

ACF

Administration for Children and Families

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES Administration on Children, Youth and Families

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3. Originating Office: Administration on
Developmental Disabilities

4. Key Word: Protection and Advocacy System Independence
P&A Governing Boards

PROGRAM INSTRUCTION

TO: Chairpersons, Protection and Advocacy System
Governing Boards
Chairpersons, State Developmental Disabilities
Councils
Directors, State Protection and Advocacy Agencies
Directors, State Developmental Disabilities
Councils

SUBJECT: Presence of State Developmental Disabilities
Council Members on Protection and Advocacy Agency
Governing Boards

LEGAL AND RELATED
REFERENCES: The Developmental Disabilities Assistance and Bill
of Rights Act, P.L. 104-183 (42 U.S.C. 6000,
et seq.), Section 142(a)(2)(F).

House Committee on Energy and Commerce Report
No. 803, 101st Congress
Senate Report No. 376, 101st Congress


CONTENT: There are continuing questions about whether or
not a member of a State Developmental Disabilities
Council (DDC) can serve on the governing board of
a State's Protection and Advocacy (P&A) System.
ADD's longstanding policy on this matter is that
individuals who are currently members of the DDC
may not serve on P&A governing boards.

This policy is consistent with Section 142(a)(2)(F) of the Act which requires P&A independence of any agency that provides treatment, services, or habilitation to individuals with developmental disabilities. DDCs are defined as "service providers" because they fund and plan services for people with developmental disabilities.

If an agency funded by a DDC is the object of the P&A's advocacy, the P&A's governing board would be called on to make decisions concerning P&A action. Given their ties to the DDC, Council members may be protective of the interests of agencies and organizations funded by the DDC. As a result, the presence of a Council member on the P&A board could be a conflict or create the appearance of a conflict of interest. Even the apparent loss of the P&A's independence due to the presence of a Council member on the P&A board could result in a violation of the Act.

Arguments can be made against this policy: the presence of a single individual or group of individuals on the P&A board who are also DDC members is not sufficient to compromise the independence of the P&A system; individuals with dual membership may constitute a minority on the board; board members recuse themselves from decisions in which their interest as members of the DDC conflicts with their responsibility as members of the board of the P&A system. However, in the interest of facilitating Federal monitoring of P&A independence, ADD maintains the policy that the DDC and P&A remain separate.

INQUIRIES TO: Jackie Ezzell, Program Specialist, POD
Lynne Lau, Program Specialist, POD
ACF Regions I - X


Reginald F. Wells, Ph.D.
Acting Commissioner
Administration on
Developmental Disabilities

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cc: Regional Administrators, Regions I-X
Director, Regional Operations Staff, ACF
Executive Director, National Association of Protection and
Advocacy Systems, Inc.
Director, Consortium of Developmental Disabilities Councils
Executive Director, National Association of Developmental
Disabilities Councils
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Consortium of Developmental Disabilities Councils

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February 10, 1998

Reginald Wells, Ph.D.
Acting Commissioner
Administration on Developmental Disabilities
336D Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Commissioner Wells:

We are writing to express our concurrence with the arguments raised by Ms. Lois Simpson, President of the National Association of Protection and Advocacy Systems (NAPAS) in her letter to you dated January 14, 1998. In this letter, Ms. Simpson expresses NAPAS' strong disagreement with the provisions of ADD's Program Instruction 97-1 (issued November 14, 1997), which prohibit members of a State Developmental Disabilities Council (DDC) from serving on the governing board of a protection and advocacy (P&A) system. We believe this prohibition is unjustified in light of the language of the Developmental Disabilities Assistance and Bill of Rights Act (DD Act), that it will lead to major disruptions on the governing boards of both DDCs and P&As, and that it will negatively impact the day-to-day coordination of effort between these organizations which is so vital to ensuring the best possible use of limited resources in addressing the needs of people with developmental disabilities and their families.

In her letter, Ms. Simpson provides an excellent presentation and analysis of the portions of the DD Act relevant to this issue. She demonstrates --quite effectively, we believe-- that Program Instruction 97-1 is inconsistent with the DD Act, that P&A boards are not permitted to exercise control over decisions related to individual advocacy situations, that DDCs are not "service providers," that the presence of DDC members on a P&A board would not diminish the P&A's ability to exercise its independence, and that collaboration between DDCs and P&As has been a central goal and requirement of ADD for many years. We would urge you to rescind Program Instruction 97-1 in light of Ms. Simpson's presentation and analysis.

Central to the reasoning underlying Program Instruction 97-1 is the misconception that DDCs are, in fact, "service providers." We are aware that this assumption is based on an opinion by the Office of the General Counsel issued on June 25, 1991, that (erroneously, we believe) concluded that "the better position" for ADD to take would be to assume that DDCs are "service providers" and prohibit DDC members from being on the governing boards of P&As.

While the opinion does acknowledge that other constructions of the statute are possible, it makes no effort to provide a logical or legal explanation as to why these other interpretations might be

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February 10, 1998

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None of these statutory responsibilities reflects the "essential direct services to people with developmental disabilities" which were referred to in House Report 803 (101st Congress) or Senate Report 376 (101st Congress), and cited in the Office of General Counsel's opinion. While the "demonstration of new approaches" provision at 42 USC 6024(c)(4)(A) might at times be construed as constituting a "direct service," such demonstrations are time-limited research and development activities, not on-going "essential direct services." Such demonstrations provide Governor's offices and State legislatures with field tests of new approaches to services prior to full-scale implementation.

For example, based on the input of people with developmental disabilities and their families as well as a thorough review of national research in the area, the Pennsylvania DDC sought to demonstrate that people with developmental disabilities could become home owners. They worked with leading financial institutions in order to devise methods by which people with developmental disabilities could obtain mortgages. As part of this effort, 14 people became home owners. What was important in this demonstration was the fact that banks and other financial institutions across the State changed their lending policies, thereby allowing potentially thousands of people to own their own homes. The fact that 14 people obtained home ownership --with their own money-- as a result of this effort is commendable, but not essential to the overall mission of the project.

In a similar manner, Councils have used demonstration programs to test new approaches such as inclusive education, supported employment, family-based support, etc. These demonstrations have been employed in order to advance the basic purpose of the DD Act: to increase the independence, productivity, integration, and inclusion of people with developmental disabilities. Are these demonstration projects "essential direct services?" No. In their absence, program participants would have continued to receive education (albeit in segregated schools), vocational options (probably in sheltered workshops), and families would have placed their family members with disabilities in residential facilities. Thus, while these projects can provide some tangible outcomes for the very small number of people participating, they are time-limited, experimental (i.e. they could fail), and they are directed toward much larger goals (e.g. changes in State laws and policies), not the provision of "essential direct services."

In light of the arguments contained in Ms. Simpson's letter and those made above, we would request that you suspend enforcement of Program Instruction 97-1, and re-submit this matter (including Ms. Simpson's letter and the present letter) to the Office of General Counsel for reconsideration. These actions would help to soothe the impending chaos in the States and allow for a more informed consideration of this issue. Please note that we would be happy to work with you or representatives of the Office of the General Counsel in order to provide you with assistance on this matter.

It is somewhat ironic that after expending hundreds of thousands of Federal funds on training and technical assistance activities designed to promote and foster "interagency collaboration" over the past decade, ADD is now at a point where it is seeking to discourage one of the hallmarks of such collaboration: joint board membership. The overall purpose of these joint board memberships (which, most often, involve the presence of a single representative from one agency sitting on the 15-30 member board of another) is to enhance communication and to avoid



Consortium of Developmental Disabilities Councils

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To: CDDC Executive Directors
From: Sharon A. Tipton
Date: January 30, 1998
Re: NAPAS Protest of ADD Program Instruction 97-1

As you are probably aware, the National Association of Protection and Advocacy Systems (NAPAS) has taken a strong position against ADD's Program Instruction 97-1, which states that a member of a Developmental Disabilities Council may not serve on the governing board of a protection and advocacy (P&A) system. Please find following a letter from Lois Simpson, NAPAS President, to Acting Commissioner, Reginald Wells, outlining NAPAS's objections.

On Tuesday of this week, the CDDC Management Team voted to support NAPAS's objections to this Program Instruction. As Developmental Disabilities Councils, we are particularly concerned about the characterization in the Program Instruction of Developmental Disabilities Councils as "service providers". We believe that this characterization of Developmental Disabilities Councils is inaccurate, in conflict with the Developmental Disabilities Act and fails to capture the full range of Developmental Disabilities Councils activities established in law. We are also concerned that the characterization of Councils as "service providers" is driving the process of the establishment of outcome indicators for Councils in ways which are not useful or appropriate.

To this end, we will shortly be circulating a sign-on letter from CDDC and individual Councils to ADD. We would ask you to be on the lookout for this letter over the next couple of days (it will be faxed and/or emailed to you) and carefully consider adding your Council as a signer on this letter.

Please give me a call should you have any questions regarding this issue.

Thanks!

From: Ed Burke To: Sharon Tipton
JAN-20-98 TUE 13:51

Date: 1/30/98 Time: 10:29:02

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NAPAS

National Association of Protection & Advocacy Systems

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January 14, 1998

Reginald F. Wells, Ph.D., Acting Commissioner
Administration on Developmental Disabilities
Department of Health and Human Services
200 Independence Ave., SW
Hubert H. Humphrey Building, Room 329-D
Washington, D.C. 20201

Dear Dr. Wells:

On behalf of the Board of Directors of NAPAS, I am writing to express our very strong disagreement with ADD's Program Instruction 97-1 (November 14, 1997). The Program Instruction states that a member of a State Developmental Disabilities Council (DDC) may not serve on the governing board of a protection and advocacy (P&A) system.

As is discussed below, the policy is inconsistent with the clear language of the Developmental Disabilities Assistance and Bill of Rights Act (the Act), and thus is legally insupportable. Accordingly, we urge ADD to rescind the policy.

As stated in the Program Instruction, the basis for this policy is concern regarding a conflict of interest (or the appearance of a conflict) for a person serving in this dual capacity. The document states in part that:

If an agency funded by a DDC is the object of the P&A's advocacy, the P&A's governing board would be called on to make decisions concerning P&A action. Given their ties to the DDC, Council members may be protective of the interests of agencies and organizations funded by the DDC. As a result, the presence of a Council member on the P&A board could be a conflict or create the appearance of a conflict.

Such a situation, the Program Instruction states, would violate the requirement in Section 142(a)(2)(G) that P&As be "independent of" service providers, that is (in the words of the statute), "any agency which provides treatment, services, or habilitation to individuals with developmental disabilities." The Program Instruction concludes that DDCs are service providers because they fund and plan services for people with developmental disabilities.

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JAN-20-98 TUE 13:51

Date: 1/30/98 Time: 10:29:52

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The policy is clearly inconsistent with multiple express statutory provisions. Also, the policy incorrectly assumes that P&A board members are permitted to exercise control regarding specific decisions on case selection or the focus of the agency's advocacy efforts (thus giving rise to potential conflicts of interest). Moreover, the policy is based on the erroneous assumption that DDCs are a type of service provider. Even if this were the case, there is nothing express or implied in the Act which suggests that the mere presence of a service provider on a P&A board would necessarily conflict with the Act's "independence" requirement. Any concerns regarding independence can be adequately addressed through an effective conflict of interest policy. Each of these issues is addressed below.

I. INCONSISTENCIES WITH THE ACT

A. The P&A has Discretion in Selecting Board Members

The policy is in direct conflict with the Act's requirements concerning the selection of governing board members. The Act, at Section 142(a)(2)(e), provides that the P&A shall have discretion (but for two enumerated limitations) to select multi-member governing boards according to its own policies and procedures. Neither of the two statutory exceptions can be read as empowering ADD to prohibit DDC members from serving on P&A boards. It is a fundamental rule of statutory interpretation that when Congress expressly includes in statutory language specific exceptions or limitations to a mandate, no other exceptions or limitations may be inferred. If Congress had wished to limit or prohibit participation on P&A boards by DDC Members, it would have done so with clear statutory language.

The first limitation on this appointment authority (Section 142(a)(2)(e)(1)) is that governing board members must be persons who "broadly represent or are knowledgeable about the needs of individuals served by the system and include individuals with developmental disabilities" or their representatives. Clearly, DDC members readily satisfy this requirement.

The second limitation relates to appointments to the board by the Governor. Section 142(a)(2)(e)(2) prohibits the Governor from appointing more than one third of the membership of a P&A governing board. It was Congress' intent in including this provision to "limit the ability of the governor of a state to unduly influence the governing board of the protection and advocacy agency and protect its independence." H. Rep. 803, 101st Cong., 2nd Sess. 25 (1990). In contrast, Congress did not see fit to limit in any manner the participation of DDC members on P&A boards. If Congress had a similar concern regarding interference with P&A independence posed by such participation, it would have incorporated analogous language into the Act.

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B. Congress Limited DDCs' Involvement with regard to P&As in Only One Respect -- the "Administration" of the Agency

The Act contains only one express limitation on the relationship between P&As and DDCs. Section 142(a)(2)(F) of the Act states that the P&A must "not be administered by the State Developmental Disabilities Council." (Emphasis added.) That is, P&As and DDCs may not be one and the same entity. Neither may DDCs otherwise exercise total day-to-day control over the P&A. Congress clearly left open the door to other types of interrelationships between P&As and DDCs. If Congress had intended to prohibit DDC participation on P&A boards, it would have done so. Again, in view of this particular limitation on the relationship between DDCs and P&As, congressional intent to create other limitations may not be inferred.

C. DDCs are Required to include Among their Memberships P&A Board Members or their Agents.

ADD's policy is inconsistent with the requirement set forth in Section 124(b)(3) of the Act -- that each DDC shall at all times include at least one representative from the P&A. The Act implicitly requires that such a representative be a member of the board of directors of the P&A, or at least an individual acting as an agent of the board. In this regard, the Act, at Section 124(b)(3)(A), states that such a representative must "have sufficient authority to engage in policy planning and implementation on behalf of" the agency which he or she represents.

Congress amended the Act in 1994 to include the above language because it found that "In many cases, the State agency representatives who serve on the Council are not in policy positions. This hinders the ability of the Council to carry out its responsibilities." Senate Report 120, 103rd Cong., 1st Sess. 29 (1993). Accordingly, the DDC cannot satisfy this requirement by including in its membership a low level P&A staff member who lacks policy making authority -- that is, one who is not a board member or is not acting at the board's direction. It follows that Congress could not have intended to prohibit individuals from serving on both the P&A board and the DDC.

II. P&A BOARDS ARE NOT PERMITTED TO EXERCISE CONTROL OVER INDIVIDUAL ADVOCACY DECISIONS

The P&A's board members are not permitted to exercise such control over the P&A's operations as to influence decisions regarding the P&A's initiation of particular legal actions. Thus, ADD's concern regarding interference with the independent judgment of P&As in targeting particular service providers for legal action is unwarranted. As stated in NAPAS' Standards for Advocacy Programs for People with Developmental Disabilities and People with Mental Illness (the Advocacy Standards), the role of a P&A governing board is much more limited. The board is charged with setting broad policy regarding program design and priorities, and management, planning, financial and personnel

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policies The board is prohibited from interfering with the advocate-client relationship (Standard 400.30). Similar requirements for non-profit boards are established in state laws with which P&A boards are obligated to comply.

In this regard, the American Bar Association Committee on Ethics and Professional Responsibility has provided relevant guidance (see ABA Formal Opinion, August 10, 1974). Commenting on the issue of case-related oversight by a legal services board, the Committee stated that "there should be no interference with the lawyer-client relationship by the directors of a legal aid society after the case has been assigned to a staff lawyer, and . . . the board should set broad guidelines respecting the categories or kinds of cases that may be undertaken rather than acting on a case-by-case, client-by-client basis." The opinion went on to observe that "it is difficult to see how the preservation of confidences of a client can be held inviolate prior to the filing of an action when the proposed action is described to those outside of the legal services office."

Thus, P&A board members may not require P&A staff members to disclose information about potential courses of advocacy or legal strategies, and may not seek to influence such decisions.

III. DDCs ARE NOT "SERVICE PROVIDERS"

It is clear from the text of the DD Act itself and from the Act's legislative history that Congress did not consider DDCs to be a type of "service provider" (which must remain independent from the P&A pursuant to Section 142(a)(2)(G)).

The statute contains two separate provisions which relate to the P&A's relationship to DDCs and service providers, respectively. As noted above, Section 142(a)(2)(F) of the Act states that the P&A must "not be administered by the State Developmental Disabilities Council." The Act addresses services providers distinctly -- in a separate section of the Act, Section 142(a)(2)(G). That section provides that the P&A must "be independent of any agency which provides treatment, services, or habilitation to individuals with developmental disabilities."

This statutory framework makes clear Congress' intent to view and treat distinctly DDCs and service providers -- by mandating in separate statutory sections differing levels of permissible involvement with regard to the P&A and service providers and DDCs, respectively. The House report on the above statutory provisions further supports this conclusion. The report states that these provisions clarify the relationship between the P&A and the "State planning council [now referred to as developmental disability council] or any agency delivering services to the developmentally disabled population." (Emphasis supplied.) H. Rep. 1188, 95th Cong., 2d Sess. 19 (1978). The use of the term "or" in this context demonstrates congressional intent that the two entities should not be viewed as one and the same.

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Indeed, DDCs do not function as service providers. DDCs are mandated to carry out advocacy activities, policy analysis and system enhancement activities under the Basic State Grant Program. While in some cases, DDCs may provide funding to service providers, this fact alone would not transform a DDC itself into a service provider.

**IV. IN ANY CASE, THE PRESENCE OF DDC MEMBERS ON P&A BOARDS
WOULD NOT NECESSARILY VIOLATE THE ACT'S INDEPENDENCE
REQUIREMENT**

Even, assuming for the sake of argument, that DDCs may be viewed as a type of service provider, this fact alone would not necessarily conflict with the independence of a P&A on whose board a DDC member sits. Based on ADD's reasoning, consumers' participation on P&A boards should also be viewed as posing an unacceptable conflict. That is, a consumer's relationship with a service provider may result in him or her being protective of the interests of that entity, and thus create a potential conflict with regard to advocacy decisions concerning that provider. Of course, it could not be argued that consumer involvement on P&As is prohibited, given the Act's requirements to the contrary (see Section 142(e)). Neither can it be argued that a DDC member's participation on the P&A board is per se prohibited, in light of the discussion above.

Rather, than mandating this approach, ADD should permit P&As to rely on their conflict of interest policies in addressing any issues in this regard. Indeed, we believe Congress, in crafting the Act's independence requirement, intended to afford P&As this flexibility.

The Advocacy Standards require P&As to establish measures for their boards to ensure the prevention of conflicts of interest (Standard 400.20). For instance, the P&A may not permit conflicts of interest regarding specific decisions on case selection or the focus of the program's advocacy (Standard 420.20 (1)). Further, P&As must establish a process by which board members abstain from decision-making on issues where a conflict or potential conflict of interest may arise (Standard 420.20 (3)).

**V. ADD PROMOTES AND SPONSORS COLLABORATION AMONG THE ACT'S
THREE PROGRAMS**

ADD has always promoted collaboration among the three programs funded under the Act and, in recent years, has placed even greater emphasis on such cooperation. The most recent version of the PPR, for instance, has a whole section devoted to priorities which have been consensually established by the three programs. Regional ADD meetings bring all three program representatives together to report on their joint activities. It is hard to understand how such collaboration can take place without some formal means of communication. While there can and should be a diversity of

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communication approaches, interactive participation on the formal policy-setting bodies of the three entities is one desirable means of ensuring that all three programs are in sync.

Again, we urge ADD to rescind this Program Instruction. As an alternative to this policy -- in order to address ADD's concern regarding potential conflicts of interest posed by the presence of DDC members on P&A boards -- ADD may wish to encourage P&As to establish strong conflict of interest policies. This approach would be consistent with the intent of the Act to allow P&As the flexibility to address such concerns on a case-by-case basis.

Thank you for your consideration of our views.

Sincerely,



Lois Simpson
President
NAPAS Board of Directors