1979 WL 43167 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 13, 1979

***1 RE: Access to State Records by the South Carolina Protection and Advocacy System for the Handicapped, Inc.**

Honorable Heyward McDonald
Senator
Richland, Chester and Fairfield Counties
Post Office Box 142
604 Gressette Senate Office Building
Columbia, South Carolina 29202

Dear Senator McDonald:
You have requested an opinion from this Office concerning the difficulty encountered by the South Carolina Protection and Advocacy System for the Handicapped, Inc., in obtaining records of their clients from the various state institutions and agencies who are serving or may have served them. Your principal question seems to be whether or not there is a state statute which would 'override the mandate of the federal statute and prevent the Protection and Advocacy people from obtaining access to the patient records on their own motion?'. The federal statute referred to is P.L. 94-103 of 1975, as amended by P.L. 95-602 of 1978, now codified as 42 U.S.C. § 6012(a) [Developmentally Disabled Assistance and Bill of Rights Act]. Specifically §113 of P.L. 94-103 created the requirement that as a condition to receiving funds under the Act a State have in effect a system to protect and advocate the rights of persons with developmental disabilities. I will not repeat herein the provisions of § 113 now codified at 42 U.S.C. § 6012(a) nor the attendant regulations of HEW set forth at 45 C.F.R. § 1386.70 which are almost identical to the federal statute.

A review of the pertinent statutes, rules and regulations of HEW and the legislative history of P.L. 94-103 and P.L 95-602 fails to disclose any discussion whatsoever on the question of access to records as may be required by § 113. There is no indication in the statutes, rules and regulations or the legislative history that there was any intent on the part of Congress that the protection and advocacy system have unquestioned access to any state records. The pertinent provision only requires that the system 'have authority to pursue legal, administrative, or other appropriate remedies to ensure the protection and the rights of such persons who are receiving treatment, services, or habilitation within the state.'

The South Carolina protection and advocacy system was originally incorporated as the Advocacy for Handicapped Citizens, Inc., and located in Charleston; however, by Act No. 48 of 1979, the General Assembly authorized the advocacy system to be transferred to Columbia and the functions under § 113 of P.L. 94-103, as amended by P.L. 95-602, were transferred to a nonprofit corporation known as the South Carolina Protection and Advocacy System for the Handicapped, Inc. Act No. 48 did not create additional authority or powers in the new corporation other than those authorized by the nonprofit corporation laws of South Carolina. The posture of the new corporation is no different from that of any private civil litigant or adversary who may attempt to gain access to records of a client from a service agency. The statutes of that particular service agency would have to be examined to ascertain if, in fact, there is a confidentiality of records provision which protects the records. As an example, within the Department of Mental Health, § 44-23-1090 creates a confidential protection of the records pertaining to the mentally ill; however, the individual patient or ex-patient may consent to their release, or if a minor, his parent or legal guardian. There is other authority upon which the records may be disclosed, including court order. Section 44-17-130 referred to in your letter is not applicable to the client as this provision applies only to the licensing and regulations of private mental health facilities by the Department of Mental Health.

***2** The protection of a service agency's client records by statutory enactment declaring such records confidential serves a beneficial purpose which is generally understood and in the opinion of this Office, in no way interferes with any right of the advocacy system, just as any other private individual, to obtain access if so authorized by statute. Certainly the advocacy corporation could not have unlimited access to the confidential records in order to go on a 'fishing expedition'. This procedure is not permitted private attorneys and would, likewise, not be permitted to the advocacy corporation. The essential mandate of the federal statutes and the rules and regulations is to have in effect a 'system to protect and advocate the rights of persons with developmental disabilities' and South Carolina appears to conform to the federal requirements; and under South Carolina eleemosynary corporation law, does have the right to sue and be sued as well as pursue other administrative or appropriate remedies as vested in them by their charter. They would have no greater rights than any other private individual or any greater rights than any other agency or quasi-state agency.

The concern of the Committee that if we have a state law which thwarts the purpose of the federal statute and may therefore threaten federal funding, in the opinion of this Office, is unfounded. First, as observed above, the federal statutes do not require specifically access to state records and the advocacy corporation is not prevented from access to records, they simply must conform as any other private individual to the proper proceedings to gain access either by consent or state court order where permitted.

Very truly yours,

Raymond G. Halford
Deputy Attorney General

1979 WL 43167 (S.C.A.G.)

End of Document