



DEPARTMENT OF HEALTH & HUMAN SERVICES

ADMINISTRATION FOR CHILDREN AND FAMILIES
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

MAY 1 1989

Mr. James A. Rothrock
Director
Department for Rights of Virginians
with Disabilities
James Monroe Building - 17th Floor
101 N. 14th Street
Richmond, Virginia 23219-3641

Dear Mr. Rothrock:

The Administration on Developmental Disabilities (ADD) finds that the Protection and Advocacy (P&A) System of the State of Virginia is not in compliance with the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6000 et seq.).

This notice serves as the Letter of Findings from the Program Administrative Review (PAR) of the Virginia Protection and Advocacy System formula grant program which was conducted July 24-25, 1989 by a team of Region III and ADD staff. The purpose of the PAR was to determine and document compliance with the applicable sections of the Developmental Disabilities Assistance and Bill of Rights Act, as amended.

The reviewers identified a number of program strengths. These included, but were not limited to, efficient and effective program administration; knowledgeable and enthusiastic staff who clearly understood their duties and responsibilities and the program's impact on clientele; client records which were maintained in a manner designed to safeguard confidentiality; and evidence of detailed policy development in support of Federal, State and agency requirements.

However, based on other PAR findings and subsequent examination of correspondence and additional materials by ADD, I find that the Virginia P&A is not in compliance with all legislatively mandated requirements. While the DRVD has provided assurances of the Protection and Advocacy System's authority and eligibility as prescribed by law, in fact the P&A does not comply with two areas of Section 142 of the Act as discussed below.

Section 142(a)(2)(A)(i), 42 U.S.C. 6042

The Code of Virginia is inconsistent with the Federal statute which provides, among other things, that in order for a State to receive an allotment under Part B of the Act, "...the State must have in effect a system to protect and advocate the rights of persons with developmental disabilities..." [and that] such system must ...have the authority to...pursue legal, administrative and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such persons within the State who are or may be eligible for treatment, services, or habilitation...."

The Code of Virginia, specifically Section 51.5-37(5), directs the Department for Rights of the Disabled (renamed Department for Rights of Virginians with Disabilities) in administering the developmental disabilities program:

"To employ mediation procedures to the maximum extent possible to resolve complaints concerning violations of rights of persons with disabilities...." When such procedures fail...the Department may file an action in any court only upon the express approval of the Governor, whose authority to act under this provision shall not be delegated."

Moreover, the DRVD's policy manual, in the subsection entitled "Judicial Determination" provides that legal action may be filed in the appropriate court only upon receipt of approval of the Governor.

Although you indicate in your letter of February 26, 1991 that only one type of legal remedy, a court action, requires gubernatorial approval and that the Governor's role is not an impediment to effective advocacy in theory or practice, it is my determination that the aforementioned sections of both the Code of Virginia and the Department for Rights of Virginians with Disabilities policy manual are not in compliance with the letter and intent of the Federal statute and with the assurances dated February 18, 1988 and signed by the Governor. If gubernatorial approval must be obtained prior to the pursuit of court action, then the Virginia P&A does not have the required authority to pursue legal remedies as mandated by law.

Section 142(a)(2)(F), 42 U.S.C. 6042

I also find that the Department for Rights of Virginians with Disabilities (DRVD) is not in compliance with the requirement that the Protection and Advocacy System be independent of any agency which provides treatment, services, or habilitation to persons with developmental disabilities. As an agency involved in the funding and planning of services, the Board for Rights of Virginians with Disabilities is a service-provider. Therefore, the existing relationship between the Board and the Department for Rights of Virginians with Disabilities is inconsistent with Federal statute.

Moreover, you state in your February 26, 1991 letter that the Deputy Director for P&A Systems Advocacy supervises and evaluates the performance of the Board Administrator, Assistant Board Administrator, Board Planner, and Executive Secretary of the Board for Rights of Virginians with Disabilities (the State Planning Council). This supervisory relationship exists through an administrative arrangement between the Department of Mental Health, Mental Retardation and Substance Abuse (DMHM RSA) and the Board for Rights of Virginians with Disabilities, which is the State Developmental Disabilities Planning Council.

While this arrangement is consistent with Virginia State law, it is in conflict with Federal statute in that it places the Protection and Advocacy System in a position

which nullifies the P&A's ability to act independently in carrying out its legislative mandate. It is also in conflict with Section 124(c)(2) of the Act which provides that each State Planning Council, consistent with State law, hire a Director of the State Planning Council who shall be supervised and evaluated by the State Planning Council and who shall hire and supervise the staff of the State Planning Council. A copy of my letter to the Board of Rights for Virginians with Disabilities (BRVD) about this issue is enclosed for your information.

As stated in regulation, 45 CFR 1386.21(a): "In order for a State to receive Federal financial participation for Protection and Advocacy activities under this subpart, as well as the Basic Support Program...the Protection and Advocacy system must meet the requirements of section 142 of the Act (42 U.S.C. 6042) and that system must be operational." Therefore, the P&A's compliance with all statutory requirements of the Act under Section 142 is essential to continued support of the Protection and Advocacy System and the basic State grant program within the State of Virginia.

In order to come into compliance, the Department for Rights of Virginians with Disabilities must provide:

1. Documentation that the Protection and Advocacy System program has the unequivocal authority to pursue all legal remedies to ensure the protection of, and advocacy for, the rights of persons with developmental disabilities in the State without the requirement of obtaining prior approval; and
2. Documentation that the Protection and Advocacy System program is carrying out its mission independent of any agency of the State, or private agency providing direct services, and that the P&A has severed its illegal relationship with the State Planning Council.

The Protection and Advocacy System will be ineligible for Fiscal Year 1992 funding if these issues are not resolved on or before September 30, 1991. As a result, Virginia would

also be ineligible for basic state grant funds at the end of the current fiscal year. Both compliance issues must be satisfactorily addressed by the State for continued funding under Parts B and C of the Act.

To demonstrate the intent to rectify the areas which are not in compliance with Federal law, the Protection and Advocacy System must develop and submit a Corrective Action Plan (CAP) within 45 days from the date of this letter. The CAP must address each requirement which is out of compliance and detail the specific action steps, the attendant timeframes, and the party or parties responsible for implementing them, so as to correct the compliance deficiencies by September 30, 1991.

I recommend that the CAP be developed in conjunction with appropriate State officials and will expect that evidence of the State's attention to this matter be included as part of the CAP. Such evidence must include a letter signed by the Governor stating his intention to request the legislature to amend Virginia Code Ann. Section 51.5-34, 51.5-37(1), (5) and to make whatever other statutory changes are necessary to remedy the deficiencies noted in this letter. A copy of the legislation being requested by the Governor must accompany his letter along with an opinion of the State's Attorney General stating that the proposed legislation will accomplish the required changes in the statutes. Such a letter is necessary for the State to continue its participation in the Developmental Disabilities program. Of course, continued participation in the program is also contingent on the enactment of the proposed legislation by the Legislature in its next session. You may also want to consider redesignation of the P&A as another option for bringing Virginia into compliance. As you know, Section 142(a)(5) of the Act provides for redesignation of protection and advocacy agencies.

The CAP should be submitted to the Philadelphia Regional Office at the following address. Also, please forward a copy to my office in Washington, D.C.

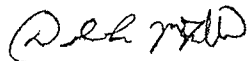
Richard Spitzborg
Acting Regional Administrator
Administration for Children and Families
Department of Health and Human Services
P. O. Box 13716, Room 5450
Philadelphia, Pennsylvania 19101

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The CAP will be reviewed upon receipt, and Mr. Spitzborg will inform you in writing regarding its acceptability. We are available to assist you in developing the plan for coming into compliance with Federal requirements. If you need technical assistance, contact Ms. Deloris Smith at (215) 596-0392 or at the address shown for Mr. Pearis.

I urge you to move forward in a judicious and expeditious manner to bring the Virginia Protection and Advocacy System program into total compliance with the Act and applicable regulations.

Sincerely,



Deborah L. McFadden
Commissioner
Administration on
Developmental Disabilities

Enclosure

cc: Linda Veldeer, DMHM RSA
Meade Boswell, BRVD
Richard Spitzborg, DHHS Region III
Alvin Pearis, Director, OSP, Region III