

MAINE STATE LEGISLATURE

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114th MAINE LEGISLATURE

SECOND REGULAR SESSION - 1990

Legislative Document

No. 2112

H.P. 1527

House of Representatives, January 5, 1990

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.

Reference to the Committee on Human Resources suggested and ordered printed.

A handwritten signature in cursive script that reads 'Ed Pert'.

EDWIN H. PERT, Clerk

Presented by Representative CLARK of Brunswick.

Cosponsored by Senator BUSTIN of Kennebec, Senator CAHILL of Sagadahoc and Representative MANNING of Portland.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY

**An Act to Establish the Protection and Advocacy Agency for Persons
with Disabilities.**

(EMERGENCY)



2 The Governor shall designate an agency, independent of any
3 state or private agency that provides treatment, services or
4 habilitation to persons with developmental disabilities or mental
5 illness, to serve as the Protection and Advocacy Agency for
6 Persons with Disabilities. The agency shall also protect and
7 advocate for the rights of persons with learning disabilities.

8
9 **§19502. Definitions**

10 As used in this chapter, unless the context otherwise
11 indicates, the following terms have the following meanings.

12
13 1. Abuse. "Abuse" means the act or failure to act,
14 knowingly, recklessly or intentionally, that causes, or may
15 cause, injury or death. "Abuse" includes, but is not limited to,
16 rape or sexual assault, the striking of an individual, the use of
17 excessive force in the use of bodily restraints and the use of
18 bodily or chemical restraints in a manner that is not in
19 compliance with federal and state laws, regulations and rules.

20
21 2. Agency. "Agency" means the Protection and Advocacy
22 Agency for Persons with Disabilities.

23
24 3. Developmental disability. "Developmental disability"
25 means a disability attributable to a mental or physical
26 impairment or combination of mental and physical impairments that:

27 A. Is manifested before the person reaches 22 years of age;

28 B. Is likely to continue indefinitely;

29 C. Results in substantial functional limitations in 3 or
30 more of the following areas of major life activity:

31 (1) Self care;

32 (2) Receptive and expressive language;

33 (3) Learning;

34 (4) Mobility;

35 (5) Self direction;

36 (6) Capacity for independent living; and

37 (7) Economic self-sufficiency; and

38 D. Reflects the person's need for a combination and
39 sequence of special, interdisciplinary or generic care,
40 treatment or other services that are of a lifelong or
41 temporary nature.

2 extended duration and are individually planned and
3 coordinated.

4 4. Exploitation. "Exploitation" means the illegal or
5 improper use of an individual or the individual's resources for
6 another's profit or advantage.

8 5. Facility. "Facility" means any foster home; boarding
9 home; nursing home; group home; hospital; state mental health
10 institute; state, county or municipal detention facility;
11 shelter; any other facility licensed or funded by the State, or
12 any subdivision of the State, for the provision of residential
13 services or treatment; or any other facility providing
14 residential services that is operating without a license, but is
15 required to be licensed under the laws of the United States, this
16 State or any subdivision of this State.

18 6. Learning disability. "Learning disability" means a
19 disorder exhibited in one or more of the basic psychological
20 processes involved in understanding or in using language, spoken
21 or written, that may manifest itself in an imperfect ability to
22 listen, think, speak, read, write, spell or to do mathematical
23 calculations.

24 7. Mental illness. "Mental illness" means a significant
25 mental illness or emotional impairment, as determined by a
26 qualified mental health professional.

28 8. Neglect. "Neglect" means a negligent act or omission
29 that causes or may cause an individual's injury or death or that
30 places an individual at risk of injury or death. "Neglect"
31 includes, but is not limited to, failure to establish or carry
32 out an individual program, treatment or habilitation plan or the
33 deprivation of or failure to meet essential needs, including
34 needs for adequate nutrition, clothing, health care and a safe
35 environment.

38 9. Personnel. "Personnel" means salaried staff employed by
39 the agency.

40 10. Persons with disabilities. "Persons with disabilities"
41 means persons with a developmental disability, a learning
42 disability or a mental illness.

44 **§19503. Organization**

46 The Protection and Advocacy Agency for Persons with
47 Disabilities is established.

50 1. Governing authority. The agency is governed by an
51 authority established in accordance with the following.

2 A. Members must be selected in accordance with the agency's
3 policies and procedures.

4 B. By October 1, 1990, membership must include the chair of
5 the advisory council, as described in subsection 2, and
6 other individuals who represent or who are knowledgeable
7 about the needs of the clients served by the agency.

8 C. The governing authority is responsible for the planning,
9 design, establishment of priorities and implementation and
10 functioning of the agency, subject to the provisions of
11 subsection 2.

12
13 2. Advisory council. The agency shall establish an
14 advisory council with the following membership and duties.

15 A. The advisory council shall advise the agency on policies
16 and priorities to be followed in carrying out the duties of
17 the agency as the protection and advocacy agency for
18 mentally ill individuals.

19 B. Members of the advisory council must include attorneys,
20 mental health professionals, individuals from the public who
21 are knowledgeable about mental illness, a provider of mental
22 health services, individuals who have received or who are
23 receiving mental health services and family members of those
24 individuals. At least 1/2 of the membership must consist of
25 individuals who have received or who are receiving mental
26 health services and family members of those individuals.

27
28
29 **§19504. Duties of the agency**

30
31 The agency shall:

32
33 1. Information and referral. Provide information on and
34 referral to programs and services addressing the needs of persons
35 with disabilities;

36
37 2. Advice. Advise and educate individuals on the rights of
38 persons with disabilities and otherwise support and assist those
39 persons in the protection of and advocacy for those rights;

40
41 3. Pursuit of remedies. Pursue administrative, legal and
42 other appropriate remedies on behalf of persons with disabilities;

43
44 4. Investigation. Investigate allegations of abuse,
45 exploitation or neglect of persons with disabilities. The agency
46 may initiate an investigation upon receipt of a report that an
47 incident of abuse, exploitation or neglect has occurred or is
48 occurring. The agency may also initiate an investigation on its
49 own initiative when it has probable cause to believe that abuse,
50 exploitation or neglect has occurred or is occurring; and
51

2 5. Report. Prepare an annual report for submission to the
3 Governor, the Legislature, the Commissioner of Mental Health and
4 Mental Retardation and the Secretary of the United States
5 Department of Human Services. The report must describe the
6 activities, accomplishments and expenditures of the agency during
7 the most recently completed fiscal year.

8
9
10 §19505. Agency access to records, facilities, persons with
11 disabilities and reports

12 For the purposes of this chapter, agency personnel in the
13 performance of duties pursuant to section 19504 must be granted
14 access to records, facilities, persons with disabilities and
15 reports as follows.

16
17 1. Records. Agency personnel must be granted access to all
18 records that:

19
20 A. Pertain to a person who is a client of the agency, if
21 the person or the person's legal guardian or other legal
22 representative has authorized the agency to have that
23 access; or

24
25 B. Pertain to an individual who is or was a person with
26 disabilities and who is the subject of a complaint received
27 by the agency or who the agency has probable cause to
28 believe has been or is being abused, exploited or neglected,
29 and who is:

30 (1) By reason of a mental or physical condition,
31 unable to authorize the agency to have access; and

32
33 (2) Either under public guardianship or without a
34 legal guardian or other representative who may
35 authorize the agency to have access.

36
37 2. Persons with disabilities. Any department, agency,
38 board, commission or office of the State or of any subdivision of
39 the State, and any private agency or individual licensed or
40 funded by the Federal Government or the State or any subdivision
41 of the State that operates or administers any program or facility
42 providing services to persons with disabilities shall permit
43 agency personnel performing duties pursuant to section 19504 to
44 meet with those persons. The program or facility must allow
45 agency personnel to communicate privately with the persons with
46 disabilities.

47
48 3. Facilities. Any facility that serves persons with
49 disabilities shall permit entrance in and upon the premises of
50 the facility to agency personnel performing duties pursuant to
51 section 19504.
52

2 4. Reports. The agency must be provided copies of each
4 annual survey report and plan of corrections for cited
6 deficiencies made pursuant to Title 22, chapter 405 and pursuant
8 to 42 United States Code, Sections 1395 et seq. and 1396 et seq.
 with respect to any facility serving persons with disabilities
 within the State. The reports and plans must be provided to the
 agency within 30 days of completion.

10 Upon their request, agency personnel must be provided with copies
12 of reports describing incidents of abuse, exploitation, neglect
14 or injury, and the steps taken to investigate those incidents,
16 prepared by any staff person of any facility serving persons with
 disabilities or by any agency charged with investigating
 allegations of abuse, exploitation, neglect and injury occurring
 at facilities that serve persons with disabilities.

18 §19506. Confidentiality of information; representation of
20 individuals with disabilities

22 1. Disclosure of nonidentifiable information. Authorized
24 agency personnel, in the performance of their duties, may
 disclose information, materials and records that do not contain
 personally identifiable data.

26 2. Disclosure to subject. Disclosure of information to a
28 person with mental illness who is the subject of records is
 subject to this section.

30 A. Authorized agency personnel may disclose information
32 from the records obtained pursuant to section 19505 to a
34 mentally ill individual who is the subject of the records,
36 except when a mental health professional associated with the
38 organization providing the records, who is responsible for
 supervising the provision of the mental health services to
 the individual, notifies the agency in writing that, based
 on the professional's determination, disclosure would be
 detrimental to the health of the subject individual.

40 B. Upon receipt of written notification pursuant to
42 paragraph A, the agency may not disclose information from
44 the records to the subject individual unless another mental
46 health professional has reviewed the records and, based upon
 the professional's judgment following review, determines
 that disclosure would not be detrimental to the health of
 the individual. The reviewing mental health professional
 shall be selected by:

48 (1) The individual;

50 (2) The individual's guardian or other legal
52 representative; or

2 (3) The agency, acting on behalf of an individual
4 whose guardian is the State or an individual whose
6 guardian or other legal representative is not the
8 State, has not selected, within a reasonable time after
 receipt of notice pursuant to paragraph A, a mental
 health professional to review the records.

10 3. Disclosure of identifiable information and
12 representation. Agency personnel may undertake to represent
14 persons with disabilities or disclose information, materials and
 records containing personally identifiable information when the
 following occurs.

16 A. The person gives consent.

18 B. The person has been judged incompetent or is a minor,
20 and the individual's guardian or other legal representative
 gives consent.

22 C. The person, by reason of a mental or physical condition,
24 is unable to give consent and is without a legal guardian or
 other representative who may consent on behalf of the
 individual.

26 D. The person is under public guardianship and the agency
 proceeds according to the provisions of subsection 4.

28 E. The surrogate parent of a developmentally disabled or
30 learning disabled minor authorizes the agency to represent
32 the person in, or to disclose information regarding, special
34 education matters governed by Title 20-A, chapter 303,
 subchapter I, or 20 United States Code, Sections 1401 to
 1485.

36 4. Public guardians. Before the agency represents or
38 discloses personally identifiable information pertaining to a
40 person with a disability who is under public guardianship, the
 agency and the public guardian shall adhere to the following
 procedures.

42 A. The agency shall give the public guardian written notice
44 of its intent to represent or disclose personally
46 identifiable information pertaining to a person with a
 disability who is under public guardianship.

48 B. After giving notice pursuant to paragraph A, the agency
50 may represent the person or disclose the information unless,
 within 5 working days, the public guardian gives to the
 agency written notice of its objections.

2 C. The objections of the public guardian to the agency's
4 representation or disclosure may only be based upon the
6 public guardian's belief that the actions of the agency
would be detrimental to the person's interests. The written
notice must state the public guardian's basis for that
belief.

8 D. The agency may request a hearing if the public guardian
10 gives notice pursuant to paragraph C. The hearing must be
12 conducted in accordance with procedures that the agency and
14 the state departments acting as public guardians establish
through interagency agreements. The procedures must ensure
that a decision is rendered promptly by an independent
decision maker.

16 E. The decision of the independent decision maker
18 constitutes final agency action of the state department
20 acting as public guardian and is effective immediately
22 unless judicially stayed in review proceedings brought
pursuant to the Maine Administrative Procedure Act, Title 5,
chapter 375, subchapter VII, or upon petition to the Probate
Court of appropriate jurisdiction.

24 F. In cases of emergency requiring immediate agency
26 representation in judicial or administrative proceedings,
28 the agency need not await the public guardian's response to
30 its notice of intent to represent. In these instances the
public guardian may raise objections in the proceedings in
which the agency represents the person with disabilities.

32 **§19507. Application to residents in children's homes**

34 This chapter also applies to exceptional students in
36 children's homes, emergency shelters, family foster homes,
38 specialized children's homes and residential child care
facilities, as defined in Title 22, section 8101, and to other
residential educational facilities, including the Governor Baxter
School for the Deaf and other similar facilities.

40 **Sec. 2. 22 MRSA c. 961, as amended, is repealed.**

42 **Emergency clause.** In view of the emergency cited in the
44 preamble, this Act shall take effect when approved.

46 **STATEMENT OF FACT**

48 This bill establishes the Protection and Advocacy Agency for
50 Persons with Disabilities.

2 The 99th Congress of the United States enacted and the 100th
Congress amended the Protection and Advocacy for Mentally Ill
4 Individuals Act of 1986, 42 United States Code, Section 247a,
which permits states to receive funding for protection and
6 advocacy services on behalf of mentally ill individuals who
reside in a facility. The State has been receiving funds under
8 this Act through the system providing protection and advocacy
services for persons with developmental disabilities, which under
10 federal law is the only system eligible for receipt of those
funds.

12 This bill is intended to ensure that no conflict exists
between state laws and federal laws which might constrain the
14 agency in the performance of duties required under federal law as
a condition of funding, and if funds are appropriated, to allow
16 the protection and advocacy agency to assist persons with a
mental illness who do not reside in a facility.

18 The 100th Congress of the United States also amended the law
20 governing protection and advocacy for persons with developmental
disabilities. This bill reflects the federal amendments.

22 Finally, this bill repeals the laws which established the
24 protection and advocacy agency for the developmentally disabled
and learning disabled, and establishes an agency with
26 consolidated functions for persons with mental illness,
developmental disabilities and learning disabilities.