Transition of the Virginia Office for Protection and Advocacy to a Private Nonprofit Entity

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PREFACE

This document is a study of the privatization of the Virginia Office of Protection and Advocacy, an independent state agency which serves as the legal advocate for Virginians with disabilities. House Bill 1230 (Appendix I), passed by the General Assembly and signed by the Governor, calls for the conversion of the Virginia Office for Protection and Advocacy from a state agency to a private nonprofit no later than January 1, 2014.

On April 25, 2012, at its regularly scheduled meeting, the Governing Board for the Virginia Office for Protection and Advocacy directed the agency to prepare a study of all aspects of conversion of the independent state agency to a private nonprofit entity and the implications of such a conversion. (See letter to Governor McDonnell, Appendix II.) The study will address the concerns raised by Governor McDonnell in his suggested changes to HB 1230, including:

- whether similar protection and advocacy entities in other states are private nonprofit entities, independent state-run organizations, or some other structure,
- whether gubernatorial appointments are made in other states to the protection and advocacy entities, and
- general trends and information on how these entities are structured and operate,
- evaluation of the structure and operations of the Virginia Office of Protection and Advocacy as compared to similar protection and advocacy entities.

Additionally, the Governor suggested an analysis on:

- how federal funds flow to and are used by the Virginia Office of Protection and Advocacy,
- what impact, if any, converting the Virginia Office of Protection and Advocacy to a private nonprofit entity will have on the federal funding, and
- eliminating benefits pursuant to the Workforce Transition Act (§ 2.2-3200 et seq. of the Code of Virginia) to employees who transition employment to the new nonprofit entity.

EXECUTIVE SUMMARY

Converting the Virginia Office for Protection and Advocacy to a private nonprofit organization is consistent with a national trend for the 57 organizations in each state and territory. Such conversion will support the organization's independent role to advocate on behalf of individuals with disabilities. Conversion also represents an opportunity to reduce the size of state government by privatizing a governmental function which can be more effectively accomplished by the private nonprofit sector. The Virginia Office for Protection & Advocacy is entirely federally funded; its operation as a private nonprofit will not jeopardize federal funds, so long as the transition is accomplished in a manner consistent with federal regulations. Additionally, under federal law, the Governor retains the ability to designate another organization to serve as the protection and advocacy program if, at any time in the future, there is good cause for redesignation.

A. Mission of the Virginia Office for Protection and Advocacy (VOPA)

The Virginia Office for Protection and Advocacy was created in 2002 as an independent state agency. VOPA's mission is …..

Through zealous and effective advocacy and legal representation to: protect and advance legal, human, and civil rights of persons with disabilities; combat and prevent abuse, neglect, and discrimination; and promote independence, choice, and self-determination by persons with disabilities.

VOPA investigates allegations of abuse and neglect in state-operated and privately-operated facilities, as well as assists individuals to access necessary services such as special education, Medicaid, and assistive technology. VOPA offers training and educational materials, represents individuals in discrimination claims, promotes systemic reform, and educates policymakers regarding the rights of people with disabilities.

B. The Federal Protection and Advocacy and Client Assistance Programs

The federal protection and advocacy (P&A) system was created to provide federal oversight of each state's systems of care for persons with disabilities. The P&A program consists of seven core programs:

- Protection and Advocacy for Persons with Developmental Disabilities (created 1975)
- Protection and Advocacy for Individuals with Mental Illness (1986)
- Protection and Advocacy for Individual Rights (1993)
- Protection and Advocacy for Assistive Technology (1994)
- Protection and Advocacy for Beneficiaries of Social Security (1999)
- Protection and Advocacy for Individuals with Traumatic Brain Injury; (2002) and
- Protection and Advocacy for Voting Accessibility.[1] (2002)

[1] Protection and Advocacy for Persons with Developmental Disabilities, 42 U.S.C. §15041 *et seq.*, 45 C.F.R. 1386.1 *et seq.*; Protection and Advocacy for Individuals with Mental Illness, 42 U.S.C. §10801 *et seq.*, 42 C.F.R. 51.1 *et seq.*; Protection and Advocacy for Individual Rights, 29 U.S.C. §794e, 34 C.F.R. 381.1 *et seq.*; Protection and Advocacy for Assistive Technology, 29 U.S.C. §3004; Protection and Advocacy Beneficiaries of Social Security, 42 U.S.C. §1320b-21; Protection and Advocacy for Individuals with Traumatic Brain Injury, 42 U.S.C. §300d-53; Protection and Advocacy for Voting Accessibility, 42 U.S.C. §15461.

Under federal law, each state's Governor designates a single state or nonprofit entity to serve as the state's P&A. The designated P&A administers each of the seven P&A programs in that state.

The federal government has also established the Client Assistance Program (CAP) to assist individuals with disabilities in accessing vocational rehabilitation services.[2] The CAP may be administered by an agency separate from the agency administering the P&A programs. However, the majority of states, including Virginia, house their CAP within the same agency as the designated P&A.

C. The History of Virginia's Protection and Advocacy System

The Commonwealth's experience with the federal protection and advocacy system has been evolving towards greater independence over the last four decades. Virginia's first Protection and Advocacy System, the Virginia Developmental Disabilities Protection and Advocacy System, was created in August 1977 by executive order. It was then an "Office" within the Office of the Secretary of Human Resources. Originally, the Office had the "authority to pursue legal, administrative and other appropriate remedies to insure the protection of the rights of" people with developmental disabilities, but shortly after its creation, the Governor removed the authority to pursue legal remedies.

Without that authority, the system did not meet the federal requirements. So, in 1981, Virginia withdrew from the federal Developmental Disabilities Program, and for a short period of time, Virginia did not have a federal protection and advocacy system.

In 1982, Virginia returned to participating in the Developmental Disabilities Act program. However, the Office was prohibited from initiating litigation against another state agency without the Governor's written approval.

In 1984, in order to provide the agency with more legal authority, the Virginia General Assembly created the Advocacy Department for the Developmentally Disabled. The Director of the Department was appointed by the Governor. The Department had the authority to "[p]ursue administrative remedies with the appropriate state officials and recommend alternatives to the Secretary of Human Resources if a resolution to the problem is not attained."

In 1985, as part of the Virginians with Disabilities Act, the protection and advocacy system was renamed the Department for Rights of the Disabled. The General Assembly

[2] Client Assistance Program, 29 U.S.C. §732, 34 C.F.R. 370.1 *et seq.*

assigned specific authority to the Department to ensure enforcement of the Virginians with Disabilities Act.

In 1991, the United States Department of Health and Human Services ("HHS"), found that Virginia's protection and advocacy system, then known as the Department for the Rights of Virginians with Disabilities, did not comply with federal law, because of its lack of independence. HHS determined that the statutory requirement for gubernatorial approval prior to initiation of litigation was inconsistent with the Developmental Disabilities Act's requirement of independence. "If gubernatorial approval must be obtained prior to the pursuit of court action, then the Virginia P&A does not have the required authority to pursue legal remedies as mandated by law." In response, Virginia considered various options, and in the end, amended the statute to remove the gubernatorial approval requirement and other limitations in order to assure greater independence for the program.

Throughout the 1990s, however, the Department for the Rights of Virginians with Disabilities encountered serious interference with its independence. The Department faced delays or prohibitions in hiring necessary staff, prohibitions on travel, and limits on certain kinds of actions.

In response to demands from the disability community for still greater independence, in 2002, Virginia legislatively established VOPA as an "independent state agency," Va. Code Ann. § 51.5-39.2(A), with independent litigating authority. Pursuant to state law, VOPA operates independently of the Executive Branch and independently of the Attorney General. As a state agency, however, VOPA still faces some limitations on its ability to recruit and hire qualified staff and on its ability to use its resources. VOPA also has a politically-appointed Governing Board.

The 2002 legislation resulted from years of efforts by advocates for people with disabilities who contended that Virginia's protection and advocacy system needed more independence from the executive branch to properly perform its watchdog function. Those efforts were based on persistent complaints that the System was ineffective and unwilling to criticize or sue state agencies. Indeed, VOPA's predecessor acknowledged that it had "been stymied, historically, in carrying out its duties." When the legislation was enacted in 2002, the Governor at the time explained that the statute removed the protection and advocacy system from the executive branch "to ensure that these systems are able to function with the required independence and autonomy."

D. VOPA's Administration of the Protection and Advocacy System

1. How Federal Funds Flow To and Are Used by VOPA

The Virginia Office for Protection and Advocacy is supported entirely by federal funds and operates under federal law. The federal government provides the federal funds "directly" to VOPA. 42 U.S.C. § 15042(b). However, in practice, the funds are received by the state and accounted for in the state budget. The Appropriation Act authorizes VOPA to spend the funds.

Until July 2010, VOPA received some state general funds to support the enforcement of the Virginians with Disabilities Act and to offset costs inherent in operating a state agency. However, as of Fiscal Year 2011, all state general funds to the agency were terminated.

VOPA receives eight federal program grants, each with specific expectations for advocacy for people with disabilities. (The amount of each grant may vary from year to year, but has remained relatively level for the last decade.)

- ***Developmental Disabilities Program*** – approximately $773,000 annually to promote community integration and protect persons with developmental disabilities who have experienced abuse, neglect, or discrimination in education, housing, employment, community programs, treatment, or services.
- ***Protection and Advocacy for Individuals with Mental Illness Program*** – approximately $657,000 annually to protect human rights and access to services for residents of mental health facilities, persons recently discharged, or persons living in the community who have a serious mental illness.
- ***Client Assistance Program*** – approximately $265,000 annually to protect the rights and benefits of people who are applicants or clients of the Department of Rehabilitative Services, Department for the Blind and Vision Impaired, Centers for Independent Living, or other programs funded under the Rehabilitation Act of 1973, as amended.
- ***Assistive Technology Program*** – approximately $86,000 annually to assist individuals with disabilities in obtaining access to assistive technology devices and services
- ***Protection and Advocacy of Individual Rights Program*** – approximately $387,000 annually to provide services that help clients overcome discrimination, barriers to living independently, or barriers to accessing benefits. The program also provides services to individuals not eligible for other advocacy programs.

- ***Protection and Advocacy for Beneficiaries of Social Security Program*** – approximately $100,000 annually to provide assistance and individual representation to Social Security beneficiaries with disabilities who are seeking to return to work, including individual advocacy services and various forms of alternative dispute resolution to address issues that arise in the developing, implementing, and amending a beneficiary's individual work plan under the Ticket to Work and Self-Sufficiency program.
- ***Traumatic Brain Injury Program*** – approximately $62,000 annually to improve access to services for people who have experienced a traumatic brain injury and reduce incidences of discrimination.
- ***Help America Vote Act Program*** – approximately $84,000 annually to monitor the way Virginia and local Boards of Elections implement the Help America Vote Act with regard to persons with disabilities.

In each program, VOPA uses a variety of strategies to resolve legal rights issues, including information and referral services, short-term assistance, negotiation and mediation, individual legal representation, group advocacy, education and training. In some situations, VOPA may litigate or use other formal remedies.

2. <u>VOPA's Structure, Operations, and Governance</u>

In total, VOPA's federal funding amounts to approximately $2.4 million annually. Approximately 82% of VOPA's annual expenditures are for personnel salary and wages. VOPA employs, full time, ten attorneys, six advocates and six support staff. VOPA also has one advocate who is a part time wage employee, and two support staff who are part-time wage employees.

VOPA is governed by an 11-member board consisting of 11 nonlegislative citizen members. Va Code 51.5- 39.2. Five members are appointed by the Speaker of the House, three by the Senate, and three by the Governor. Virginia Code establishes a complex formula for the appointments, in an attempt to coalesce the requirements of the eight different grants operated by the Office. For example, of the five appointed by the Speaker, two must represent the needs of people with developmental disabilities, one must be a person with a physical disability, one must represent people with cognitive disabilities, and one must represent persons with sensory or physical disabilities. For those appointed by the Senate, one represents cognitive disabilities, one represents persons with mental illnesses, and one represents people with mental

or neurological disabilities. Of the Governor's appointments, one must be a person with a mental illness, one a person with a sensory disability, and one representing mental or neurological disabilities.

3. Challenges in the Current Appointment Process

State law governs the appointment of members to the Governing Board. In theory, the law is designed to meet the complex requirements of the federal grants regarding Board composition and operation. In practice, the appointment process often falls short.

The process for Board appointments has placed VOPA at some risk with its federal funders. For example, although state law requires that VOPA present nominations based on the input of statewide advocacy groups, and the appointing authority is to "seriously consider" those nominations, the appointing authority is not required to choose from among those nominations. Over the last decade, some Board members have been appointed who were not qualified under state law, even some who were unfamiliar with the agency. Moreover, in practice over the last decade, the appointing authority has appointed persons to the Board who do not meet the statutory requirements of the federal grants administered by the agency, placing the agency at considerable risk.

The process for political appointment to the Board risks violation of federal law in other ways, as well. Senate appointments are made by the Senate Rules Committee, which does not have a mechanism for making appointments that arise out of the regular cycle. For example, a Senate-appointed Board member sought to resign, for family reasons, in December, 2011. That Board member was advised by her Senator that the Senate Rules Committee did not have a means of making an appointment until its reconvened-session meeting in the spring of 2012. Because federal law states that the P & A cannot have a vacancy on the Board for more than 60 days, the Board member agreed to stay on the Board until February, 2012 at some personal sacrifice. However, the Senate Rules Committee did not meet for its reconvened session in April as originally expected, but instead met in May. The Board vacancy then extended past the 60 day limit.

The process employed for appointment by the Governor can be slow and cumbersome, as well. In one instance, although the Governor's staff recognized the

need for a replacement appointment, staff were unable to process that appointment for more than eight months.

The process for the removal of Board members also impedes VOPA's ability to comply with federal law. Under the Virginia Code, a Board member cannot be removed by the Board itself, even when a member fails to attend meetings or to comply with other requirements under the federal grants. According to the Virginia Code, a Board member can only be removed by the appointing authority and only for a criminal offense or a declaration of incompetence. The appointing authority can only remove a Board member by bringing an action in state court. While this does provide the Board with some protection against political interference, there is no mechanism for the removal of a Board member who is not fulfilling duties required by federal law.

E. National Protection and Advocacy and Client Assistance Program Practices

1. Trends in Protection and Advocacy and CAP Administration

Most P&As are housed in private, nonprofit agencies. Of 57 state and territorial P&As, 47 are housed in nonprofit agencies, 9 are in state or territorial agencies, and 1 is housed in a state university.[3] Thirty-three state P&As also administer the CAP program.

The trend has been to move state or territorial P&A agencies out of state government. In recent years, New Jersey and North Carolina have moved state agency P&As to nonprofit organizations. Both Ohio and New York are in the process of privatizing their P&A and CAP programs.

The reasons states have privatized their P&As have varied, but the most common reason has been to ensure the independence and autonomy of the P&A. In addition, states have moved their P&A and CAP function to a nonprofit to reduce the size of government as well as assure the P&A and the CAP maximum flexibility to comply with federal funding rules without state law restrictions on budget, hiring, travel, or Board operations.

2. Other Similarly Sized State Protection & Advocacy and Client Assistance Programs

VOPA is a medium-sized P&A, with an annual grants income of $2.4 million. VOPA surveyed the eight protection and advocacy organizations that are most

[3] Connecticut, Indiana, Kentucky, New York, North Dakota, Ohio, New York, American Samoa, and Puerto Rico have state/territorial agency P&As, although Ohio and New York are transitioning from a state agency to a not-for-profit agency. Alabama's P&A is part of the Alabama State University School of Law.

similar in size to VOPA. See Appendix III.

Every similarly-sized organization surveyed is a private nonprofit. Every organization has a governing Board that is self-nominating. None of the governing boards have any gubernatorial or legislative appointments. There is no similarly sized protection and advocacy organization that is in state government.

	Funds	Board Size	Staff Size	Self-Nominating Board?	Political Appointments to Board?
NJ	2.5 mil	17	37	Y	N
AZ	2.1 mil	19	26	Y	N
MA	2.1 mil	20	22	Y	N
TN	2.25 mil	14	32	Y	N
WA	2 mil	10 - 12	16	Y	N
GA	3.3 mil	10	36	Y	N
NC	3.2 mil	17	42	Y	N
WI	1.9 mil*	17	60	Y	N
	(*total budget 5 mil)				

3. National Standards for Protection and Advocacy Systems

VOPA reviewed the standards developed by the National Disability Rights Network (NDRN), the national association of P&A and CAP agencies, and adopted by a consensus vote of executive directors in October 2011. These standards reflect the generally accepted norms for an effective protection and advocacy system.

The national standards include foundational principles to guide each organization, one of which is that the organization must be independent from service providers and from state agencies that serve people with disabilities. The standards also emphasize the necessity for the organization to be free from influence by state agencies so as to be able to educate policymakers without threat of interference.

The standards emphasize that the P&A's primary loyalty is to people with disabilities and their full inclusion into community life, without competing concerns for the protection of state interests.

The NDRN Standards provide that

- management should be structured to support effective legal and rights advocacy.
- The board and advisory councils should be led by individuals with disabilities and represent the cultural, ethnic, racial, and disability diversity in its state.
- The P&A should hire, retain, and promote persons with disabilities.

The NDRN Standards identify systems advocacy as a core function that should be a significant component of each P&A/CAP's activities, including bringing impact litigation and informing state or federal legislative action.

F. Transition of the Virginia Office for Protection and Advocacy

During the 2012 General Assembly session, the legislature passed HB1230 by an overwhelming margin. The legislation calls for the privatization of Virginia's protection and advocacy system. The Governor signed that bill on May 18, 2012.

HB1230 called for the development of a transition plan to be provided to the legislature. Although HB1230 required the plan to be developed by December 1, 2013, VOPA's Governing Board established a deadline of December 1, 2012.

The Governing Board has stated its intention that all staff who are employed by VOPA at the time of transition will be offered jobs with the new entity. HB1230 contemplated this as well. The job offers would, of necessity, require staff to resign from the state agency in order to accept the new offer. Thus, no employee who transitions to the new nonprofit would be eligible for benefits under the Workforce Transition Act. (See Va Code §2.2-3200(B)). HB1230 expressly stated that employees who transition to the new nonprofit would not be eligible for WTA benefits.

G. Redesignation Process

Under the federal law creating the protection and advocacy system, each state's Governor has the ability to designate the organization who will carry out the program. Although federal law authorizes the Governor of each state to make the initial designation of the protection and advocacy system, the Governor cannot redesignate the P&A without "good cause." 42 USC §15043(a)(4).

There are strict procedures in federal law for how a Governor can "resdesignate," or select a different organization to serve as the protection and advocacy system. (See Appendix IV.) The Governor must provide notice to the P&A of the intent to redesignate and must specify the cause. The State must give the P&A an opportunity to respond to the assertion that there is "good cause" to redesignate. The P&A then has the opportunity to appeal to the Secretary of Health and Human Services, challenging the redesignation. If the P&A does not challenge the redesignation, and if it is shown that the newly-designated organization has the capacity to carry out the program effectively, the Secretary of Health and Human Services generally accepts the redesignation.

CONCLUSION

In converting its protection and advocacy system to a private nonprofit organization, Virginia joins a nationwide trend to ensure maximum independence of the state's disability rights system. Further, it represents an opportunity to reduce the size of state government and privatize a governmental function in a manner that more effectively serves the interests of Virginia's disabled citizens. Conversion to a nonprofit is permissible under federal law, pursuant to an established notice process. Moreover, conversion to a nonprofit ensures greater compliance with federal law and an enhanced ability to serve as the watchdog for individual rights in Virginia.