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Honorable Richard E. McLawhorn
Commissioner, Department of Youth Services
Post Office Box 7367
Columbia, South Carolina 29202

Dear Commissioner McLawhorn:

You have asked whether or not the Department of Youth Services needs to promulgate regulations to initiate a fees for services schedule. Section 20-7-3270, CODE OF LAWS (1976), as amended, authorizes the "fees for services" schedule where it provides in pertinent part:

> The Board is authorized to charge and collect fees for evaluation and treatment services provided for any person referred or temporarily committed to its facilities .... Section 20-7-3270 also allows the Department of Youth Services to charge for residential care. Section 20-7-3270, however, provides that '[n]o fees shall be charged to any person who is finally committed to a custodial facility of the Department ....' (Emphasis added).

Section 20-7-3270 further states:

> The Board shall approve a schedule of maximum charges for the various services of the Department, including residential care, and shall review the schedule from time to time. The Board shall adopt procedures to determine ability to pay and may authorize its designees to reduce or waive charges based upon their findings.

The Code provides that no charge may exceed actual costs and that "the Department shall establish a hearing and review procedure" for purposes of allowing the guardians to challenge the particular charges. Finally, the Department "may utilize legal procedures to collect lawful claims" which are to be deposited with the State Treasurer to defray the cost of services. The statute does not specify that "regulations" are necessary for the establishment of a "fee schedule" which was mandated for the Board in 1973. 1973 Acts and Joint Resolutions, Act No. 370, pp. 645-646, amended 1974 Act No. 1209, p. 2820. This Act was amended in the Children's Code in 1981 without revising the critical language.

Your inquiry addresses the applicability of the Administration Procedures Act, Section 1-23-10, et seq., as it relates to the development of regulations.

Section 1-23-10(4) provides a list of exemptions from the term "regulation." Section 1-23-10(4) provides in pertinent part:

> The term does not include ... orders of the supervisory or administrative agency of any penal ... institution, in respect to the institutional supervision, custody, control, care or treatment of inmates, prisoners or patients therein.

The Department of Youth Services performs these responsibilities upon orders from the Family Court system by "referral or temporary commitment." Sections 20-7-3230, 20-7-3270. It cannot be seriously questioned that the Department of Youth Services is a supervisory or administrative agency of a penal institution. Similarly, the fees schedule concerning "evaluation," "treatment," and "residential care" of Section 20-7-3270 are within the unambiguous intent of the exemption from regulation related to "supervision, custody, control, care and treatment" of the inmate, prisoner, or patient. It would seem to be clear the regulations of the fees schedule need not be promulgated now under the A.P.A.

The inquiry into the requirement of regulations does not end here. To fully answer your question, Section 8-21-15, CODE OF LAWS (1976), as amended (1987), must be considered, and it provides in pertinent part:

> No state agency, department, board, committee, commission, or authority initially may set a fee for performing any duty, responsibility, or function unless the fee ... is authorized by statutory law and set by regulation. (Emphasis added).

The section does not apply to state-supported governmental health care facilities, schools, educational and training programs, charges for room and board on state-owned property, court fees and fines, among other specified items. This Act has no application to Section 20-7-3270 for a number of reasons. First, the Board was mandated by the General Assembly to establish these fees and review them from "time to time" since 1974. Second, when the A.P.A. was passed in 1977, it excluded these fees by the agencies from being subject to a regulation. Third, in 1981, the section was re-enacted by the General Assembly without requiring a "regulation" under South Carolina law. Therefore, the costs were mandated to be "initially set" in 1974 in full compliance with South Carolina. Fourth, the section excludes education and training programs, which DYS by law is a "special school district," Section 20-7-3240, and the fees under Section 20-7-3270 may be charged to another "public" ... "agency responsible for the temporary commitment," which under Section 8-21-15 are exemptions from the "no fee" act. It is our opinion that Section 8-21-15 does not reveal any legislative intent that fees established under Section 20-7-3270 are required to be established by regulation. Further, for the current appropriation year, reference must be made to Section 129.42 of Act 171 of Acts and Joint Resolutions of 1991, the Appropriations Act. In Section 129.42 it provides language similar to Section 8-21-15. For the same reasons set forth above, it would appear that 129.42 does not require regulations for these matters.

The purpose of these fees is understandable. Each person evaluated by the DYS Reception and Evaluation Center will have been "adjudged delinquent" by the commission of a criminal act against the citizens of the state. These fees for evaluation are a reasonable expense by the child's guardian who bears some legal responsibility as the supervision for the criminal acts of the child which has placed this ever-increasing burden under the taxpayers of the state. The statute created a "reasonable actual cost of services" and "ability to pay" limits and clearly are not intended to be a punitive assessment against the guardian, but rather a reasonable one. I hope the Board has heeded the mandate of the General Assembly in expeditiously enacting and enforcing a reasonable fee schedule to help defray this unnecessary burden from the innocent

taxpayers. To unnecessarily hinder its enforcement through the regulatory process was certainly not the intent of the Legislature.

Sincerely,

Donald J. Zelenka
Chief Deputy Attorney General

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