Privatization: The Decision is not Easy

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Abstract

Privatization is the process of transferring productive operations and assets from the public sector to the private sector. It is much more than selling an enterprise to the highest bidder, as it includes contracting, leasing, private sector financing of infrastructure or objects and liquidation, as well as other means of moving operations to the private sector. This research will look at the legal obligations, fiscal concerns, liability issues and administrative controls with regard to medical care for inmates within jail facilities. The appropriate privatization path depends on the goals of the agency, as well as the economical and political context of the governing organization.

Introduction

A new approach is needed to guide the decision making process before public funds are handed over to the private sector. Correctional leaders should strongly consider all options and services at their disposal before relinquishing responsibility of medical care for inmates. Although privatization is an option, consideration should be given to public managed care. It is not useful to raise questions or concerns about privatization without applying those same questions and concerns to publicly-operated jail medical facilities. For any problems, questions, or concerns to be argued for or against privatization, it must be shown that they apply to private and public facilities.

In the past, delivery of health services to inmates was relatively simple. A physician, physician's assistant or nurse held sick call several times a week. If an inmate was sick or needed medical attention, they would be treated in-house or transported to a local hospital for treatment.

The standard of "deliberate indifference" was brought to light with a Supreme Court decision (Estell v. Gamble, 1976). This marked the beginning of the courts' intervention in the administration of prisons and jails. Deliberate indifference to serious medical needs falls under the Fourteenth Amendment's Due Process Clause, stating "pretrial detainees are entitled to the same degree of protection against denial of medical care as that afforded to convicted inmates under the Eighth Amendment" (Frohader v Wayne, 1992).

In 1985, the Pinellas County Jail awarded their first health care delivery contract to Szabo Corporation, breaking the long held tradition of publicly-operated health care. Since that time, a debate has ensued regarding which type of service (private or public program) has the best overall service and is the most responsive to the public's demand for responsibility and accountability. The impetus for privatization comes from three sources: 1) public concerns over rising costs of government; 2) the courts' position on quality health care available to all inmates; and, 3) fiscal responsibility of the managing authority. Although the literature on the subject of correctional medicine is abundant, there is a lack of focus when politics and profits are primary elements of the equation.

Research Problem

"Endless litigation, civil mandates, court orders and expanded state regulations have made it clear that providing adequate inmate health care is no longer optional, it is compulsory. In response, most jails have substantially enhanced medical services" (Findeiss,1992,p. 56). Medical care within county jails needs a review and an unbiased comparison of the two systems to determine their advantages and disadvantages. Medical care in jails is being targeted by private firms who suggest resources can be used more efficiently. Government officials try to reassure their constituents that public control is more effective and therefore should not be relinquished. The noted differences and lessons learned to help guide future decisions in reference to private and public health care for inmates is compared in the research.

The Constitution does not mandate comfortable prisons, (Rodes v. Chapman 1981), nor does it permit inhumane ones. It is stated that "the treatment a prisoner receives in a prison and the condition under which he is confined are subject to scrutiny under the Eighth Amendment" (Helling v. McKinney 1993). The Eighth Amendment also imposes duties on officials to provide humane conditions of confinement. Prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care and must "take reasonable measures to guarantee the safety of the inmates".

Deliberate indifference first appeared in Estelle v. Gamble (1976). Use of the term described a state of mind more blameworthy than negligence. In considering the inmate's claim in Estelle v Gamble, inadequate prison medical care violated the Cruel and Unusual Punishment Clause and distinguished "deliberate indifference to serious needs of prisoners," from "negligence in diagnosing or treating a medical condition". (114 Supreme Court Reporter, 1994, p.1978).

Method

This research was managed primarily by literature review, from a broad-based view of correctional privatization issues throughout the country. The topic of privatization of medical facilities was later defined. This focus was delineated by conducting written and verbal surveys to privately operated facilities and public operated institutions.

Although the primary method of extrapolating information was conducting interviews with individuals, an instrument was also developed to obtain information from sources that were too remote for interviews. Furthermore, the amount of detail requested in the questionnaire made it likely that respondents would need time to collect data. Several of the individuals agreed to talk about the topic, but only if guaranteed anonymity for themselves and their facilities. Consequently, many of the topics and comments are noted and placed within the following text.

Results

A total of 36 surveys were sent to county sheriffs' offices with an inmate population of 200 or more (Appendix A) . The returned surveys from privately contracted facilities totaled 11. Ten surveys were returned from public facilities. Additionally, several interviews were conducted with state and local administrators with a broad base

understanding of the corrections medical field. Surveys were sent with a return self-addressed stamped envelopes, with the intent of facilitating positive participation.

Facilities Under Private Contract

Comments were taken directly from the surveys and were edited for grammar and clarity.

Question Asked: Please list the most important reasons that you feel you are more effective and/or efficient that a public operated facility. What are lessons learned?

- Private care left unmonitored is no more or less effective than in-house maybe easier to manage.
- The wheel does not need to be reinvented. Medical is allowed to do their job as professionals with complete cooperation from the correctional staff.
- Privatization does not necessarily result in efficiency or effectiveness. The results, largely, are dependent on the quality of the Request For Proposal (RFP) and Terms and Conditions of the contract for services. While one should expect vendors to make a profit, it is reasonable to expect that the promised savings to employers are more than rhetoric. Consequently, good RFP's and contracts are prerequisites to realizing enhanced services while containing/reducing costs.
- With three providers, there has been some successes and some failures, but for the most part our relationship has been satisfactory. We maintain control but have medical expertise and resources otherwise unavailable or more expensive.
- Quality of care is at best difficult to manage and measure. A benefit is the budget cost for service.

Publicly-Operated Facilities

These comments were taken directly from the surveys and were edited for grammar and clarity.

Question Asked: Please list the most important reasons that you feel you are more effective and/or efficient that a privately operated facility. What are lessons learned?

- Ability to control budgetary items more directly. Integration of facility operations. Ownership by staff (part of corrections). Controlled services (self & consultants) ability to negotiate contracts and costs. Integration of other county agencies (fire rescue, county medical clinics, pharmacy).
- We have better control over cost containment and staffing.
- Quality and caliber of staff is controllable. Security and control of facility. Lowest bidder is not the best bidder.
- I have operated a jail for 20 years and will not let inmates go untreated. I look out for the total costs and what the charges are on the inmates , possibly he can be cut loose, etc. Say it is a non-violent crime and he needs a minor operation. Can we get him out of jail, etc.?

- Private companies must make a profit to exist . They cut costs by limiting staff and health care suffers. Look at some of the other county jail's problems and privatization of other facilities, No thanks.
- Primary concerns with the profit margin. Quality of care would suffer in an effort to increase profits. Loyalties lie with the Sheriff and the citizens of our county. We are concerned with the expenses to the taxpayers. We will save money any way we can. Sub-contracting at a possible better rate. We have a better knowledge of our return prisoners and have ability to detect scams or seeing potential medical problems earlier, thus saving money.
- The last comparison revealed appropriate, quality care was being provided at our facility for much less than private health care provider quotes. Staff members are employed by the Sheriff and work as a team with corrections. We also have developed a good working relationship with community health care providers who provide services free (public health dept.) or at Medicaid (hospitals) and Medicare (specialists) rates.

Discussion

Fiscal Concerns

Although this pertains to security issues, it is in direct correlation to private medical care. Agencies should carefully study any proposal that claims to perform services cheaper than the county. Many times, private vendors will take only minimum security and low risk prisoners leaving the maximum security prisoners for the county to contend with. Another situation an agency should also be aware of, is the deep pockets of a bidding corporation. A vendor may bid at a low cost. Then after obtaining the contract and after the county has gone out of the corrections/medical business, the private contractor raises the costs dramatically. It puts the county in a very difficult position. Either way the county looses; go with the increase or get back into the business in a very short time.

"Costs associated with the decision to privatize or not, should be carefully evaluated. Current experience in Florida is that general management monitoring and overview costs are significantly higher than that required of a state run operation" (Needs Assessment, 1994, Florida, DOC).

Liability

A county or government entity cannot delegate its liability, especially in civil rights areas. Additionally, a government may not avoid liability for medical malpractice suffered by the inmates of its correctional facilities by contracting with a private corporation to perform health care service. Herbert v District of Columbia (DC Ct App, No. 93-C v-4407, 4/10/97) noted that the corporation and its employees are agents of the city for purposes of applying the doctrine of respondent superior. This is a special relationship pursuant to which the city has a non-delegatable duty to provide non-negligent medical care. Additionally, government can not be released from its primary service responsibility by way of contract to any other means. Any attempt to separate

government from these services only adds an additional layer of bureaucracy. This opinion was underscored in the 1988 U.S. Supreme Court Case, West v. Atkins in which the court unanimously held that the state was liable for the actions of its contractors.

Undue Influence

"Once a corporation and its directors and officers have entered into a contract, they will want to keep it. It has been documented repeatedly that corporations give large political contributions and lucrative perks to officials who decide the fate of their contract" (Ficano, 1996). Political contributions are sanctioned by the first amendment, but is it really the direction we want to go?

Agencies should also have philosophical concerns about "prisons for profit" The ultimate power government has is to take away the liberty and freedom of its citizens and administer punishment. As mentioned by Sheriff Ficano " The owner of a private jail is motivated by profit. That profit must not come at the expense of public safety. Privatization is not panacea, it raises questions, on accountability and equity, with no airtight guarantee of better service or reduced costs" (1996, 11).

Listed are survey results, verbal and written, regarding arguments for and against private contracting of medical health care within correctional facilities.

Arguments for Contracting

Propriety

- Contracting, in conjunction with governmental monitoring, adds a new layer of independent review of correctional decisions and actions.

Cost

- Contracting may reduce overall generous public employee pensions and benefits.
- Contracting typically indexes fee increases to the Consumer Price Index, while government costs have been shown to rise faster than the general level of inflation.
- Contracting discourages waste because prodigality cuts into profits.
- Contracting counteracts the motivation of budget-based government agencies to continually grow in size and to maximize their budgets.
- Contracting avoids cumbersome and rigid government procurement procedures; vendors can purchase more quickly, maintain lower inventories, and productivity while lowering absenteeism and turnover.
- Contracting has the ability of fixed annual budgets (good for both parties).
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Quality

- Contracting provides an alternative yardstick against which to measure government services; it allows for comparisons.

- Contracting motivates both governmental and private medical practitioners to compete on quality as well as costs.
- Contracting, by creating an alternative, raises standards for the government as well as for private vendors.
- Contracting adds new expertise and specialization skills.
- Contracting promotes creativity and enthusiasm by bringing in “new blood” and new ideas more often than is possible under civil service.
- Contracting promotes quality and high standards by forcing officials and the public to evaluate expenditures carefully, rather than masking costs through overcrowding and substandard conditions.
- Contracting could hardly do worse than some current (public) operated medical services within institutions, in terms of quality.

Quantity

- Contracting will allow quicker response in the future to meet changing needs or to correct mistakes resulting from inaccurate predictions or faulty policies.
- Contracting helps limit the size of government.

Flexibility

- Contracting allows greater flexibility, which promotes innovation, experimentation, and other changes in programs, including expansion, contraction, and termination.
- Contracting can avoid capital budget limits through leasing, or spread capital costs over time through lease-purchasing.
- Contracting reduces the level of bureaucracy (red tape) involved in management decisions.
- Contracting reduces some of the political pressures that interfere with good management.
- Contracting avoids civil service and other governmental (and sometimes union) restrictions that interfere with efficient personnel management (i.e., hiring, firing, promotion, and salary setting; assignment of duties, work schedules, vacations, and leaves; adequate staffing to avoid excessive overtime).
- Contracting reduces the tendency toward bureaucratic self perpetuation.
- Contracting promotes specialization to deal with special needs inmates (AIDS patients, dialysis, cardiac, to name a few).
- Contracting relieves public administrators of daily hassles, allowing them to plan, set policy, and supervise.

Security

- Contracted medical help are less likely to go on strike because they are more vulnerable to termination.

Liability

- Contracting may decrease the risks for which government remains liable, through higher quality performance and through indemnification and insurance.

Accountability

- Contracting increases accountability because market mechanisms of control are added to those of the political process.
- Contracting increases accountability because it is easier for the government to monitor and control a contractor that to monitor and control itself.
- Contracting promotes the development and use of objective performance measures.
- Contracting can require medical providers to be certified by meeting the standards of the National Commission on Correctional Health Care.
- Contracting motivates vendors to serve as watchdogs over their competitors.
- Contracting provides a surgical solution when bad management has been entrenched and resistant to reform.

Corruption

Contracting gives managers more of a vested interest in the reputation of their institution.

Dependence

Contracting can increase the number of suppliers, thus reducing dependence and vulnerability to strikes, slowdowns, or bad management.

<u>Arguments Against Contracting</u>

Propriety

- Contracting may put profit motives ahead of the public interest, inmate interest or the purpose of providing medical services.
- Contracting may face legal obstacles in some jurisdictions.
- Contracting threatens the jobs and benefits of public employees; it is anti-labor.

Costs

- Contracting is more expensive because it adds a profit margin to all other costs.
- Contracting creates special costs, e.g. initiating, negotiating, and managing contracts, and monitoring contractor performance.
- Contractors may cost more in the long run as a result of “lowballing” initial low bids followed by unjustified price raises in subsequent contracts.
- Contracting may cost more in the long run if high capital costs inhibit market entry and restrict competition.
- Contracting lacks effective competition in “follow-on” contracts, which are commonplace.

- Contracting costs the government extra for the termination, unemployment, and retaining of displaced government workers.
- Contracts with costs-plus-fixed-fee provisions provide no incentive for efficiency.
- Contracting may have a higher initial marginal cost than would expanding government services.

Quality

- Contracting may reduce quality through the pressure to cut corners economically.
- Contracting will decrease the professionalism of rank and file of medical workers because they will be underpaid and insecure and thus not able to develop a career orientation.

Quantity

- Contracting creates a kind of underground government, thus adding to total government size.

Flexibility

- Contracting may limit flexibility by refusal to go beyond the terms of contract without renegotiating.
- Contracting may be stopped in advance, or suddenly reversed in midstream, by adverse public reaction, legal challenges, partisan politics, or organized opposition by interest groups, including public employee unions.
- Contracting reduces ability to coordinate with other public agencies (police, sheriff, probation, parole, transportation, maintenance, medical, and the like).

Summary

The following information is a compilation of personal opinions, survey findings and items from literature regarding both sides of the on privatization issue.

<u>Administrative Controls</u>

Through better planning and analysis, corrections can be more efficient in providing health services. Agencies can also learn from what the health service industry has gone through over the past several decades.

Fundamentally, because of changes in the third-party payment system, the health service industry was forced to explore methods toward cost controls and increase service productivity. Managers of inmate health care services delivery programs have begun implementing some of these administrative cost-containment methods, including:

- utilization review of on-site and off-site health services to evaluate level, location and appropriateness of service delivery and use of service;
- cost review and analysis;
- prior authorization procedures for off-site services;
- quality and risk management programs.

All of these methods provide management with information about their system and services used, frequency of use, service appropriateness to need location of service delivery, service resulting high costs and/or untoward outcomes (e.g., death, injuries, liability) and service performance evaluation. Given this information managers can assess and adjust the current delivery methods relative to cost and liability concerns.

In addition to these cost controls methods, some agencies have required co-payment for services with inmates. Co-payment provides some, although limited, revenue for services provided, it also reduces the overuse or inappropriate use of the inmate health care system. Of the private facilities that responded to the survey, 82% have provisions for co-payments. Self-operated facilities had a 100% participation in the co-payment procedure. Co-payment is also used as a tool to prevent abuse of the medical system by reducing the overuse or inappropriate use of the inmate health care system thereby holding inmates to a legitimate concern.

What can county jails facilities do to limit their liability? John Burke , Bureau of Health Administration (personal interview, November 13, 1996) stated: "Screening all inmates is a primary concern and can limit liability. Most of the medically high profile inmates are not seen by a medical screener as quickly as they should. Screening should be done within the first hour of booking".

"Staffing issues that could be examined include using paramedics and EMT staff instead of registered nurses for general triage care. Several conversation indicate that trends lean toward the idea that institutions are getting away from registered nurses for inmate care and using an appropriate level of medically trained staff" (Patricia Cates, Health Service Administrator, personal interview, July 16, 1997).

If facilities are under contract they should have a liaison between medical and correctional staff to avoid problems which may become contractual issues. Often times the contract monitor does not have the capability to intervene and deal with day to day issues. If they do intervene, the topic of discussion may be viewed as putting pressure on the provider without a contractual obligation to follow through with the concern.

In a recent Supreme Court decision (Richard v McKnight 1997), the court ruled in a 5-4 decision that personnel employed by private companies that run jails and prisons under a contract with a state or local government are not entitled to the immunities from offender lawsuits that shield correctional officers working for governmental agencies. The impending question: would this not also apply to any agency contracted by government to provide services? Although the topics are not all inclusive, there may be some information usable to those considering contracted medical care for inmates.

"Proponents of privatization assert that the experiences of several states demonstrated that private contractors can operate prisons at less costs than the government, without reducing the levels or quality of service. In contrast, other observers say there is little or no valid evidence that privatization of corrections is a cost-effective alternative to publicly run facilities" (GOA,1996, p.2).

Conclusion

After extensive conversations and readings, these findings should give suggestions or ideas for agencies that are considering privatization. Likewise, agencies that are privatized can view different issues for consideration.

Due to this research, many topics were brought to the forefront for scrutiny. Public funds will continue to be limited and tax dollars will be targeted for project-de-jour. If the primary purpose for contracting is to save resources, many of topics should be looked at before committing to a contract. Within many agencies the present way of doing business is no longer acceptable. Public agencies need to employ their own cost containment measures or the general public will demand change. The Courts demand that certain rights and liberties are guarded and deliberate indifference will continue to be monitored. Propriety, costs, quality, quantity, flexibility, security, liability, accountability, corruption and dependence are issues that were discussed by those interviewed. Individuals in the corrections and medical field commented and gave many candid suggestions.

There is no single definitive answer to the question raised. The topic is dynamic and legal opinions promote modifications to our day to day operations. Systemic issues are unique to individual institutions and should be reviewed on an ongoing basis; as these are changing times.

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