

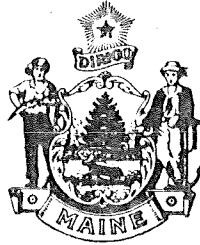
# MAINE STATE LEGISLATURE

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JAMES E. TIERNEY  
ATTORNEY GENERAL



STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

November 10, 1981

James S. Henderson, Deputy  
Secretary of State  
State House  
Augusta, Maine 04333

Dear Mr. Henderson:

This will respond to your inquiry as to whether the Advocates for the Developmentally Disabled ("ADD") should be deemed a state agency and thereby be exempted from the lobbyist disclosure law. It is our opinion that, although it performs some quasi-governmental functions, ADD is a non-profit agency subject to the lobbyist disclosure law.

I.

In 1977, Congress passed the Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C.A. § 6000 et seq. In each state there must be a system in place responsible for lobbying for the rights of the developmentally disabled. 42 U.S.C.A. § 6012. Consequently, in order to receive federal funds, ADD was created in August, 1977.

ADD is almost completely funded by the federal government. In 1980, it received \$125,000 from the federal government, \$300 from individuals and no direct funds from the state. The state provided office space worth \$3,188.88 (\$6.18 per sq. ft. x 516 sq. ft. of office space). Consequently, calculating direct and in-kind support, the state underwrites 2.5% of ADD's operating budget.

In 1979, the Legislature established a protection and advocacy system for the developmentally disabled. P.L. 1979, c. 553, § 2, enacting 22 M.R.S.A. c. 961. In that act, the

Governor was directed to "designate an agency independent of any state or private agency which provides treatment, services or habilitation to persons with developmental disabilities, to serve as the Protection and Advocacy Agency for the Developmentally Disabled in Maine. . . ." 22 M.R.S.A. § 3551. Neither the Governor nor the Legislature chooses the members of the governing board.<sup>1/</sup> There is no direct control exercised over the board by any state agency or department. Federal support is contingent upon the independence of ADD. 42 U.S.C.A. §§ 6011, 6012. The extent of state involvement in the direction of the Board is that each year the Governor certifies that ADD is the organization responsible for representing the developmentally disabled in Maine and, therefore, is eligible for federal funds.

ADD's assertion that it is a state agency and therefore exempt from the reporting requirements of the lobbyist disclosure law is a close case because of the quasi-governmental functions that it does perform. For example, the agency is empowered to request services and information from state departments and agencies in the aid of its activities. 22 M.R.S.A. § 3553(3). See also 34 M.R.S.A. § 1-B(2). Additionally, it is empowered to conduct investigations when it has received a complaint that the rights of developmentally disabled persons have been violated. See 22 M.R.S.A. § 3554.<sup>2/</sup> However, counterbalanced against these quasi-governmental functions is the institutional independence of ADD. Creation by the State or performance of quasi-governmental functions alone does not insulate an organization from the lobbyist disclosure law; the overall nature and all of the functions of the organization, as well as the purpose of the lobbyist disclosure law, must be taken into account.

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<sup>1/</sup> The members of ADD choose the 13 member Board of Directors at the annual meeting. An individual can become a member of ADD by expressing an interest in the organization and paying an annual fee. There are approximately 50 members of ADD throughout the State. Any member of ADD can nominate an individual to become a director at the annual meeting. Additionally, a subcommittee of the Board of Directors nominates individuals to become directors at the annual meeting. If a vacancy occurs between annual meetings, the President of ADD nominates a replacement, subject to the approval of the Board of Directors.

<sup>2/</sup> See also 22 M.R.S.A. § 3356, allowing ADD to petition the court to review the guardianship of developmentally disabled persons.

II.

The clear legislative intent behind the Lobbyist Disclosure Act must set the framework for the analysis of all exceptions to that Act. The Legislature provided that "[i]n order to ensure the full participation of all people in the state in the legislative process, full disclosure of the identity, expenditures and activities of any persons who engage in professional lobbying is required." 3 M.R.S.A. § 311 (emphasis supplied). The Legislature, then, intended that the application of the Act be read broadly and the exceptions be read narrowly. Consequently, close questions should be resolved in favor of disclosure.

The Lobbyist Disclosure Act requires that any person acting as a lobbyist register with the Secretary of State. 3 M.R.S.A. § 313. A person is defined under the Act as an

individual, business, corporation, association, professional association, labor union, firm, partnership, club or other organization, whether profit or non-profit, or any municipality or quasi-municipality but does not include the State of Maine, any agency of the State of Maine, the University of Maine or Maine Maritime Academy.

3 M.R.S.A. § 312(11).

ADD will not have to register under the Lobbyist Disclosure Act if it is an agency of the State of Maine. Dean Crocker, Executive Director of ADD, describes the organization as a "private non-profit agency certified by the Governor." See attachment. (Emphasis supplied). The fact that ADD is non-profit is irrelevant; the characterization of ADD as a private agency conflicts with the assertion that it is also a state agency.<sup>3/</sup>

The State provides office space, but no other direct or indirect support. The State does not directly control the policies of ADD. The basis for ADD's asserted exemption from disclosure lies in the statutory language quoted below:

The Governor of the state shall designate an agency, independent of any state or private agency which provides treatment, services or habilitation to persons with developmental disabilities to serve as the Protection

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<sup>3/</sup> We would note that since January, 1981, ADD has voluntarily sent monthly reports to the Secretary of State outlining its lobbying activities.

Advocacy Agency for the Developmentally Disabled in Maine pursuant to the United States Code, Title 42, sections 6001 through 6012. The agency designated shall have the authority to pursue legal, administrative and other appropriate remedies to insure the welfare and protect the rights of persons with developmental disabilities.

22 M.R.S.A. § 3551.

Federal law requires that the state certify an organization such as the one created. The federal law does not require that the state create or maintain an agency. The Governor's certification is a prerequisite for eligibility for federal monies. The Governor merely designates an agency; the agency could be an existing public or private organization. Designation or certification alone does not transform a private group into a state agency.<sup>4/</sup> The 1979 legislation did not create an agency; it simply provided the Governor with the power to certify an agency for federal funds. Thus, it has been held, in the context of an analogous question, that the federal law did not contemplate or create an entity with the full status of a government agency. Medley v. Ginsburg, 492 F. Supp. 1294, 1305 (S.D.W.Va. 1980) (The federal act did not create an administrative agency subject to the Administrative Procedures Act).<sup>5/</sup>

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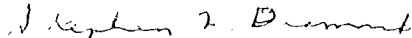
<sup>4/</sup> Although 22 M.R.S.A. § 3533(8) requires ADD to operate in conformance with a plan submitted annually for the Governor's review and approval, we believe this statute exists as an adjunct to the Governor's certification responsibility. It does not empower the Governor to dictate how ADD should operate.

<sup>5/</sup> The Court's decision in Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979), does not change our conclusion. The District Court held that the federal law did not create a private cause of action. However, the Court's holding has no bearing on the question of whether the entities carrying out the functions mandated by the federal law are government agencies. Cf. Cort v. Ash, 422 U.S. 66, 76 (1975) (four-part test to determine existence of private cause of action does not include existence of government agency).

In conclusion, we believe that the status of ADD under the Lobbyist Disclosure Act is a close question that must be resolved in accordance with the policy underlying that act. Stated succinctly, that policy is to require disclosure by all "persons" who expend funds "for the purpose of influencing any legislative action." The exemption for state agencies is presumably based on the assumption that they are already subject to considerable public accountability. Since ADD is designed to have substantial independence from state government, it is our opinion that its lobbying activities, which constitute one of its primary functions, should not be deemed to fall within the narrow exemption created for state agencies.<sup>6/</sup> See 22 M.R.S.A. § 3553(2); 42 U.S.C.A. § 6012.

I hope this information is helpful to you. Please feel free to contact me if I can be of further assistance.

Sincerely,



STEPHEN L. DIAMOND  
Deputy Attorney General

SLD/ec  
Enclosure

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<sup>6/</sup> The fact that ADD is funded almost entirely with government money does not in itself result in an exemption, as evidenced by the fact that municipalities and quasi-municipalities are expressly required to register as lobbyists. 3 M.R.S.A. § 312(11).



THE ADVOCATES FOR THE DEVELOPMENTALLY DISABLED

CLEVELAND HALL, WINTHROP STREET  
HALLOWELL, MAINE 04347  
TELEPHONE (207) 289-2395

July 29, 1981

James Barnett  
Secretary of State's Office  
State House--Station 29  
Augusta, Maine 04333

Dear Mr. Barnett:

The Advocates for the Developmentally Disabled is a private non-profit agency certified by the Governor to act as the State Protection and Advocacy system pursuant to PL 1979 Chapter 961.

We would like to request a formal opinion as to whether or not we are required to register under the Lobbyist disclosure law. It is our opinion that as a quasi governmental agency whose function is defined by State law that we have the same immunity from registration as any other State agency.

Thank you for your attention and assistance with our request.

Sincerely,

Dean Crocker  
Executive Director, ADD

DC/nl