Texas Department ʻ
Mental Health an, :ntal Retardation

Karen F. Hale, M.S.S.A.
Commissioner

RQ-0427-JC

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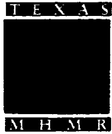

August 30, 2001

Central Office
P.O. Box 12668
Austin, TX
78711-2668
(512) 454-3761

The Honorable John Cornyn
Attorney General of Texas
Price Daniel Sr. Building
209 West 14th Street
Austin, Texas 78711

FILE # ML-42139-01
I.D. # 42139

Dear General Cornyn:

The Texas Department of Mental Health and Mental Retardation operates 21 residential campuses serving persons with mental illness and/or mental retardation and other developmental disabilities. Federal law authorizes and funds Protection and Advocacy systems ("P&A") to independently protect and advocate for the rights of individuals served in these facilities (42 USCA §§15041, et seq., for P&A systems overseeing facilities for persons with developmental disabilities ("DD statute"); and 42 USCA §§10801, et seq., for P&A systems overseeing facilities for individuals with mental illness ("MI statute")). In many instances a single organization performs P&A systems functions for both the mental illness and mental retardation/developmental disabilities populations. In Texas, Advocacy, Incorporated ("Advocacy, Inc."), is the designated P&A system. The P&A system is given the authority by federal statute to perform several different functions (e.g., investigation of abuse and neglect, referral to programs and services, reviewing complaints, etc.).

Recently questions have been raised by a number of guardians of persons receiving services in our facilities pertaining to the authority of Advocacy, Inc., to have access to their ward or their records without the guardian's consent. The guardians have sent TDMHMR letters asking that we prohibit access by Advocacy, Inc., to their ward in our facilities (sample letters attached). The guardians contend that they have the ultimate authority to decide whether or not their ward is to be contacted by personnel from Advocacy, Inc., and whether or not the ward's records are to be reviewed. To support this argument, they have cited the definition of "guardian" found in the Code of Federal Regulations pertaining to Protection and Advocacy Systems, which they argue indicates that a guardian is empowered to make all decisions on behalf of the ward, and also language that they argue implies that access to wards can be denied at a guardian's request because the provision includes instruction on what to do in such a case (see 45 CFR §§1386.19 and 1386.22(i) and 42 CFR §51.2).

However, Advocacy, Inc., claims to have a right of access to consumers, irrespective of guardian consent, citing to 42 USCA §15043(a)(2)(H) of the DD statute, which provides:

> *(2) such system shall--(H) have access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such an individual, in order to carry out the purpose of this part;*

Further, they cite to the federal regulations on the MI statute, 42 CFR §51.42(c)(d)&(e), which, they argue, indicate that P&A systems are allowed to perform its statutory investigative and monitoring activities irrespective of a guardian's refusal of access.

In addition, the P&A system's right to access an individual's records is a companion issue we would like addressed in situations where the individual's guardian has prohibited access to those records. While the above-cited statutes have provisions that address the right of access to records in varying circumstances, there is a difference of opinion about whether a guardian can ultimately prohibit access to records when the P&A system has offered assistance to the guardian and the guardian has rejected the offer.

To our knowledge, the specific issues raised above have not been directly addressed by a court in our jurisdiction. However, there have been a number of recent court decisions from other jurisdictions including *Iowa Protection and Advocacy Services, Inc. v. Gerard Treatment Programs, L.L.C.* (2001 WL 720631 (N.D. Iowa)). This case serves as a good review of the issues presented and discusses the other federal case law pertaining to P&A system access and authority. However, this case limits its discussion to P&A system access under the MI statute. The court also does not directly address the issue of P&A access to the actual patient (talking to or interviewing the patient) as opposed to accessing their records.

Your advice and counsel are, therefore, respectfully requested with regard to the following questions:

1. May Texas' P&A system, Advocacy, Inc., have access to individuals (both persons with mental illness and persons with mental retardation/developmental disabilities) receiving services in TDMHMR facilities when these same individuals' guardians have specifically refused to allow such access?

2. May Advocacy, Inc., access the records of an individual (both persons with mental illness and persons with mental retardation/developmental disabilities) under either 42 USCA §10805(a)(4)(C)(i-iii) or 42 USCA §15043(a)(2)(I)(iii)(I-V) when that person's guardian has specifically refused to allow access after being offered assistance by the P&A system, as described in each statute?

3. Does the P&A system authorize different levels of access to individuals and records (over the objections of guardians) for each of the various functions the P&A is authorized to perform, for example, investigating alleged abuse/neglect or overseeing facilities?

Sincerely,

Karen F. Hale
Commissioner

KFH:LS:CC

c: The Honorable Rick Perry, Governor
Don Gilbert, Commissioner, Health and Human Services Commission
Mary Faithful, Acting Executive Director, Advocacy, Inc.
Mike Stephens, President, PART, Inc.
Cathy Campbell, Director, Legal Services