

CONNECTICUT LEGAL RIGHTS PROJECT, INC.

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APPROPRIATIONS COMMITTEE

**Testimony of Thomas Behrendt Regarding House Bill No. 5016, An Act
Implementing the Governor's Recommendations Concerning General Government
(Proposal to merge CHRO and Office of Protection & Advocacy).**

March 8, 2012

Senator Harp, Representative Walker, and members of the Committee:

I am Thomas Behrendt, Counsel Emeritus with the Connecticut Legal Rights Project (CLRP), a legal services organization that advocates for low-income adults who have, or are perceived to have, psychiatric disabilities. I am here to voice my opposition to the proposed merger of the CHRO and the Office of Protection and Advocacy for Persons with Disabilities (OPAPD).

The proposed merger of these two state agencies, as set forth in Sections 74 – 82 of House Bill 5016, is ill-advised and problematic. It would give rise to conflicts of interest for each body, and it would deprive OPA of the independence it needs in order to function effectively. Such a consolidation is inconsistent with applicable federal law and is harmful to Connecticut residents with disabilities. I urge you to do everything in your power to stop this proposal.

OPAPD, the agency charged with protecting the rights of persons with disabilities and representing them when bring formal discrimination complaints, would be combined with CHRO, the agency that judges whether these complaints have merit and may go forward. The inherent conflicts of interest should be obvious.

The CHRO's obligation is to represent the state in enforcement of anti-discrimination laws. It is a neutral decision-maker when cases are filed – it is the CHRO that makes the threshold determination whether discrimination cases can proceed. CHRO functions as an impartial judge or magistrate; OPAPD represents its clients in complaints brought to the CHRO. While both these agencies are tremendously important to persons with disabilities, there is no way that these distinct, and at times conflicting, roles can be reconciled.

The merger proposed in H.B. 5016 runs afoul of federal law. Under the federal P&A system and the relevant federal laws and regulations, any attempt to combine Protection & Advocacy with another governmental body would amount to a “**re-designation**” of the state's federal Protection and Advocacy system. Connecticut would almost surely be required to undergo a federal investigation (by the Department of Health and Human Services), and we would risk the loss of federal funding.

Enacting the proposal under consideration -- or combining OPAPD with any other state entity -- could result in the defunding of the eight federally mandated P&A programs that OPAPD presently operates in Connecticut, and would jeopardize the funding of other federally-funded disability programs that are conditioned on the state having an independent P&A.

At present, the New York State P&A, which had been regarded as a national model, is in the midst of a **major federal investigation stemming from concerns about its lack of independence** from that state's executive branch.¹ This may result in federal decertification and loss of funding. At a minimum, the New York P&A will be required to operate under a federally approved "Plan of Correction" and submit to ongoing scrutiny by DHHS. (I have attached a recent article from the New York Times, "**U.S. Report Criticizes New York on Monitoring Care of Developmentally Disabled**," Jan 10, 2012.²)

As is the case with every Protection & Advocacy agency in the country, OPAPD must abide by federal law and regulations. The governing provisions are 42 USC § 10805 and the regulations established thereunder. See, e.g, **42 CFR 51.26:**

Conflicts of interest.

The P&A system must develop appropriate policies and procedures to avoid actual or apparent conflict of interest involving clients, employees, contractors and subcontractors, and members of the governing authority and advisory council, particularly with respect to matters affecting client services, particular contracts and subcontracts, grievance review procedures, reimbursements and expenses, and the employment or termination of staff.

Over the years, the overwhelming majority of states and territories have moved to a system where the P&A is private, non-profit organization, run by its own Board of Directors. In addition to providing the required independence, such agencies are regarded as more cost-effective, with enhanced flexibility to efficiently advance program objectives and safeguard the interests of its clients.

This proposed merger with the CHRO -- and any merger -- would strip away OPA's independence and effectiveness and would constitute a huge step backward for Connecticut. Persons with disabilities, and their families and advocates are entitled to have a strong and independent protection and advocacy program. I urge you to remove any reference to a proposed merger in the H.B. 5016.

Thank you for your attention to this matter and for the opportunity to testify.

¹ "According to the [federal DHHS] report, the commission's very structure worked against its oversight role. Among other things, both the commission and the agencies it is supposed to oversee, including the State Office for People With Developmental Disabilities, report to the governor's office. In most other states, similar watchdog groups are set up as independent nonprofit organizations.

"The report noted that the commission's chief cannot even make independent hiring decisions. The report also cites the commission for inadequate policies regarding the handling of confidential records..."

² The DHHS report and letter of transmittal can be found at:

www.nytimes.com/interactive/2012/01/11/nyregion/12abused-Federal-Report-on-Disabled-Care.html?ref=nyregion.

January 10, 2012

U.S. Report Criticizes New York on Monitoring Care of Developmentally Disabled

By DANNY HAKIM

ALBANY — The federal government sharply criticized New York's oversight of the developmentally disabled in a new report, saying the state agency charged with oversight lacks independence from the governor's office, failed to account for how it is spending public money and has broken several requirements of federal law.

The report from the Department of Health and Human Services in Washington, which The New York Times obtained on Tuesday, raised questions about whether the Cuomo administration has gone far enough in its efforts to reform the Commission on Quality of Care and Advocacy for Persons With Disabilities.

The commission, which is supposed to be a watchdog over much larger state agencies that care for the developmentally disabled and the mentally ill, has been sharply criticized as not fulfilling its mission.

According to the report, the commission's very structure worked against its oversight role. Among other things, both the commission and the agencies it is supposed to oversee, including the State Office for People With Developmental Disabilities, report to the governor's office. In most other states, similar watchdog groups are set up as independent nonprofit organizations.

The report noted that the commission's chief cannot even make independent hiring decisions. The report also cites the commission for inadequate policies regarding the handling of confidential records and for not seeking sufficient information from families of the disabled. It says the commission failed to turn over documents detailing how federal money was being spent in the agency, as required by law. And it found that there was "no evidence of data-driven strategic planning to establish goals" in the agency.

The report was prompted by a series of articles in The Times last year that examined problems of abuse, neglect and financial mismanagement in the state's system of caring for developmentally disabled people.

Gov. Andrew M. Cuomo's administration has undertaken a reform effort over the last nine months intended to address decades of mismanagement in the state's care of the developmentally disabled. But the report suggests it has much work ahead, including a potential reorganization of the commission.

The inspection of the agency took place in July, four months after the Cuomo administration installed Roger Bearden, former director of the Disability Law Center at New York Lawyers for the Public Interest, to head the commission.

[NY Times, Jan. 10, 2012]

The federal government, which provides billions of dollars in Medicaid money to New York, has given the Cuomo administration until Friday to respond to the report, and the administration has already circulated to stakeholders plans for public hearings on the future of the Commission on Quality of Care.

Sharon B. Lewis, commissioner of the federal Administration on Developmental Disabilities, a branch of the Health and Human Services Department, which drafted the report, said in a statement she was “confident that the state is taking appropriate action to address the concerns.” In an interview, she said she was pleased that state officials had said they would examine whether the commission should become a nonprofit agency.

In his own statement, Mr. Bearden said the Commission on Quality of Care had already been undertaking reform efforts, adding that the federal report gave “additional valuable guidance on how to make the federal programs currently administered by C.Q.C. more effective in serving New Yorkers with disabilities.”

Mr. Cuomo’s office had no comment on the report.

Michael Carey, an advocate for the developmentally disabled whose autistic son died in state care, has met with Mr. Bearden. He said he was frustrated that the commission had not become more independent.

“This agency has been an absolute failure,” Mr. Carey said. “The agency is not independent, it is not a strong watchdog agency, it is not investigating abuse and neglect or deaths properly.”

He also noted that a commission charged with rooting out financial fraud at nonprofit groups was itself cited in the federal report for failing to turn over financial documentation.

The Times has outlined numerous problems at the Commission on Quality of Care. For example, 10 percent of deaths of the developmentally disabled in state care reported to the commission were listed in its database as occurring from unknown causes, suggesting widespread failures in the state’s diligence in finding out why people died.

One in six deaths in state and privately run homes, or more than 1,200 in the past decade, have been attributed to either unnatural or unknown causes, according to data obtained by The Times. The agency has also been plagued by minimal disclosure in the past. Mr. Bearden’s predecessor, Jane G. Lynch, never spoke to a reporter during her nearly three-year tenure, her staff members said.