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Office of the Attorney General

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Human & Natural Resources Division

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Judicial Affairs Division

Stephen D. Rosenthal
Deputy Attorney General
Public Safety & Economic Development Division

MEMORANDUM

ATTORNEY-CLIENT PRIVILEGE

TO: The Honorable Howard M. Cullum
Secretary of Human Resources

THROUGH: R. Claire Guthrie
Deputy Attorney General

FROM: Susan T. Ferguson
Assistant Attorney General

DATE: May 31, 1991

RE: Department for Rights of Virginians With Disabilities and Board for Rights of Virginians With Disabilities - Non-compliance Notices from U. S. Department of Health and Human Services, Administration For Children and Families

Your attention is kindly directed towards the attached Exhibits marked for identification "A" and "B." Exhibit "A" is a notice to the Board for Rights of Virginians with Disabilities that it is out of compliance with the Developmental Disabilities Assistance and Bills of Rights Act of 1990 (42 U.S.C. § 6000 et seq.) because its director and staff are hired, supervised, and evaluated by the Department for Rights of Virginians with Disabilities. Exhibit "B" is a notice dated May 1, 1991 to the Department that it is out of compliance with the federal law. Both notices require that specific corrective action plans be submitted by appropriate state officials on or before June 15,

1991 and that implementation of an approved plan achieve compliance on or before September 30, 1991. The Department and the Board have been advised that they will be ineligible for basic state grant funds in fiscal year 1992 if resolution does not occur by September 30, 1991. In addition, there is a possibility that current funding may be disallowed, requiring the return of same to Health and Human Services' ("HHS") Administration for Children and Families.

I. BACKGROUND

As you know, utilization of the federal grant monies under the Developmental Disabilities Assistance and Bill of Rights Act involves four components. These components include: 1) a policy-making board called the Board for Rights of Virginians With Disabilities ("BRVD"), which serves as the State Planning Council; 2) the designated state agency which is the Department of Mental Health, Mental Retardation and Substance Abuse Services; 3) the university-affiliated program at Virginia Commonwealth University; and 4) the Department for Rights of Virginians With Disabilities, ("DRVD"), which serves as the Protection and Advocacy System under federal law. The DRVD and BRVD expend a combined total of $1.6 million dollars to prioritize, address, protect, fulfill and advocate the needs and rights of developmentally disabled persons.

The powers and duties of DRVD are codified at Va. Code § 51.5-37 which states in pertinent part:

1. To provide staff to assist in the performance of the administrative and technical duties of the Board for Rights of Virginians with Disabilities and to render such advice to the Board as the Board may from time to time request ...;

....

3. To accept grants from the United States government and agencies and instrumentalities thereof ... the Department shall have the power to comply with such conditions and execute such agreements as may be necessary, convenient, or desirable.

4. To monitor the implementation of Chapter 9 (§ 51.5-40 et seq.) of this Title and to render assistance to persons with disabilities in the protection of the rights of persons with disabilities under the laws of the Commonwealth and of the United States.

5. To employ mediation procedures to the maximum extent possible to resolve complaints concerning violations of rights of persons with disabilities, when those rights are related to such disabilities. When such procedures fail, the Department shall have the authority to pursue legal, administrative, and other appropriate remedies to protect the rights of persons with disabilities, when those rights are related to such disabilities; however, 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. In the event there is no conflict of interest nor federal requirement to the contrary, the Governor may refer such action to the office of the Attorney General;

The powers and duties of the Board are codified at Va. Code § 51.5-33 which states in pertinent part:

4. To serve as the State Planning Council for the administration of certain federal public health and welfare laws as provided in § 6000 of Title 42 of the United States Code.

5. To perform all duties and exercise all powers designated by federal law for such state planning councils, including the responsibility for planning activities on behalf of all developmentally disabled persons ... for developing and approving the state plan, and for monitoring and evaluating the implementation of such plan for the provision of services and facilities ...;

Section 51.5-34 also requires that "[T]he Board shall be assisted in its administrative and technical duties by the staff of the Department for Rights of Virginians with Disabilities." Staff for administering the developmental disabilities grants shall be housed within the Department of Mental Health, Mental Retardation and Substance Abuse.

The Board, like all policy boards listed in Va. Code § 9-6.25:2, is charged with promulgating regulations and policies, but is "not responsible for supervising [an] agency or employing personnel." (See Va. Code § 9-6.25.)

II. BRVD LEGAL ISSUES

Exhibit "A" is a letter of non-compliance dated May 1, 1991 which was sent to BRVD administrator, Meade Boswell, and which cites the Board for not hiring, supervising and evaluating its own staff as required by § 124(C)(2) of the Act. HHS requires a gubernatorial letter affirming Virginia's intent to amend § 51.5-34 and § 51.5-37(1).

Since October 1, 1990, § 124(c)(2), 42 U.S.C. § 6012 specifically requires each "State Planning Council, consistent with State law, [to] 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." By contrast, Va. Code §§ 51.5-34 and 51.5-37(1) provide that the Board shall be assisted in its administrative and technical duties by DRVD staff, and, in practice, DRVD provides staff to the Board. This is clearly

contrary to federal law as amended. In order to comply with federal requirements, the first paragraph of § 51.5-34 and § 51.5-37(1) must be repealed, or, in the alternative, may be amended to read: "The Board shall be assisted ... by its own staff as directed by the Board Chair or its designee." Va. Code § 51.5-37(1) language up to "to render such advice to the Board ..." should be deleted. Va. Code §§ 9-6.25:2 and 9-6.25:3 must also be amended to change the status of BRVD from a policy board to a supervisory board in order to insure that it has the power to hire, supervise and evaluate staff. Va. Code § 51.5-33 should also be amended to include staffing power within those powers enumerated for BRVD.

III. DRVD LEGAL ISSUES

A. Health and Human Services cites DRVD for non-compliance with federal funding requirements because of the state law provision at Va. Code § 51.5-37(5) that requires DRVD to secure gubernatorial approval before filing any lawsuit on behalf of a client.

Section 142(a)(2)(A)(i), 42 U.S.C. § 6042, provides that the protection and advocacy system] must ... have the authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure protection of and advocacy for, the rights of such persons within the State who are or may be eligible for treatment, services or habilitation ...." Commissioner McFadden's letter to the DRVD states that, because gubernatorial approval is required before a lawsuit may be filed, the Virginia Protection and Advocacy Agency does not have the required authority to pursue legal remedies as mandated by law.

It may be argued that the requirement of gubernatorial approval does not deprive DRVD of the authority to pursue legal remedies on behalf of its clients and serves to insure those cases which may be resolved amicably without expensive litigation are so resolved; that only appropriate cases are commenced in court; and that federal and state resources are prioritized and utilized in the most effective and efficient manner.

In addition, a case can be made that the federal statute does not require DRVD to have "independence" from the Governor. Section 6042 requires the state to have a "system" that has authority to pursue legal remedies. The regulations require the state to designate an "agency" to "administer" the system. Neither the regulations nor the statute require that the agency that administers the state's advocacy system have independent authority to file a lawsuit. Arguably, when the "agency" designated to "administer" the system is a state agency, the Governor as chief executive office is part of the "system." Section 142(g) specifically provides that "[N]othing in this Act shall preclude the [Protection and Advocacy System] ... from bringing a suit on behalf of persons with developmental disabilities against a state, or agencies, or instrumentalities of a state." The Developmental Disabilities Act itself does not therefore preclude gubernatorial approval.

Only nine states, including Virginia, continue to have state agencies assigned to administer the Protection and Advocacy System grandfather provisions in the federal law, and no Protection and Advocacy System in the country, other than

Virginia, has a comparable statutory prelitigation requirement.[1] It may be argued that such a provision has a chilling effect on protection and advocacy functions, and the Department, as the Protection and Advocacy Agency, is not allowed to exercise independent professional judgment on behalf of its clients vis-a-vis the merits of litigation.

DRVD proposed last year that Va. Code § 51.5-37(5) be repealed for the reasons stated in DRVD's 1990 legislative package which I have attached as Exhibit "C" for your consideration. I particularly recommend to you the July, 1990 letter of assurance on the proposed legislation submitted by the Deputy Attorney General on the proposed repeal of this statute.[2]

Regardless of the legal arguments to the contrary available, the sledgehammer wielded by HHS as it interprets its own program requirements is loss of future and perhaps current Developmental Disabilities Act basic grant funds if the approval provision is not removed from state law. Federal regulation 45 CFR § 1386.21(a) states, "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

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[1]Information confirmed by Curtis L. Decker, Executive Director of the National Association of Protection and Advocacy Systems.

[2]Other strategies for achieving the desired control remain; such as the requirement that an internal prioritization system be implemented, and that certain specified procedures be followed before suit is initiated. These may be as effective as gubernatorial approval.

section 142 of the Act (42 U.S.C. § 6042) and that system must be operational."

The Developmental Disabilities Assistance and Bill of Rights Act of 1990 substantially changed the requirements for Protection and Advocacy Systems as of October 1, 1990, and these changes reflect an increased emphasis on independence from state government. The system must prepare its own annual statement of objectives and priorities which draws upon public comments. Section 142 [42 U.S.C. 6042] (F) requires that the Protection and Advocacy System be "independent of any agency which provides treatment, services, or habilitation ...." This requirement for independence from service-providers has already been interpreted by HHS to mean independence from Governors who are the ultimate overseers of state treatment facilities and from Attorneys General who serve as legal counsel to all state agency service providers.

Health and Human Services Administrators have not been persuaded by arguments in defense of Va. Code § 51.5-37(5) that gubernatorial approval of litigation is not unreasonably withheld, nor by the fact that it may facilitate resolution of protection issues. To comply with HHS demands on this issue the corrective action plan submitted by DRVD "must include a letter from the Governor stating the intention of requesting the legislature to amend § 51.5-37(5)." A decision not to provide such a letter will in all probability lead to fund termination and protracted litigation.

B. The Department is not independent of the State Planning Council.

A second finding of non-compliance on the part of DRVD is based on its close association with BRVD, the State Planning Council, an agency involved in the funding and planning of service that is funded through the designated state agency, DMHMRSAS. The DRVD director also hires, supervises and evaluates the Board administrator and assistants. Section 142(a)(2)(F) provides that the system must "be independent of any agency which provides treatment, services, or habilitation to persons with developmental disabilities ...." The Department, as the protection and advocacy component, may not maintain ties to service providers.

This non-compliance finding may be challenged because HHS has erroneously concluded that the Board is a "service provider." Va. Code §§ 51.5-33(5)(6) describe the Board's duties and functions and its activities do not include service delivery. Services for the developmentally disabled are defined in both federal and state law as "acquisition or modification of equipment or devices, interpreters, readers, taped texts, amplifiers, paratransit and other special transportation services, facilities, privileges, telecommunication devices, ... brailled materials." See 28 CFR § 39.103. Section 39.104 provides a list of examples of auxiliary aids and services. The Board is not involved in the delivery of any of these except indirectly in its recommendations of various service proposals deemed worthy of funding.

Virginia Code § 51.5-35(5) defines services for persons with developmental disabilities as "specialized services or special adaptations of generic services ... [including] diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, training, education, sheltered employment, recreation, counseling ... referral ...." The Board's statutory powers and duties at Va. Code § 51.5-33(5), (6) do not in any way include delivery of the aforementioned services to disabled persons. The Board or Planning Council also does not administer the protection and advocacy activities of the Department. In my opinion, we could contest HHS' conclusion that the Board is a service provider and, therefore, the only corrective action required as a result of a change in the federal law, would be to allow BRVD to hire its own administrative staff.

Since October 1, 1990, the amended federal law, Section 142(c)(2), 42 U.S.C. § 6012, specifically requires the Board to hire, supervise, and evaluate its own staff. Virginia's statutory arrangement currently allows the Board's staff to be hired, supervised and evaluated by DRVD's director. As there has been a clear and unequivocal change in federal requirements and no grandfather provision exists, DRVD may no longer perform the Board's personnel functions. Amendment of Va. Code §§ 51.5-34 and 51.5-37(1) as recommended in Part II of this memo, would remove any administrative ties between DRVD and BRVD and moot HHS' objection that the Board is a service provider.

IV. RECOMMENDATION

James Rothrock, DRVD Director, prepared a list of policy options available to address to HHS' non-compliance findings which is marked as Exhibit "D" and attached. A challenge to the findings in totality is not possible given explicit changes in federal law (Option 5). Withdrawing from the federal grant program (Option 2) does not present legal problems but may not be practical. Compliance could result from a negotiated corrective action plan which includes the express intent to repeal Virginia Code § 51.5-37(5) and proposed statutory changes that would give BRVD express authority to hire, supervise and evaluate its three administrative staff members as specified above (Option 1). The litigation undertaken by DRVD would remain subject to approval by Director Rothrock, and limited by both budgetary constraints, and the statutory emphasis on mediation and conciliation. This option may also necessitate the creation of a new line item in the budget separating out BRVD and DRVD staff costs which are presently commingled.

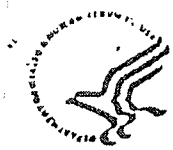
Director Rothrock has also suggested that it would be feasible to achieve compliance and maintain funding by repealing the gubernatorial approval provision and establishing a private, non-profit Protection and Advocacy System which would be accountable only to HHS and its auditors (Option 3). Alternatively, he suggests that DRVD could, within existing law, contract out litigation to private attorneys who would be free to act without gubernatorial approval (Option 4). This alternative, however, is not workable as it would violate Va. Code § 51.5-37

which requires the Department to bring all court actions on behalf of developmentally disabled persons and the Department can only do so legally with the Governor's approval. Thus, attorneys on contract would have no more authority to file without gubernatorial approval than attorneys on staff now do. In addition, if clients are routinely referred to independent, private counsel for the filing of all litigation, this scenario may violate § 142(a)(2)(A)(i), 42 U.S.C. § 6042 which requires the Protection and Advocacy System to have the authority to pursue legal remedies.

In summary, the Commonwealth may challenge HHS' finding that gubernatorial approval does not comply with federal funding requirements. HHS has clearly stated its position on this issue and litigation is a certainty if the position is challenged. If Virginia loses, it will lose the federal funding and federal funds will be withheld beginning with the first administrative case decision by the agency against DRVD.

The Commonwealth may also challenge the finding that BRVD is a service provider. The activities BRVD, or the Planning Council, engages in do not meet accepted definitions of service delivery. On the other hand, clearly separate administration and personnel functions from DRVD may solve the "service deliver" agency problem. With the October 1990 amendments to the Act, it is clear that the authority to hire, supervise and evaluate staff must reside with BRVD and not with DRVD.

I am available to discuss this matter fully with you or your designee as you wish and look forward to your direction and response.



DEPARTMENT OF HEALTH & HUMAN SERVICES

MAY 03 1991

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

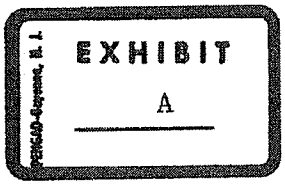
Ms. Meade H. Boswell
Administrator
Board for Rights of Virginians
with Disabilities
James Monroe Building, 17th Floor
101 N. 14th Street
Richmond, Virginia 23219-3641

Dear Ms. Boswell:

I am in receipt of your letter of February 26, 1990 in response to questions I raised concerning the relationship between the State Developmental Disabilities Planning Council and the Protection and Advocacy System program and have determined that the Board for Rights of Virginians with Disabilities is not in compliance with the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 600 et seq.).

As you know, Section 124(c)(2) of the Act requires that the 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.

Your February 26, 1991 response states that the Deputy Director for Systems Advocacy of the Department for Rights of Virginians with Disabilities supervises and evaluates the performance of the Board (Council) Administrator, Assistant Board Administrator and Board Planner in the execution of Council designated activities. Therefore, I find that the Board for Rights of Virginians with Disabilities is not in compliance with the amended Federal statute which increases the autonomy of the Council in this area.



Further, I have advised the Department for Rights of Virginians with Disabilities that this same relationship constitutes a compliance issue for the Protection and Advocacy System. Title 42 U.S.C. 6042 requires 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 in violation of statutory requirements for the Virginia Protection and Advocacy System. The Virginia Protection and Advocacy System has also been advised of an additional compliance issue. A copy of my letter to the Department for Rights of Virginians with Disabilities about these issues is enclosed for your information.

As stated in Title 42 U.S.C. 6042(a)(2)(A)(i), "In order for a State to receive an allotment under Part B...the State must have in effect a system to protect and advocate the rights of persons with developmental disabilities..." This statutory citation is further clarified in regulation, 45 CFR 1386.21(a): "In order for a State to receive Federal financial participation for Protection and Advocacy activities...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 State Planning Council, as well as the P&A, must be in compliance with all relevant statutory requirements of the Act for continued Federal support of these programs within the State of Virginia. A copy of this letter has also been forwarded to Linda Veldeer of the Designated State Agency, the Department of Mental Health, Mental Retardation and Substance Abuse (DMHMRSA), since this relationship exists through an administrative arrangement between DMHMRSA, the DRVD and BRVD.

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

documentation that the State Planning Council shall, 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.

The State Planning Council will be ineligible for Fiscal Year 1992 basic state grant funds if this issue, also impacting on the P&A's eligibility, is not resolved on or before September 30, 1991. During the same time period, the P&A must also satisfactorily resolve the additional compliance issue referenced above for the State to continue to receive funding under Parts B and C of the Act.

To demonstrate the intent to rectify the area which is not in compliance with Federal law, the State Planning Council must develop and submit a Corrective Action Plan (CAP) within 45 days from the date of this letter. The CAP must address the 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 deficiency 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. Sections 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.

The CAP should be submitted to the Philadelphia Regional Office at the following address. Also, please forward a copy of the CAP directly 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

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 State Developmental Disabilities Planning Council into total compliance with the Act and applicable regulations.

Sincerely,

Deborah L. McFadden
Commissioner
Administration on
Developmental Disabilities

Enclosure

cc: James A. Rothrock, DRVD
Linda C. Veldeer, DMHMRSA
Richard Spitzborg, DHHS Region III
Alvin Pearis, OSP Region III

DEPARTMENT OF HEALTH & HUMAN SERVICES

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

MAY 1 1991

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 (DMHMRSA) 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

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, DMHMRSA
Meade Boswell, BRVD
Richard Spitzborg, DHHS Region III
Alvin Pearis, Director, OSP, Region III

Department for Rights of Virginians with Disabilities
1991 General Assembly
Summary of Legislative Proposal Priority 1

SUMMARY OF CHANGES	FUNDING REQUIRED	FTE REQUIRED
Amend and reenact Section 51.5-37 of the Code of Virginia relating to the powers and duties of the Department for Rights of Virginians with Disabilities.	No	No

Program Name Not applicable

Subprogram Name Not applicable

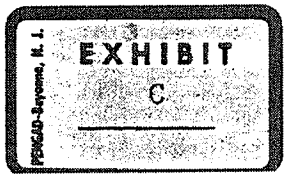
Objective To remove the requirement for approval by the Governor before the agency may file an action in court. This change will enable the agency to comply with a federal funding mandate that we have the ability to bring action in court on behalf of people with disabilities.

Needs Assessment Following a federal monitoring visit in 1989, the agency was advised verbally of a finding of noncompliance related to the practice of submitting requests for approval to file suit to the Governor as presently required by the Code. To comply with federal requirements the agency must have independent authority to pursue legal, administrative and other remedies. Removing the provision for gubernatorial approval is necessary to assure the agency does in fact have the requisite independent authority.

DRVD has not previously submitted this proposal.

Internal Impact Is the proposal needed as the result of:

agency organization?	no
state agency program changes?	no
state study?	no
other internal state government changes?	no
efficiency/paperwork reduction?	yes



While increased efficiency and reduced paperwork are not the motivating factors for requesting this change, it must be acknowledged that the agency would be able to more efficiently represent clients when not compelled to allow extended time for review and action by the Office of the Governor. Similarly, the agency would not be compelled to develop decision briefs and case histories on cases to be filed in court thus reducing the paperwork between the agency and the Office of the Governor.

External Impact

Is the proposal needed as a result of:

federal law, regulation or other requirement?	Yes
condition of continued funding?	Yes
court decision?	No
non-state study?	Yes

The federal Developmental Disabilities and Bill of Rights Act enables states to receive federal dollars for the operation of a protection and advocacy system for people with developmental disabilities. The Act requires among other things that state protection and advocacy systems have the authority to pursue legal, administrative and other remedies in order to qualify for federal funds. DRVD is the designated agency in the Commonwealth for receipt of these federal protection and advocacy dollars. In 1989, the Administration on Developmental Disabilities conducted a monitoring visit to DRVD to assess adherence to federal program requirements. This agency's ability to file actions in court has been the subject of discussion for several years. The site visit which included review of our administrative procedures and enabling state legislation confirmed that the Governor determines whether the agency can pursue action in court. If steps are not taken to bring us into compliance, present and future funding is in jeopardy.

Program and Client Services Impact

Removing the requirement for gubernatorial approval will enable the agency to fully comply with federal funding mandates and maintain eligibility for receipt of federal funds.

Clients of DRVD will be assured the Commonwealth is honoring their right to independent representation as provided for in federal law.

Statement of assurance of other agencies or organizations affected by the proposal

This proposal is specific to the operations of DRVD. Other agencies and organizations are not directly affected so no letters are attached.

Letter of assurance from the Office of the Attorney General

The proposal has been sent to the Office of the Attorney General for review and comment. A copy of the response is included as page 13.

file DRD.

Mary Sue Terry
Attorney General

H. Lane Kneedler
Chief Deputy Attorney General

Deborah Love-Bryant
Chief-of-Staff

COMMONWEALTH of VIRGINIA

Office of the Attorney General

K. Marshall Cook
Deputy Attorney General
Finance & Transportation Division

R. Claire Guthrie
Deputy Attorney General
Human & Natural Resources Division

Gail Starling Marshall
Deputy Attorney General
Judicial Affairs Division

Stephen D. Rosenthal
Deputy Attorney General
Criminal Law Enforcement Division

July 9, 1990

James A. Rothrock
Director
Department for Rights of Virginians with Disabilities
101 N. 14th Street -- 17th Floor
Richmond, VA 23219

Dear Jim:

I have reviewed the Department's proposals for inclusion in the Administration's legislative package for the 1991 General Assembly. Neither proposal would have a significant impact on this Office if enacted. In addition, both proposals are consistent with state and federal law and constitutional on their face. In fact, your priority number one proposal to amend § 51.5-37 to delete the requirement for advance litigation approval from the Governor may prevent protracted litigation with the federal government regarding the validity of this requirement under federal law.

As you know, in a recent program audit triggered by the Department's receipt of federal funds, federal officials raised a question whether the prelitigation approval requirement compromised the Department's "independence" for purposes of compliance with developmental disabilities advocacy program requirements. While I have determined that the current statute is defensible under the applicable federal rules, it is clear that the responsible federal officials may take a contrary view and threaten to terminate federal funding of the Department unless state law is changed. Should we choose to challenge the federal interpretation in court, this would lead to extended litigation with an uncertain outcome.

Sincerely yours,

R. Claire Guthrie
Deputy Attorney General

6:c015

Department for Rights of Virginians with Disabilities
1991 Legislative Proposal
Priority 1

A Bill to amend and reenact § 51.5-37 of the Code of Virgninia relating to the powers and duties of the Department for Rights of Virginians with Disabilities.

Be it enacted by the General Assembly of Virginia:
That § 51.5-37 of the Code of Virginia is amended and reenacted as follows:

CHAPTER 8.

Department for Rights of Virginians with Disabilities.

§ 51.5-36. Department created.-- There shall be in the executive branch of state government the Department for Rights of Virginians with Disabilities. The Department shall be assigned to the Secretary of Health and Human Resources and shall be independent of all other agencies reporting to the Secretary. The Department shall be headed by a Director who shall be appointed by the Governor, subject to confirmation by the General Assembly. The Director shall be a person qualified by knowledge, skills, and abilities to administer and direct the provision of advice and other services regarding the rights of persons with disabilities. The Director shall employ such qualified staff, including legal counsel, as shall be necessary for carrying out the purposes of this chapter.

§ 51.5-37. Powers and duties.-- The Department shall have the following powers and duties:

1. To provide staff to assist in the performance of the administrative and technical duties of the Board for Rights of Virginians with Disabilities and to render such advice to the Board as the Board may from time to time request, not inconsistent with the other duties of the Department;

2. To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this chapter, including but not limited to, contracts with the United States, other states, agencies and governmental subdivisions of Virginia;

3. To accept grants from the United States government and agencies and instrumentalities thereof and any other source. To this end, the Department shall have the power to comply with such conditions and execute such agreements as may be necessary, convenient, or desirable;

4. To monitor the implementation of Chapter 9 (§ 51.5-40 et seq.) of this title and to render assistance to persons with disabilities in the protection of the rights of

persons with disabilities under the laws of the Commonwealth and of the United Sates;

5. To employ mediation procedures to the maximum extent possible to resolve complaints concerning violations of rights of persons with disabilities, when those rights are related to such disabilities. When such procedures fail, the Department shall have the authority to pursue legal, administrative and other appropriate remedies to protect the rights of persons with disabilities, when those rights are related to such disabilities; ~~however, 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. In the event there is no conflict of interest nor federal requirement to the contrary, the Governor may refer such action to the office of the Attorney General;~~

6. No counsel shall be hired by the Department under the provisions of this chapter without the express approval of the Attorney General;

7. To do all other acts necessary or convenient to carry out the purposes of this chapter and Chapter 9 (§ 51.5-40 et seq.) of this title.

§ 51.5-38. Department designated as state agency for purpose of cooperation with federal government.-- The Department is designated as the state agency for the purpose of cooperating with the federal government in the protection of and advocacy for persons with disabilities under the federal Rehabilitation Act and the federal ~~Development~~ Developmental Disabilities Assistance and Bill of Rights Act.

§ 51.5-39. Cooperative agreements with state agencies regarding advocacy services for their clients.-- Notwithstanding the foregoing, state agencies providing services to persons with disabilities may develop and maintain advocacy, client assistance or ombudsman services for their clients, which services may be within the agency and independent of the Department. The Department may enter into cooperative agreements with any state agency providing advocacy, client assistance, or ombudsman services for the agencies' clients, in order to assure the protection or and advocacy for persons with disabilities, provided that such agreements do not restrict such authority as the Department may otherwise have to pursue any legal or administrative remedy on behalf of persons with disabilities.

Department for Rights of Virginians with Disabilities

RESPONSE OPTIONS FOR FEDERAL COMPLIANCE FINDINGS

Two practices of DRVD have been found out of compliance with federal requirements for which corrective action has been required for continued funding under the federal developmental disabilities program:

1. gubenatorial approval requirement before action in court, and,

2. the staffing relationship with the Board for Rights of Virginians with Disabilities.

While the compliance findings are specific to the federal DD program, DRVD receives funds from two other federal programs (Vocational Rehabilition Client Assistance Program and Protection and Advocacy for the Mentally Ill) whose rules contain the same provisions regarding ability to take legal action on behalf of clients and independence from service providing agencies as does the DD program. Addressing compliance for all three federal programs should be considered when deciding the response to the federal compliance findings in regards to the DD program.

<u>Response Options</u>

1. Accept Findings and Comply

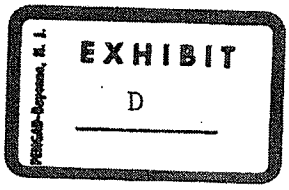
Action: Governor sends a letter indicating the state's intent to comply with three attachments - a corrective action plan, draft legislation and a letter from the office of the attorney general regarding the draft legislation

Pros:
* Achieves compliance
* Assures more expedient services
* Improves satisfaction with program in disability community
* Creates strong position for appeal if needed to assure the continued flow of funds for FY 92

Cons:
* Loss of Governor's oversight authority
* Business community concerns about agency having unchecked authority to file suit

2. Accept Findings and Withdraw from Program

Action: Governor sends a letter indicating the state's intent to withdraw from the program effective FY 92 rather than seek change of the state code.



Pros: * Eliminates need to change state practice

Cons: * Significant loss of funds which would need to be replaced by state dollars to continue services, or,
* Services diminished
* Creates perception that Commonwealth is not invested in the rights of people with disabilities with the potential to become a national issue

3. Redesignation (establish a private, non-profit P & A agency)

Action: Same as number 1

Pros: * Achieves compliance
* Downsizes government

Cons: * Loss of Governor's oversight authority
* Scope of services may be reduced to strictly legal representation
* Availability to and coverage of the state may be reduced

4. Contract Legal Services (DRVD continues to provide advocacy assistance for informal resolution when formal resolution must be considered case referred to private contractor)

Action: Same as number 1

Pros: * Achieves compliance
* Addresses concerns about a state agency having authority to sue other agencies or private businesses

Cons: * Loss of Governor's oversight authority
* More likely that money considerations will drive decision to represent
* Decreased services

5. Appeal (This action would not prevent loss of funds as stipulated in the letter of findings. It could be pursued in isolation or in combination with any of first four options. The timeframe allotted for an appeal is 60 days from date of action.)

Action: Director DRVD and Administrator BRVD file an appeal in federal court.

Pros: None identified

Cons: Does not buy time

Revised LCV 12/90

FEDERAL YEAR 1990
DEVELOPMENTAL DISABILITIES GRANT AWARDS

NUMBER	TITLE/Grantee	DD Grant Award
90-01 PAM SOLICITED	CONSUMER EMPOWERMENT PROJECT Center for Public Affairs Department of Rehabilitation Counseling Virginia Commonwealth University	$ 99,000
90-02 PAM SOLICITED	BOARD FOR RIGHTS OF VIRGINIANS WITH DISABILITIES TECHNICAL ASSISTANCE PROJECT Virginia Institute for Developmental Disabilities Virginia Commonwealth University	$ 165,885
90-03 CDA FIRST YEAR	A STATE AND LOCAL PARTNERSHIP FOR PREVENTION OF LEAD INDUCED DEVELOPMENTAL DISABILITIES Central Virginia Health District (City of Lynchburg)	$ 85,734
90-04 CDA FIRST YEAR	TRAINING AND TECHNICAL ASSISTANCE FOR THE PROMOTION OF PRIMARY PREVENTION OF DEVELOPMENTAL DISABILITIES Virginia Institute for Developmental Disabilities Virginia Commonwealth University	$ 62,126
90-05 CDA SECOND YEAR	INSERVICE TRAINING FOR HEALTH CARE PROVIDERS IN THE EARLY IDENTIFICATION AND REFERRAL OF INFANTS/FAMILIES AT RISK FOR DEVELOPMENTAL DISABILITIES School of Nursing Medical College of Virginia (Collaboration with Virginia Department of Health and Virginia Institute for Developmental Disabilities)	$ 58,250
90-06 CLA FIRST YEAR	PERSONAL ASSISTANCE SERVICES PILOT PROJECT Department of Rehabilitative Services	$ 100,000
90-07 CLA FIRST YEAR	FINANCIAL AND PSYCHOSOCIAL IMPACT OF TUBE FEEDING ON CHILDREN AND FAMILIES IN VIRGINIA Kluge Children's Rehabilitation Center	$ 59,926
90-08 CLA FIRST YEAR	SUPPORT FOR AGING CAREGIVERS OF DEVELOPMENTALLY DISABLED INDIVIDUALS Rappahannock-Rapidan Community Services Center	$ 33,702
90-09 CLA SECOND YEAR	PROJECT HEAD COACH Virginia Head Injury Foundation	$ 48,283
90-10 SECOND YEAR	TRAUMATIC BRAIN INJURY PSYCHIATRIC AND BEHAVIORAL RESOURCE CENTER Department of Psychiatry Medical College of Virginia	$ 54,814

90-11 CLA SECOND YEAR	**THE AGED AND AGING DEVELOPMENTALLY DISABLED: BUILDING A BETTER SYSTEM FOR COMMUNITY LIVING** Department for the Aging (Collaboration with Virginia Institute for Developmental Disabilities)	$ 22,733
90-12 CLA SECOND YEAR	**OUTREACH TO RURAL FAMILIES WITH A SERIOUSLY MENTALLY ILL MEMBER** Virginia Alliance for the Mentally Ill	$ 25,600
90-13 EA FIRST YEAR	**PARTNERSHIP FOR THE ADVANCEMENT OF SUPPORTED EMPLOYMENT SERVICES (PASES)** The Association for Persons in Supported Employment (APSE)	$ 109,788
90-14 EA SECOND YEAR	**BUILDING A SYSTEM OF TRAINING AND SUPPORT: PLANNING FOR THE 1990s** Department of Rehabilitative Services (Collaboration with Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services)	$ 48,000
90-15 CLA FIRST YEAR	**SELF-DIRECTED FAMILY SUPPORT NETWORK** Jewish Family Services of Tidewater (Collaboration with Jewish Community Federation of Richmond)	$ 12,000 ($25,000 to be awarded from Federal Year 199: DD Grant Funds)

SUMMARY

GRAND TOTAL - $985,841

I. PRIORITY AREA AND MANDATE ACTIVITIES (PAM)

Solicited Projects Total: $264,885

II. PRIORITY AREAS Total: $720,956

Child Development Activities (CDA)

New Projects:	$147,860
Continuation Projects:	$58,250
Total:	$206,110

Community Living Activities (CLA)

New Projects:	$205,628
Continuation Projects:	$151,430
Total:	$357,058

Employment Activities (EA)

New Projects:	$109,788
Continuation Projects:	$48,000
Total:	$157,788