigation, a criminal investigation should ensue which includes all of the protections to the accused which criminal law provides and this bill does not. In that vein, there are already procedures in place to obtain a legitimate *ex parte* search warrant, via the criminal justice system. Texas Family Code §261.301(f) states that "an investigation of a report to [DFPS] that alleges that a child has been or may be the victim of conduct that constitutes a criminal offense that poses an immediate risk of physical or sexual abuse of a child that could result in the death of or serious harm to the child ***shall*** be conducted jointly by a peace officer … from the appropriate local law enforcement agency…. [EMPHASIS ADDED].

Without a hearing, no DFPS agent is required to present herself/himself to the court. Further, it appears that the bill does not even require that she/he provide the court with a competent affidavit. It is basic law that an affidavit must be made on the affiant's personal knowledge and must state that the facts in it are true. It must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness. See, for example, *Simmons v. Moore*, 774 S.W.2d 711, 715 (Tex.App.—El Paso 1989) and Texas Government Code §312.011. This bill negates that standard by replacing the "personal knowledge" standard with a "based on information available" standard. As shown above, there is no requirement that the available information be corroborated in any way.

Such an order is a violation of the U.S. Constitution's Fourth Amendment protection against unreasonable search and seizure. On its face, granting a government agent access to a private citizen's home based on allegations made in an anonymous phone call and without corroboration of those allegations, likely violates that amendment.

This bill would give DFPS the ability to obtain *ex parte* orders, just like the law enforcement, without the constitutional constraints that law enforcement abides by. If DFPS wants the ability to obtain *ex parte* warrants, it should follow the law already in place by asking law enforcement to obtain one.

SB 1440 LACKS PARENTAL PROTECTIONS FOR EXECUTION OF ORDER.

Another issue of concern is that the execution of the order had no protections for parents. The pertinent language is subsection (g) where the Department "[a]s soon as practicable after executing the order or attempting to execute the order, as applicable, the department shall file with the clerk of the court that rendered the order a written report stating: (1) the facts surrounding the execution...; (2) the reasons why the department was unable to execute the order."

No opportunity is afforded in this bill for parents to refute claims made regarding lack of cooperation by the parents or to explain circumstances from their point of view. There are no standards or provisions provided or referred that exist in other parts of the law (such as regarding execution of warrants or citations) regarding how the order will be executed. Further, there are no protections for parents or consequences for unacceptable behavior during the execution. For instance, one attorney contributing to this analysis had a case in which a case worker served an Affidavit of Relinquishment on the mother claiming that if the mother signed it, the child could be adopted by a relative. Upon relinquishment, DFPS refused to allow adoption by the relative. Fortunately, and unlike SB 1440, the mother in this case was able to obtain relief through the normal appellate process. Orders to Aid in investigation under SB 1440 are not subject to judicial review.

This is an important point to parents because this written report will may be later used as evidence against the parents to prove lack of cooperation or interference in the investigation. These kinds of claims can be used to delay family reunification, even when it is apparent that such reunification should be immediately effected.

EMERGENCY/IMMEDIATE DANGER SITUATIONS ARE NOT AT ISSUE, AND NOT AFFECTED BY VETO OF SB 1440.

Section 262.101 of the Texas Family Code allows for swift action for situations where a child is in "immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child's welfare." SB 1440 covers Chapter 261, of the Texas Family Code, not Chapter 262, and therefore, the VETO of SB 1440 will have no impact on the current and continued ability of DFPS to take immediate action without a court order and without notice in such an emergency situation. It must be noted though, that even in such an emergency situation, Section 262.101 requires that such action "must be supported by an affidavit sworn to by a person with personal knowledge and stating facts sufficient to satisfy a person of ordinary prudence," a standard that is absent from SB 1440.

SB 1064, which contains the language amended onto SB 1440, states in its bill analysis that the purpose of this bill is to "expedite the investigative process." **EXHIBIT "B"**. Since Chapter 262 addresses

situations where time is of the essence, expediting the process under Chapter 261 will surely have the unnecessary effect of violating the constitutional rights of parents and children.

SUMMARY

As shown above, Senate Bill 1440 seriously undermines parents' ability to assert their legal rights against unwarranted intrusions by DFPS investigators during an abuse or neglect investigation. This bill was written and finally passed without the input from parent advocates, homeschoolers or groups whose primary focus is civil liberty and the integrity of the justice system. Thus, the concerns of the groups in opposition to this bill were not addressed.

Parental rights are a fundamental, constitutionally protected right of all citizens. These rights are not T-shirts; nor are they issued in Small, Medium or Large. They cannot be abrogated without due process of law; and SB1440 will foreclose on these rights, thus subjecting the Bill – were it enacted into law – to an almost certain facial constitutional challenge in the courts. For these reasons, we strongly urge and respectfully request that you VETO SB 1440. We also urge that you include the defense, protection and restoration of parental rights in your Call of the Legislature during the upcoming special session.

On behalf of our Members, and our broad coalition, I thank you for your thoughtful consideration of this matter; and welcome your call anytime. All the while, and with my kindest personal regards, and abiding esteem for your service to the State of Texas, I am –

Most Sincerely Yours,

Tim Lambert

TL/ss/js

enclosure

cc: VIA ELECTRONIC MAIL TO;
OFFICE OF THE GOVERNOR
The Honorable Ken Armbrister
Ms. Brandy Marty
Ms. Katherine Yoder
Ms. Sarah Floerke

We proudly join in endorsing the foregoing letter (*confirmed at time of submission*).

Cathie Adams
President
Texas Eagle Forum
Republican National Committeewoman

Kelly Shackelford
Free Market Foundation
Liberty Legal Institute

Elizabeth Graham
Texas Right to Life

Dr. Steven Hotze, M.D.

Lee Spiller
Executive Director
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Debra Medina
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David Cary
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John Bush
Texans for Accountable Government

CITIZENS COMMISSION ON HUMAN RIGHTS CCHR Established 1969

FREE MARKET foundation

HSLDA Advocates for homeschooling

Eagle Forum

Liberty Republican Liberty Caucus Texas

Campaign for Liberty

LIBERTY LEGAL INSTITUTE

Texans for Accountable Government

EXHIBIT “A”

ORDERS IN AID OF INVESTIGATION – SB 1064/ SB 1440

BACKGROUND

SB 1064, which was added to SB 1440 before enrollment, amends the process for obtaining "Orders in Aid of Investigation" under Family Code Section 261.303. Under current law, Sections 261.302 and 261.303 collectively provide that a person, including a parent, may not interfere with an investigation of child abuse or neglect conducted by the department. Typically, CPS obtains voluntary cooperation from parents and others in allowing access to the home, the child, or to relevant records in order to conduct it's child abuse and neglect investigations. However, if a person refuses to cooperate with the investigation, the department may seek an Order in Aid of Investigation from a family law court compelling the person to allow entry into the home, access to records, or the examination of a child.

The current Family Code provisions do not specify whether the court may issue an Order in Aid of Investigation "*ex parte*" (that is, without prior notice to the person and a hearing), or whether the court must first serve notice on the person who has denied the requested access and set the matter for a hearing. Some courts around the state have always interpreted Section 261.303 to allow for an *ex parte* order; others have not. A requirement to serve notice and schedule a hearing will typically delay an order by at least 7 – 10 days, and often longer. Moreover, once a parent becomes aware that CPS is investigating an allegation of abuse or neglect, many will evade the service of notice process. In sum, the current process for obtaining an Order in Aid of Investigation is inconsistent around the state and, in jurisdictions where prior notice and a hearing are required, the process is infrequently used because it is not a useful investigatory tool.

WHY SB 1064/ SB 1440 IS NEEDED

The impetus for the amendments to the Orders in Aid of Investigation process came from the influential ruling last year by the 5th Circuit Court of Appeals in the *Gates* case. As in many other circuits around the country that have interpreted the application of the Fourth Amendment to the U.S. Constitution in the context of child welfare investigations, the *Gates* court clarified that in order to satisfy the Fourth Amendment, before CPS may enter a child's home or transport a child from a public school to a Children's Advocacy Center for a forensic interview, the department must have consent, exigent circumstances, or the civil equivalent of a criminal warrant. SB 1064/SB 1440 sets forth a process that is the civil equivalent to a criminal search or seizure warrant.

THE PROCESS FOR OBTAINING AN ORDER IN AID OF INVESTIGATION

As amended by SB 1064/SB 1440, Section 261.303 now sets forth a clear *ex parte* process for obtaining Orders in Aid of Investigation. The new provisions were drafted with the assistance from the Supreme Court's Permanent Judicial Commission on Children and Families and a number of the state's most prominent CPS judges. The process is nearly identical to the process for obtaining a criminal warrant from a court magistrate. As with the issuance of a criminal

warrant, the order may be issued *ex parte* by a district court judge or associate court judge, based upon the functional equivalent of a "probable cause" affidavit from the investigating caseworker. More specifically, before the court may issue an *ex parte* Order in Aid of Investigation, the department must present an application and supporting affidavit that is sufficient to satisfy a person of "ordinary prudence and caution"[10] that:

(1) based on information available, a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect;
(2) the requested order is necessary to aid in the investigation; and
(3) there is a fair probability that allegations of abuse or neglect will be sustained if the order is issued and executed.

Should the court not be satisfied that these criteria are met, the court may simply deny the order, or set the matter for notice and hearing if the court is satisfied that (1) there is no immediate risk to the safety of the child, and (2) notice and a hearing are required to determine whether the requested access to persons, records, or places or transport of the child is necessary to aid in the investigation. Just as with a criminal warrant, once an Order in Aid of Investigation is issued, the department must file the equivalent of a "return" with the court indicating whether or not the order was executed and, if so, what the requested access to the home, child or records revealed. The entire process remains confidential and is not a matter of public record, thereby protecting the privacy of the child and family unless and until a child is removed from the parents by the department and placed in the state's custody. Should that occur, the department must include the records relating to the Order in Aid of Investigation with the department's Suit Affecting the Parent-Child Relationship.

If an Order in Aid of Investigation authorizes the department to gain access to a child's medical records, the department must timely notify the child's parents that the records were obtained. The department is also obliged under current law to notify a parent whenever an abuse neglect investigation is being conducted or the department transports a child from school for an interview.

WHAT ARE THE BENEFITS OF SB 1064/SB 1440

Although the vast majority of parents and others who have a duty to cooperate with a child abuse and neglect investigation do so voluntarily, unfortunately some do not. Just as with a law enforcement investigation, when voluntary cooperation cannot be obtained, it is vitally important that the department charged with protection of a child from an alleged abuser has prompt access to the child to ensure the child's safety and the integrity of the investigation. Just as with a criminal investigation, prior notice and a hearing are not required to obtain a "civil warrant," nor should they be. Prior notice and a hearing would provide a parent who has abused or neglected a child the opportunity to destroy evidence or to apply coercive pressure on the child to recant an outcry or be fearful of telling the truth to the CPS investigator. Prior notice will also provide a parent

[10] The "ordinary and prudent person" standard is the same standard that has long been required for a court to issue an emergency order removing a child into state custody. According to the editor's notes in the Sampson and Tindall's annotated Family Code, this standard is the legal equivalent of a "probable cause" standard, but was chosen by the drafters of the Family Code to avoid the criminal connotations associated with the "probable cause" language. The judges who assisted the drafters of SB 1064 recommended use of the same "ordinary and prudent person" standard for purposes of the Orders in Aid of Investigation statute because it is a standard with which the family courts are well accustomed. Note that this standard is considerably less vague, and therefore at least as stringent if not more so, than the current "good cause" standard for issuance of an Order in Aid of Investigation under Family Code Section 261.303.

who is ill-motives with the opportunity to further harm their child as well as an opportunity to flee or otherwise evade the department's attempts to conduct its investigation.

It is equally important that CPS caseworkers conduct their investigations in full compliance with the Fourth Amendment and the new standards articulated by the 5th Circuit Court of Appeals in the *Gates* ruling. When consent for access cannot be obtained and exigent circumstances do not exist, the caseworker must have a process that satisfies the Fourth Amendment warrant requirements in order to conduct a timely and thorough investigation. SB 1064/1440 provides this vital tool, and will ensure that the department can meet its dual obligations of protecting children while simultaneously upholding the constitutional rights of families.

EXHIBIT “B”

BILL ANALYSIS

C.S.S.B. 1064
By: Watson
Human Services
Committee Report (Substituted)

BACKGROUND AND PURPOSE

At times Department of Family and Protective Services (DFPS) investigations into reports of child abuse or neglect are hampered by the refusal of parents and others to provide needed information or access to the child. Texas law allows DFPS to obtain a court order to access the needed information or the child, but the process for obtaining a court order is not clearly specified.

The lack of specificity in obtaining and issuing a court order often slows timely investigation. When good cause is shown, the law allows for a child to be interviewed and for the release of information or medical or mental examination records. However, "good cause shown" is not defined in the statute and there is little uniformity in how courts interpret the phrase. And some courts issue orders ex parte while others do not. An ex parte order is an order decided by a judge without requiring all parties to be present.

C.S.S.B. 1064 seeks to expedite the investigative process while establishing a clear judicial process for obtaining court orders that aid in abuse and neglect investigations.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.S.B. 1064 amends the Family Code to clarify that a court is authorized to render an order to assist DFPS in an investigation of a report of child abuse or neglect. The bill clarifies that if consent to transport a child for purposes relating to an interview or investigation cannot be obtained, the court having family law jurisdiction, including any associate judge designated by the court, on presentation of an application supported by an affidavit executed by an investigator or authorized representative of DFPS and finding that the affidavit is sufficient and without prior notice or a hearing, is authorized to order transport of the child, entrance to any place where the child may be, or both for an interview, examination, and investigation. The bill removes the clarification that the court is authorized to order the parent, the person responsible for the care of the children, or the person in charge of any place where the child may be to allow entrance for an interview, examination, and investigation for good cause shown to the court. The bill makes a conforming change to clarify that DFPS is authorized to seek a court order without filing suit in aid of such an investigation.

C.S.S.B. 1064 clarifies that if a parent or person responsible for the child's care does not consent to release of the child's prior medical, psychological, or psychiatric records, or to a medical, psychological, or psychiatric examination of the child that is requested by DFPS or a

designated agency the court having family law jurisdiction, including any associate judge designated by the court, on presentation of an application supported by an affidavit executed by an investigator or authorized representative of DFPS and finding that the affidavit is sufficient and without prior notice or a hearing, is authorized to order the records to be released or the examination to be made at the times and places designated by the court. The bill removes the specification that the court is authorized to order the records to be released or the examinations to be made for good cause shown.

C.S.S.B. 1064 authorizes the court having family law jurisdiction, including any associate judge designated by the court, on presentation of an application supported by an affidavit executed by an investigator or authorized representative of DFPS, if a person having possession of records relating to a child that are relevant to an investigation does not consent to the release of the records on the request of DFPS or a designated agency, on finding that the affidavit is sufficient and without prior notice or a hearing, to order the records to be released at the time and place designated by the court. The bill requires an application for a court order in aid of an investigation, filed under its provisions to be accompanied by an affidavit executed by an investigator or authorized representative of DFPS that states facts sufficient to lead a person of ordinary prudence and caution to believe that, based on information available, a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect; the requested order is necessary to aid in the investigation; and there is a fair probability that allegations of abuse or neglect will be sustained if the order is issued and executed. The bill authorizes an application and supporting affidavit used to obtain a court order in aid of an investigation of a report of child abuse or neglect to be filed on any day, including Sunday.

C.S.S.B. 1064 authorizes a court to designate an associate judge to render an order in aid of an investigation under these provisions. The bill establishes that an order rendered by an associate judge is immediately effective without the ratification or signature of the court making the designation. The bill requires DFPS, as soon as practicable after executing the order or attempting to execute the order, as applicable, to file with the clerk of the court that rendered the order a written report stating the facts surrounding the execution of the order, including the date and time the order was executed and the name of the investigator or authorized representative executing the order or the reasons why DFPS was unable to execute the order. The bill requires a court issuing an order in aid of an investigation to keep a record of all the proceedings before the court, including the written report filed by DFPS relating to the execution of the order. The bill makes the record of proceedings, including any application and supporting affidavit presented to the court and any report regarding the execution of an order required to be filed with the court, confidential and authorizes the disclosure of such records only under a suit filed by DFPS to protect the health and safety of a child or as provided by provisions of law regarding confidentiality and disclosure of information in an investigation of child abuse or neglect.

C.S.S.B. 1064 requires DFPS, if filing a suit to protect the health and safety of a child, to include with its original petition a copy of the record of all the proceedings before the court, including an application and supporting affidavit for an order in aid of an investigation and any report relating to such an order. The bill requires DFPS, as soon as practicable after obtaining access to records of a child under a court order, to notify the child's parents or another person with legal custody of the child that DFPS has obtained the records. The bill establishes that access to a confidential record under investigation provisions does not constitute a waiver of confidentiality. The bill establishes that provisions relating to interference with an investigation of a report of child abuse or neglect do not prevent a court from requiring notice and a hearing before issuance of an order in aid of an investigation if the court determines that there is no immediate risk to the safety of the child and notice and a hearing are required to determine whether the requested access to persons, records, or places or to transport the child is necessary to aid in the investigation. The bill establishes that a court's denial of a request for an ex parte order does not prevent the issuance of a criminal warrant.

EFFECTIVE DATE

On passage, or, if the act does not receive the necessary vote, the act takes effect September 1, 2009.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.S.B. 1064 differs from the original by authorizing a court to render an order to assist the Department of Family and Protective Services (DFPS) in an investigation of a report of child abuse or neglect, rather than authorizing a court to enforce the right of DFPS to conduct such an investigation as in the original. The substitute differs from the original by authorizing a court having family law jurisdiction to render an order in aid of an investigation on presentation of an application supported by an affidavit executed by an investigator or authorized representative of DFPS, rather than requiring the court to issue such an order on presentation of the affidavit. The substitute differs from the original by making conforming changes relating to the filing by DFPS of an application supported by the affidavit for a court order and the rendering of such an order by the court after a finding that the affidavit is sufficient. The substitute differs from the original by omitting reference to an agency or entity having possession of records relating to a child that are relevant to an investigation in provisions authorizing a court order for the release of those records because the agency or entity does not consent to the release on the request of DFPS or designated agency.

C.S.S.B. 1064 differs from the original by adding to the facts that an affidavit must state the fact that there is a fair probability that allegations of abuse or neglect will be sustained if the order is issued and executed. The substitute omits a provision included in the original establishing that an affidavit used to obtain a court order in aid of investigation is not a pleading, and may not be deemed a pleading, for purposes of the Texas Rules of Civil Procedure and adds a provision not in the original authorizing an application and supporting affidavit used to obtain such a court order to be filed on any day, including Sunday.

C.S.S.B. 1064 differs from the original by requiring DFPS, as soon as practicable after executing an order or attempting to execute the order, as applicable, to file with the clerk of the court that rendered the order a written report stating the facts surrounding the execution of the order or the reasons why DFPS was unable to execute the order and making related conforming changes, whereas the original requires an investigator or authorized representative executing an order issued under these provisions to promptly file with the court that issued the order a written report stating whether access was granted, an interview was conducted, or other action was taken in accordance with the order.

C.S.S.B. 1064 omits a provision included in the original requiring a court issuing an order in aid of an investigation to certify and deliver the record to the clerk of the court accompanied by all the original papers relating to the proceedings. The substitute differs from the original by clarifying that the record of proceedings in addition to being confidential under general provisions regarding confidentiality and disclosure of information in an investigation of a report of child abuse or neglect is confidential and may not be disclosed if DFPS files a suit to protect the health and safety of a child. The substitute differs from the original by changing what is required to be included by DFPS with an original petition for a suit to protect the health and safety of a child from any prelitigation affidavit, order, or report relating to an order in aid of investigation as in the original, to a copy of the record of all the proceedings before the court under investigations provisions, including an application and supporting affidavit for an order in aid of an investigation and any report relating to such an order.

C.S.S.B. 1064 differs from the original by adding to the conditions that may determine if a court

requires notice and a hearing before issuing an order in aid of an investigation a determination that there is no immediate risk to the safety of the child and by adding a clarification to the condition that a determination based on whether the requested access to persons, records, or places is granted also include whether transport of the child is necessary to aid in the investigation. The substitute adds a provision not included in the original establishing that a court's denial of a request for an ex parte order under provisions regarding court orders and interference with an investigation of a report of child abuse or neglect does not prevent the issuance of a criminal warrant.

C.S.S.B. 1064 differs from the original in nonsubstantive ways by conforming to certain bill drafting conventions and making clarifying, technical, and conforming changes.