The State of South Carolina

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The Honorable Robert L. Helmly
Senator, District No. 37
Post Office Drawer 1194
Moncks Corner, South Carolina 29461

Dear Senator Helmly:

You have advised that in May 1990 the Legislative Audit Council issued a report to the General Assembly entitled, "A Limited-Scope Review of the South Carolina Continuum of Care for Emotionally Disturbed Children." This report made several recommendations as to how that agency could improve its operations. Recommendation number 3, on page 18 of the report, states: "The Continuum of Care should promulgate regulations for its eligibility and selection criteria as required by the Administrative Procedures Act." You have asked whether the Continuum of Care's selection criteria are required, as a matter of law, to be promulgated as regulations under the Administrative Procedures Act.

Pursuant to S. C. Code Ann. § 20-7-5610 *et seq*. (1989 Cum. Supp.), the Continuum of Care for Emotionally Disturbed Children was created to develop and enhance delivery of appropriate services to severely emotionally disturbed children and youth. By § 20-7-5620 (D), the governing body of the Continuum of Care is mandated to "promulgate regulations in accordance with this article and the provisions of the Administrative Procedures Act and formulate necessary policies and procedures of administration and operation to carry out effectively the objectives of this article [Article 23 of Title 20, Chapter 7]."

The clients served by the Continuum of Care are limited, by § 20-7-5640 (A)(1), to those children

> (a) who have been diagnosed as severely emotionally disturbed;
>
> (b) who have exhausted existing available treatment resources or services;

(c) whose severity of emotional, mental, or behavioral disturbance requires a comprehensive and organized system of care.

In § 20-7-5640 (A)(2) is stated: "Priority in the selection of clients must be based on criteria to be established by the Continuum of Care."

According to the report of the Legislative Audit Council referenced above, at page 16, the Continuum of Care has established five basic criteria for eligibility for consideration for service:

(1) Legal residence in South Carolina.

(2) Be within 6 to 16 years of age at the time of application.

(3) Have been identified as severely emotionally or behaviorally disturbed by a department of education certified school psychologist, licensed clinical psychologist, or a psychiatrist.

(4) Have treatment needs that are not being met by existing service delivery systems; and

(5) Have consent of parent(s), legal guardian, or the agency holding custody, for release of information and receipt of Continuum services.

This policy has apparently not yet been adopted as a formal regulation pursuant to the Administrative Procedures Act.

The application procedure is detailed on page 14 of the report. Applicants who meet the initial eligibility criteria undergo further screening, and a psychosocial evaluation is undertaken and evaluated, toward placement of the applicant on a waiting list to receive services. Duration and severity of the child's disturbance and extent to which available resources have been exhausted are scored and determine where a child might be placed on a waiting list. This procedure is carried out on a regional basis, rather than statewide.

If a new client position becomes available, a new client would be selected by a three-member selection panel, whose members are independent of the Continuum of Care and have a broad range of experience in children's services. Two more applicants than the total

number of available client positions are considered; these applicants would be those with the highest psychosocial scores from the waiting list of the particular region. The panel is given the applicants' histories and other written information but not the actual psychosocial scores. The panel then selects the child(ren) who will fill the newly available client positions. The selection criteria used by the regional panels are not formulated in writing or promulgated pursuant to the Administrative Procedures Act, as of now.

A review of the statutes relative the the Continuum of Care and the report of the Legislative Audit Council show that the number of applicants greatly exceeds the client positions available; each child accepted for a waiting list has great needs and has most likely exhausted all of the usual resources for services; each child's needs are great, individually and by comparison to the needs of the other applicants; and that resources are limited to serve this population. 1/ Too, each applicant's situation is unique and difficult to compare, unlike a situation in which an individual applies for food stamps or public assistance, for which service resources are less limited and eligibility for services may be easily established by simple mathematical calculations and verification of readily available information.

The Administrative Procedures Act, S. C. Code Ann. § 1-23-10 et seq., prescribes the procedure for promulgation of regulations. "Regulation" is defined in § 1-23-10 (4), in relevant part, as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." As to the necessity of a state agency generally and the Continuum of Care specifically adopting regulations, see §§ 1-23-140 and 20-7-5620 respectively.

The promulgation of regulations is a means of filling in details of statutory framework enacted by the General Assembly. Shipley, South Carolina Administrative Law, 4-1 (2d Ed. 1989). Further, "[t]he essence of administrative rule making is generality of application...." 73 C.J.S. Public Administrative Law and Procedure § 87. How far an agency might go in promulgating regulations was discussed in S.E.C. v. Chenery Corp., 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947):

> But any rigid requirement to that effect [formulating new standards of conduct] would make the administrative process inflexible and incapable

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1/ The report of the Legislative Audit Council also explicitly recognizes many of these problems. For example, on page 16 of the report it is noted that "[e]ach new applicant has potentially greater need for Continuum services than all of the other applicants on the waiting list."

> of dealing with many of the specialized problems which arise.... Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards....

Id., 67 S.Ct. at 1580. See also N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966); City of Chicago v. People of Cook County, 133 Ill.App.3d 435, 478 N.E.2d 1369 (1985) (standards used by an administrative agency in arriving at decisions are not rules related to practice or procedure and are thus not required to be promulgated by regulation).

Likewise, the extent to which an administrative agency might go in promulgating regulations, given the notion that exercise of a certain amount of discretion may be desirable, is difficult to ascertain. In his preface to volume 2 of Administrative Law Treatise (2d Ed. 1979), Davis notes:

> Discretion is indispensable.... Both courts and agencies have and must have the power to individualize, and that means discretion. The goal is not to eliminate discretion; it is to eliminate unnecessary or excessive discretion, and to confine, structure, and check necessary discretion.

Id., page xiv (emphasis in original). Davis advises that discretion "is always better when individualizing is needed," explaining further: "Discretionary power is indispensable whenever individualizing is needed. Rules without discretion cannot satisfy the need for tailoring results to unique facts and circumstances of particular cases. The judicial process as well as the administrative process often allows discretion in order to take care of the need for individualized justice." 2 Davis, Administrative Law Treatise, § 8.3.

Based on the foregoing, it is our opinion that promulgation of a regulation to establish eligibility criteria (which are currently being utilized to screen potential applicants for Continuum of Care services), as recommended by the Legislative Audit Council, would be precisely the type of matter which the General Assembly envisioned to be promulgated under the Administrative Procedures Act; these criteria are uniformly applicable to all potential recipients of service and are readily identifiable with little (if any) exercise of discretion needed. Promulgation of a regulation to establish the ultimate selection criteria would be more problematical, however, as the selection process must necessarily take into account the unique facts and circumstances of each applicant for services. The exercise of discretion is unavoidable in making the decision about who will receive services through the Continuum of Care, given the unique, individual circumstances of each applicant and the limited resources and placements available in relation to the number of applicants on the waiting lists. The above-cited resources suggest that such a matter could well not be appropriate for promulgation of a regulation. In view of § 20-7-5640 (A)(2), it is advisable to promulgate regulations covering as much of the selection process as may be practicable, keeping in mind that the ultimate decision-making necessarily involves some exercise of discretion.

With kindest regards, I am

Sincerely,

Patricia D. Petway
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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