

1980 WL 120684 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 26, 1980

***1 SUBJECT: Attorney General; Attorneys; Charitable Organizations; Physically Handicapped; State Agencies; Statutes**

The South Carolina Protection and Advocacy System for the Handicapped, Inc., an eleemosynary corporation, is not required to have the approval of the Attorney General in order to employ attorneys to engage in legal work.

The Honorable Heyward McDonald
Senator
Richland, Chester and Fairfield Counties

QUESTION PRESENTED:

Whether the South Carolina Protection and Advocacy System for the Handicapped, Inc. (SCP&A System) must have the written approval of the Attorney General in order to employ two attorneys with the use of State funds?

AUTHORITIES:

Developmentally Disabled Assistance and Bill of Rights Act of 1975, [42 U.S.C. § 6001-6081 \(1976\)](#), as amended;

[Section 1-7-80 of the Code of Laws of South Carolina \(1976\)](#);

[Section 43-33-310 of the Code of Laws of South Carolina \(1979 Supp.\)](#);

Part 1, § 10, fourth provision of the 1979-80 General Appropriations Act, 1979 Acts and Joint Resolutions, p. 579;

1978 Acts and Joint Resolutions, p. 1926;

1979 Acts and Joint Resolutions, p. 587;

U. S. Code. Cong. and Ad. News 7360 (1978);

121 Cong. Rec. 16517-16518 (1975);

[John Grace & Co., Inc. v. State University Construction Fund](#), 44 N.Y.2d 84, 375 N.E.2d 377 (1978);

[Kentucky Region Eight v. Commonwealth](#), 507 S.W.2d 489 (Ky. 1974).

DISCUSSION:

Section 1-7-80 of the Code of Laws of South Carolina (1976) and Part I, § 10, fourth provision of the 1979-80 General Appropriations Act prohibit any department or agency of the state government from hiring attorneys to be engaged in legal

work except upon the written approval of the Attorney General. In order to determine whether the SCP&A System must comply with the aforesaid statutes in employing attorneys, we must first determine whether the SCP&A System is a department or agency of the state government, within the meaning of the statutes. Therefore, the legislative history of the SCP&A System must be examined.

The origin of the SCP&A System dates back to 1975 when Congress enacted the Developmentally Disabled Assistance and Bill of Rights Act ¹ which required each state ², in order to receive specified federal funds, to establish a system which would protect and advocate the rights of developmentally disabled persons. This protection and advocacy system must be independent of any agency which provides treatment, services, or habilitation to such persons. ³ The system must also have authority to pursue legal, administrative and other appropriate remedies on behalf of developmentally disabled persons. ⁴ This authority necessarily extends to the institution of suits against states and state officials who violate the rights of developmentally disabled persons. ⁵

The federal Act and related Department of Health, Education and Welfare (HEW) regulations give the governor of each state the responsibility for establishing the protection and advocacy system and for approving the advocacy plan prior to approval of the Secretary of HEW. ⁶ By executive order in 1977, Governor James B. Edwards designated an eleemosynary corporation known as Advocacy for Handicapped Citizens, Inc. as the organization to perform the function of advocate for developmentally disabled citizens of the State of South Carolina, as required by the federal Act. ⁷ By Act No. 48 of 1979, the South Carolina General Assembly transferred the functions of protection and advocacy to an eleemosynary corporation already formed under the corporate name, South Carolina Protection and Advocacy System for the Handicapped, Inc. The Act also provided that the SCP&A System 'exercise protection and advocacy functions not only for the developmentally disabled citizens of South Carolina but also for all other handicapped citizens of the State.' The governing board of the SCP&A System is composed of twelve members who are appointed by the Governor.

*2 Although the SCP&A System is currently authorized and funded under federal legislation, this basic allotment is supplemented by State funds ⁸ and in-kind contributions from other sources. ⁹ Therefore, the SCP&A System's financial support is derived mainly from public funds.

An analogous situation arose in [Kentucky Region Eight v. Commonwealth](#), 507 S.W.2d 489 (Ky. 1974), where the Kentucky Supreme Court held that charitable, non-profit corporations organized pursuant to statute to participate in administering mental health retardation programs and clinics were not 'state agencies' within the meaning of the statutes providing for the state employees retirement system. Some of the factors which the court emphasized as controlling were:

1. Use of non-profit corporations to implement the mental health program was intended to be an alternative to use of direct state agencies;
2. The corporations were to be treated as separate and apart from state government in order to qualify fully for receipt of federal grants and tax-deductible charitable donations; and
3. Their employees were not under the merit system, state salary schedules, or any other personnel regulations.

These factors are comparatively identical to the SCP&A System situation. The Kentucky Court held that '[t]he mere fact that the corporations receive and administer grants of state funds does not mean that they are state agencies.' *Id.* at 490. Furthermore, the Court decided that 'state agencies' as used in the statute meant 'agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure and to be subject to standard personnel policies having general application in the administration of government.' *Id.* at 491.

In [John Grace & Co., Inc. v. State University Construction Fund](#), 44 N.Y.2d 84, 375 N.E.2d 377 (1978), the Court of Appeals of New York held that:

Public benefit corporations, such as the [State University Construction] Fund, created by the State for the general purpose of performing functions essentially governmental in nature, are not identical to the State or any of its agencies, but rather enjoy, for some purposes, an existence separate and apart from the State, its agencies and political subdivisions [citations omitted]. Although there is necessarily some degree of relationship between the Fund and the State—the Fund was created by the State and is subject to dissolution by the Legislature—as a public benefit corporation, the Fund is ‘independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission’ or agency [citations omitted]. [Id.](#) 375 N.E.2d at 378.

It is the opinion of this Office that the General Assembly designated the South Carolina Protection and Advocacy System for the Handicapped, Inc., not as a State agency, but as an eleemosynary corporation chartered by the Secretary of State with an existence separate and apart from the State, to perform the function of advocate for all handicapped citizens of South Carolina. The SCP&A System is a non-stock, non-profit corporation which serves a public purpose and whose financial support is derived mainly from public sources. The corporation's employees are not under the State Merit System, State salary schedules, or any other State personnel regulations. It is not such an ‘integral part of State government as to come within regular patterns of administrative organization and structure.’

CONCLUSION:

*3 It is, therefore, the opinion of this Office that the SCP&A System is not a State agency within the meaning of Section 1-7-80 of the Code of Laws of South Carolina (1976) and Part I, § 10, fourth provision of the 1979-80 General Appropriations Act. Consequently, the SCP&A System is not required to receive approval from the Attorney General in order to employ attorneys to engage in legal work.

Richard B. Kale, Jr.

Senior Assistant Attorney General

Footnotes

- 1 [42 U.S.C. §§ 6001-6081 \(1976\)](#), as amended by the Developmental Disabilities Assistance and Bill of Rights Act of 1978, Pub. L. No. 95-602.
- 2 [42 U.S.C. § 6012\(a\) \(1976\)](#), as amended.
- 3 [Id.](#) § 6012(a)(2)(c).
- 4 [Id.](#) § 6012(a)(2)(A).
- 5 Congress believed that the establishment of the protection and advocacy systems was necessary to change the ‘shocking conditions’ which were found at numerous institutions for mentally retarded throughout the nation. 121 CONG. REC. 16518 (1975) (remarks of Senator Javits). Many of the institutions were state-operated. [Id.](#) at 16517-16518.
- 6 45 C.F.R. § 1386.70(b) (1979).
- 7 [S. C. Code Ann. § 43-33-310 \(1979 Supp.\)](#).
- 8 In 1978 the General Assembly authorized \$50,000.00 for the SCP&A System. 1978 Acts and Joint Resolutions, p. 1926. In 1979 the appropriation was increased to \$147,500.00. 1979 Acts and Joint Resolutions, p. 587.
- 9 U. S. Code Cong. & Ad. News 7360 (1978).

1980 WL 120684 (S.C.A.G.)