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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79-822
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of	:	December 14, 1979
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Warren J. Abbott	:	
Assistant Attorney General	:	
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SUBJECT: FUNDING OF LITIGATION—When an Area Board on Developmental Disabilities requests and receives permission from the State Council on Developmental Disabilities to pursue litigation in an advocacy role against an agency of the State, the responsibility to fund such litigation rests with the State Council on Developmental Disabilities.

The State Council on Developmental Disabilities has requested an opinion on the following question:

When an Area Board on Developmental Disabilities requests and receives permission from the State Council on Developmental Disabilities to pursue litigation in an advocacy role against an agency of the State of California, does the responsibility for funding that litigation rest with the State Council on Developmental Disabilities or with Protection and Advocacy, Inc., a nonprofit corporation organized to carry on such litigation?

CONCLUSION

When an Area Board on Developmental Disabilities requests and receives permission from the State Council on Developmental Disabilities to pursue litigation in an advocacy role against an agency of the State of California, the responsibility to fund such litigation rests, under the present statutory scheme and administrative practices, with the State Council. The federal funds allotted to California for this purpose have been allotted directly to Protection and Advocacy, Inc., and the State Council and area boards have no control over these funds. The State Council and area boards may, however, refer cases to Protection and Advocacy, Inc. with a request that that corporation handle and fund such litigation, using the allotted federal funds.

ANALYSIS

Pursuant to a federally funded program, state legislation authorizes Area Boards on Developmental Disabilities, which are state agencies, to undertake legal action, with the approval of the State Council on Developmental Disabilities against publicly funded agencies, including those of the State of California, that serve persons with developmental disabilities to compel such agencies to alter their policies and programs to comply with the law. The area boards receive funds originating as federal funds but appropriated by the Legislature to the State Council, and in turn allocated by the State Council to the area boards. Protection and Advocacy, Inc., is a California nonprofit corporation organized to carry out the advocacy and litigation functions in California directed by the federal program, and for this purpose, directly receives from the United States Department of Health, Education and Welfare California's allotment of federal funds for the advocacy and litigation function. The issue presented is whether litigation to be undertaken by an area board with approval of the State Council, as authorized by state law, is to be funded by the State Council, presumably out of funds to be allocated to that area board, or by Protection and Advocacy, Inc. Our review of the statutory scheme and the administrative practice of direct federal funding to the nonprofit corporation leads us to conclude that any litigation undertaken by an area board with the approval of the State Council, is the basic responsibility of the State Council, and neither the State Council nor the area boards have any control over Protection and Advocacy, Inc., or its federal funds. The area boards or the State Council, may, however, request Protection and Advocacy, Inc. to handle or fund such litigation.

1. Public Law 94-103

The Developmentally Disabled Assistance and Bill of Rights Act (P.L. 94-103; 89 Stat. 486 (1975), as amended by Public Law No. 95-602, 92 Statutes at Large 2955 (1978); 42 U.S.C.A. § 6000 *et seq.*; hereafter 'P.L. 94-103') is a federal program designed, among

other purposes, to assist “. . . States to assure that persons with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their maximum potential through a system which coordinates, monitors, plans, and evaluates those services and which ensures the protection of the legal and human rights of persons with developmental disabilities.” (P.L. 94–103, § 101(b) (1); 42 U.S.C.A. § 6000(b) (1).)

This goal is accomplished through a series of grant-making authorizations, with federally mandated standards and requirements. Among these are section 131 allotments (P.L. 94–103, §§ 131, 132; 42 U.S.C.A. §§ 6061–6062), which require each state receiving an allotment to adopt and have approved by the Secretary of Health, Education and Welfare a state plan for the provision of services for persons with developmental disabilities which plan will contain, among other items, the specific objectives to be achieved under the plan, a description of the services being provided, how the section 131 funds will be used, and in general an evaluation of the program within the state. (P.L. 94–103, § 133; 42 U.S.C.A. § 6063.) In addition, each state receiving a section 131 allotment must establish a State Planning Council “. . . which will serve as an advocate for persons with developmental disabilities,” with the additional duties of assisting in the development of a state plan, and monitoring, reviewing and evaluating the state plan. (P.L. 94–103, § 137; 42 U.S.C.A. § 6067.)

Of more immediate concern to this opinion is section 113 of Public Law 94–103 (42 U.S.C.A. § 6012):

“(a) In order for a State to receive an allotment under subchapter III of this chapter, (1) the State must have in effect a system to protect and advocate the rights of persons with developmental disabilities, (2) such system must (A) have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State, (B) not be administered by the State Planning Council, and (C) be independent of any agency which provides treatment, services, or habilitation to persons with developmental disabilities, and (3) the State must submit to the Secretary in a form prescribed by the Secretary in regulations (A) a report not less often than once every three years, describing the system, and (B) an annual report describing the activities carried out under the system and any changes made in the system during the previous year.

“(b) (1) (A) To assist States in meeting the requirements of subsection (a) of this section, the Secretary shall allot to the States the sums appropriated under paragraph (2). . . .” (See also 45 C.F.R. § 1386.70.)

Thus, for a state to receive a section 131 allotment, it must establish and put into effect a system to protect and advocate the rights of persons with developmental disabilities as required by section 113. To accomplish this, however, the states are eligible to receive separate allotments under section 113.

2. The Lanterman Developmental Disabilities Services Act

California seeks to carry out its responsibilities under Public Law 94–103 through the Lanterman Developmental Disability Service Act. (Welf. & Inst. Code, § 4500 *et seq.*) As pertinent here, the Lanterman Act creates a State Council on Developmental Disabilities “. . . with authority independent of any single state service agency.” (Welf. & Inst. Code, § 4520.) The State Council, among other duties, is the “state planning council” responsible for developing the California Developmental Disability State Plan and for allocating all Public Law 94403 funds allotted to the state. (Welf. & Inst. Code, § 4540(a) & (b).) The State Plan, to be prepared by the State Council annually, must contain among other parts:

“(f) A part describing the amount of federal funds, from Public Law 94–103, that should be allotted to the state council, area boards, and state and nonstate agencies for services, planning, advocacy, construction, and other approved purposes as defined in federal law and regulations. (Welf. & Inst. Code, § 4561(f).)”¹

The Lanterman Act also provides for the existence of Area Boards on Developmental Disabilities (Welf. & Inst. Code, § 4570 *et seq.*), of which there are currently 13. The primary duty of the area boards is to:

“. . . protect and advocate the rights of all persons in the area with developmental disabilities.

“The area board shall have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the legal, civil, and service rights of persons who require services or who are receiving services in the area.

“The area board shall identify any evidence of the denial of such rights; shall inform the appropriate local, state, or federal officials of their

¹ The State Plan for Fiscal Year 1980 designates some \$3,271,720 of federal Public Law 94–103 allotments to be allocated to state agencies. These are all, we are informed, section 131 allotments and do not include any section 113 allotments. (State Plan for Developmental Disabilities Services and Facilities Construction Program for Fiscal Year 1980, Table 7–1.)

findings, and shall assist such officials in eliminating all forms of discrimination against persons with developmental disabilities in housing, recreation, education, health and mental health care, employment, and other service programs available to the general population.” (Welf. & Inst. Code, § 4590.)

Welfare and Institutions Code section 4593 provides:

“To the extent that resources are available, area boards shall review the policies and practices of publicly funded agencies that serve or may serve persons with developmental disabilities to determine if such programs are meeting their obligations under local, state, and federal statutes. If any noncompliance is determined, the area board shall inform, in writing, the director and the managing board of such noncomplying agency of its findings.

“If the agency fails to alter its policies in order to comply with the law within 30 days and after all other informal efforts to assist the agency have been exhausted, the area board may conduct a public hearing to receive testimony on the issue of the agency’s noncompliance.

“At least 30 days notice of an area board’s public hearing on noncompliance shall be given to the general public, to the agency, and to the state, federal, or local authorities responsible for allocating funds to the agency. The public hearing shall be conducted informally for the purpose of finding a solution, and all parties shall have an opportunity to be represented and to testify but shall be recorded.

“If the problem has not been resolved within 30 days following the public hearing, the area board may notify the state council and may request authorization to initiate legal action. An area board shall not initiate legal action without prior authorization from the state council”

The area boards are supported from funds allocated by the State Council (Welf. & Inst. Code., § 4611), all of which are currently Public Law 94–103 allotment funds. In two unpublished opinions of this office, we concluded (1) that area boards are state agencies (I.L. 74–189, Oct. 25, 1974) and (2) that area boards may not employ legal counsel other than the Attorney General (I.L. 76–19, Jan. 23, 1976).

Welfare and Institutions Code section 4595 directs that:

“The executive director of the state council shall review the proceedings of the public hearing under Section 4593 and may conduct additional factfinding investigations. The executive director shall report his findings to the state council within 30 days and shall recommend a course of action to be pursued by the council, the area board, or other state administrative or legislative officials.

“The state council shall review the report of the executive director and shall take such action as it deems necessary to resolve the problem. If the council authorizes the area board to initiate legal action, the state council shall make available to the area board legal assistance through the legal services provisions of Public Law 94–103.

“The state plan shall include an annual allotment of federal funds from Public Law 94–103 to be utilized for such legal assistance to area boards.

The current State Plan does not contain such an allotment in light of the arrangement with Protection and Advocacy, Inc.

3. Protection and Advocacy, Inc.

Protection and Advocacy, Inc. is a California nonprofit corporation formed, according to its articles of incorporation:

“. . . to act as the agency responsible for implementing the State of California’s plan for the protection of the individual rights of and advocacy for persons with developmental disabilities as approved by the Governor of the State of California pursuant to the Developmental Services and Facilities Construction Act as amended by Section 113 of Public Law 94–103. . . .”

Pursuant to the corporation’s by-laws, the directors are appointed by the Governor. Section 11.1 of the by-laws authorizes the Board of Directors to initiate lawsuits pursuant to section 113, Public Law 94–103. When incorporated in 1978, the corporation contemplated being funded solely by section 113 funds through a contract with the California Health and Welfare Agency. We are informed, however, that the Department of Health, Education and Welfare, in its reading of section 113’s mandate that the advocacy system not be administered by the state planning council, objected to the proposed contract arrangement. Instead, that department has entered into a direct arrangement with Protection and Advocacy, Inc., whereby it funds the corporation with what would be California’s allotment of section 113 funds. No other section 113 funds are appropriated to California, or by the Legislature to the State Council to be used by that council or allocated to the area

boards.²

² The mandated protection and advocacy system is described in the California plan as follows:

“In accordance with Section 113 of P.L. 95–602, there exists in California a protection and advocacy system to protect and advocate the rights of persons with developmental disabilities. The agency is Protection and Advocacy, Incorporated, (PAI). PAI is, by law, separate and independent of the State Council and its activities. The two organizations, do however maintain close communication to insure that their operations complement each other.

“Protection and Advocacy, Incorporated has the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State is mandated by the Developmental Disabilities Services and Facilities Construction Act of 1977, Public Law 94–103, Section 113 as amended by Title V of Public Law 95–602, Section 508. Protection and Advocacy, Inc., is the private, nonprofit corporation designated by the Governor to be California’s system in accord with federal law; and Review Committee members are appointed by the Governor.

“Protection and Advocacy, Inc., administers the protection and advocacy system in California through the letting of advocacy project contracts, and coordinates advocacy endeavors both with individuals and organizations throughout the State through the provision of informational and technical support. There is a continuing information exchange and coordination between PAI and the State Council and other components of the statewide developmental disabilities network.

“PAI Board of Directors operates the corporation, approves policies and budget, hires staff, and carries our contracts necessary for the operations of protection and advocacy activities; PAI Review Committee reviews policy, issues and reviews grant applications, and assist in operation of PAI.

“PAI’s functions include provision of informational and referral assistance to persons with developmental disabilities, their families, and their advocates through a tollfree hotline (800–952–5746); management of a central clearinghouse of information concerning service needs and advocacy developments; distribution of public education and informational materials; coordination of advocacy activities; sponsorship of advocacy training workshops and materials; development of public interest and community advocacy support; grants solicitation, review, and contracting within 1980 priority areas of education, dual diagnosis, employment, services to ethnic minorities, coordination of mandated individual program plans, and family support services; and provisions of direct advocacy services to individuals where local advocacy services are unavailable.” (State Plan for Developmental Disabilities Services and Facilities Construction Program for Fiscal Year 1980, § 5.3.2.1, pp. 5–9, 5–10.)

The use of nonprofit corporations for implementing the state protection and advocacy system is a common occurrence, being used in some 25 states. (See H.R. Rep. No. 95–1188, 2d Sess. pp. 6–7 (1978).)

We note that there is a seeming conflict between the provisions of section 113 of Public Law 94–103 and the Lanterman Act. Section 113 mandates that the state protection and advocacy system ‘not be administered by the State Planning Council.’ The Lanterman Act ties the area board to the State Council for funding (Welf. & Inst. Code, § 4611); review of activities and accomplishments of area boards (Welf. & Inst. Code, § 4605); and approval and institution of litigation (Welf. & Inst. Code, §§ 4593 & 4595). Welfare and Institutions Code section 4595 mandates that “. . . the state council shall make available to the area board legal assistance through the legal services provisions of Public Law 94–103,” and that the state plan shall include an annual allotment of federal funds from Public Law 94–103 to be utilized for such legal assistance to area boards.”³ We conclude that, for purposes of this analysis, the area boards are an adjunct to the State Council, and therefore the advocacy and litigation functions assigned to the area boards in the Welfare and Institutions Code cannot and do not qualify as the protection and advocacy system required by section 113 of Public Law 94–103. Similarly, that function would not qualify for support from section 113 funds.

The Department of Health, Education and Welfare has apparently reached a similar conclusion and resolved the conflict between section 113 of Public Law 94–103 and the provisions of the Welfare and Institutions Code by insisting that California’s protection and advocacy system be divorced from the State Council and the area boards by directing California’s section 113 allotment to Protection and Advocacy, Inc. As such, the State Council has no control over the section 113 funds granted to that corporation. As an independent corporation, management and control of its property and affairs is the responsibility of the corporation’s board of directors. (Corp. Code, § 9500; see New Corp. Code, § 5210, effective Jan. 1, 1980.) The board, in expending the federal funds allotted to it would be bound and guided, of course, by any terms and conditions attached to the grant by the Department of Health, Education and Welfare. There is no authority, however, for the State Council, or an area board, to direct the corporation to institute litigation or to pay therefor out of section 113 funds.

This conclusion, however, does not preclude an area board, with State Council approval, from instituting litigation as authorized by the Lanterman Act “to the extent that resources are available.” (Welf. & Inst. Code, § 4593.) We know of no provision in Public

³ Although not entirely clear, we assume the references to legal services provisions of federal funds from Public Law 94–103 in Welfare and Institutions Code section 4595 are to the provisions of section 113 of that act relating to allotments. Initially, when the Lanterman Act was enacted in 1976, it was apparently contemplated that the area boards, under the supervision of the State Council, would carry out the protection and advocacy functions mandated by section 113. As noted, however, as it has developed, this function has been delegated to Protection and Advocacy, Inc.

Law 94–103 prohibiting the use of section 131 allotments for this purpose provided such use is revealed in the State Plan annually approved by the Secretary of Health, Education and Welfare. (*Cf.* P.L. 94–103, § 133; 42 U.S.C., § 6063; 45 C.E.R., § 1386.1 *et seq.*) If this mechanism is utilized pursuant to Welfare and Institutions Code section 4594, funds should be allocated to the area boards in the State Plan. In response to the question presented, however, the payment for litigation to be brought by an area board with State Council approval is the responsibility of the State Council, under the Lanterman Act, unless and until the appropriated funds are allocated to the particular area board instituting litigation.⁴ Alternatively, the area boards or the State Council can refer cases to Protection and Advocacy, Inc., with the request that that agency arrange to handle or fund the litigation. If approved by the corporation’s board of directors, the use of section 113 funds by the corporation for this purpose would appear to be authorized.

⁴ We are informed that only three suits to be initiated have been approved by the State Council, and that two of these are to be handled by private counsel and not by Protection and Advocacy, Inc. A state agency is the defendant in each case, and is represented by the Attorney General. In the third suit, the area board is being represented by the Attorney General and the two state agency defendants are represented by house counsel with the consent of the Attorney General. Thus, the question of an area board using counsel other than the Attorney General is not an issue. (See unpublished Opinion I.L. 76–19, Jan. 23, 1976; Gov. Code, §§ 11042, 11040.)