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NONPROFIT ORGANIZATION REPORT – FALL 2013

DECONSTRUCTING MICROMANAGEMENT AT THE CONNECTICUT DEPARTMENT OF DEVELOPMENTAL SERVICES

(And why nonprofits *everywhere* should be concerned)

In prior issues of this newsletter we have discussed the grossly unfair imbalance in the relationship between state-financed nonprofit human service providers and the state agencies by which they are regulated and funded.[1] In this issue we will burrow into the depths of this problem by use of a case study which we hope readers will find interesting. The case involves a currently pending dispute between a nonprofit client and the Connecticut Department of Developmental Services (DDS), whose mission is to provide services to the intellectually disabled. The quarrel arose after our client objected to a mandate DDS added to its funding contracts with nonprofits which must be complied with by June 30, 2014. Our client believes (and we agree) that the mandate is an unnecessary distraction and an illustration of a type of overbearing micromanagement that is too common in a social services sector that is already struggling to maintain the safety net.

National Scope of This Problem. We are devoting this entire issue to the DDS mandate because on a deeper level we fear it is indicative of a tectonic realignment of the interests of nonprofits and state funding agencies everywhere.[2] To be specific, are what once were independent, locally managed, community-rooted nonprofit service organizations being morphed into mere appendages of the state agencies? Are the state agencies unconsciously becoming wedded more to their self-perpetuation than to their mission? In any event, the topic is particularly relevant to the people in need of services and individual and institutional donors (community and private foundations) who are increasingly asked to offer financial assistance to these nonprofits as state funding dries up. We have condensed a considerable amount of legal thinking into these four short pages, and in an effort to be as clear as possible will take on the DDS mandate on a step-by-step basis.

Step One: The Historical Bargain. This situation must be analyzed in the context of changes in the American social contract that materialized in the latter half of the last century – when human and social service tasks that had historically been the domain of private charity and the extended family were assumed in part by government. President Lyndon Johnson's Great Society initiative on the federal level is a good reference point for this shift. A fundamental pillar of this new deal on the state level is the current system in which the states fulfill the human service obligations they have assumed by hiring community-based nonprofit organizations to do the actual work – to be the "boots on the ground" service providers. This arrangement is memorialized in Purchase of Service (POS) contracts in which a state agency pays the nonprofit to do the work – and it is the DDS POS contract into which the objectionable mandate has been added.

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[1] See the Winter 2010 special supplement entitled *State Funded Human Service Agencies*, and the Winter 2013 edition entitled *State Charities Regulators and the Goldilocks Principle* – available at www.rrlawpc.com.

[2] Readers interested in the national scope of the problem can find some terrific material and examples on the website of the National Council of Nonprofits – www.councilofnonprofits.org.

Step Two: The DDS Mandate. At this point readers may have the impression that the DDS mandate is sinister in character – but on its face it is so benign in appearance that we run the risk of looking like the bad guys for rising in opposition. Here it is: *"Contractors will have at least one self-advocate with intellectual disabilities on its (sic) corporate Board of Directors no later than July 1, 2014."* Importantly, we are *not* attempting to analyze the efficacy of the "self-advocacy" policy embedded in the mandate (we are lawyers and it is for experienced caregivers to determine if the policy has utility or is simply the jargon *du jour*).[3] As lawyers, however, we do object to the DDS decision to implement the policy by sticking its fingers into internal corporate governance and, basically, telling nonprofits how to structure their statutory boards of directors. Essentially, DDS is using the POS contract to rewrite the providers' By-laws.

Step Three: Obtaining the DDS's Documents. Our legal analysis began with the filing of a Freedom of Information Act (FOIA) request with DDS to obtain the documentary road map behind both the self-advocacy policy *and* the decision to implement it with the board mandate. Candidly, we wondered if the DDS board mandate was a fix in search of a problem. The FOIA request yielded a trove of documents which indicate to us that the "self-advocacy" policy is designed to empower the consumers of services, and in Connecticut's case seems to have been derived from select national level expert studies suggesting that increased family involvement may enhance service quality in an era of diminishing governmental funding.[4] As far as the mandate altering board structure is concerned, we found nothing of consequence other than some DDS staff emails containing the POS contract language quoted in Step Two above.

Step Four: Unanswered Legal Issues. We advised our client that the legal issues raised by the board mandate are as follows: (1) board members have fiduciary duties which require intellectual analysis, so if someone with intellectual disabilities has a board seat how does the organization confirm competency to take on this role and its associated liabilities; (2) information about an intellectual disability is protected health information under HIPAA, so is a waiver needed, and is the person involved competent to execute a waiver; (3) corporate law requires board of director qualifications to be stated in the certificate of incorporation or the By-laws, so these documents may need to be amended to stay in legal compliance; (4) corporate law permits boards to have non-voting directors and directors who are not counted towards a quorum, and we do not know if directors subject to these limitations would satisfy DDS; and finally (5) would the mandate increase the risk that the nonprofits would be considered "public agencies" and become subject to the Freedom of Information Act?[5]

Step Five: DDS Not Empowered to Make the Law. We reminded our client that in our legal system the law is "made" when the General Assembly (the legislative branch) passes a statute that is signed by the governor (the executive branch); and that the administration of the law (after it is made) is the responsibility of the executive branch which does so through agencies such as DDS. As part of the executive branch, DDS has the authority to administer the law but *not* to make new law. There is, in fact, a

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[3] Our client believes that the policy is redundant because the vast majority of nonprofit providers are passionate advocates for, and attentive to the needs of, their intellectually disabled clients. Moreover, their boards almost always include parents or other family members who advocate for the interests of their children or relatives. Some boards on their own initiative have chosen to bring someone with disabilities onto their boards, but this is their choice and is done in the context of their culture, their By-laws, and appropriate legal advice.

[4] The concept is incorporated in the DDS 2012 Five Year Plan, which is available on the DDS website at www.ct.gov/dds.

[5] The concern about nonprofits becoming subject to Freedom of Information Act requirements is well founded. See the Spring 2013 issue of this report entitled *Fighting FOIA with FOIA The Freedom of Information Commission Rends the Safety Net.*

field of legal study dedicated to the powers of, and limitations on, executive branch agencies called "Administrative Law." While entire law school courses are dedicated to this field, suffice it to say for our purposes that an executive agency can adopt: (a) policy with respect to the administration of the law (policy is not law), and/or (b) formal regulations (which have the force and effect of law), but only after the agency follows a detailed outside approval process (which includes advance publication, public comment, approval by the legislative review committee of the General Assembly, and Attorney General approval). The regulation approval process insures public transparency and provides opponents of the proposed regulations (*i.e.*, the mandate) a chance to be heard by members of the General Assembly and the Attorney General. *To state it another way, does the DDS board mandate constitute "policy" over which DDS has broad authority, or does the mandate need to be the subject of formally approved regulations to be lawful?*

Step Six: Legal Infirmity of DDS Mandate. We next turned to something called the Connecticut Administrative Procedure Act (every state has an act of this type) in search of an answer to the question in Step Five. The Administrative Procedure Act embodies our state's administrative law, and in many ways this Act "regulates the regulators" by creating speed bumps to keep agencies (such as DDS) from biting off more than the law allows them to chew. In this regard, the Connecticut Act defines the term "regulation" to include any agency "*statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency.*" After reading this we concluded that the DDS mandate fell squarely within the definition of the term "regulation" because the mandate prescribes a *policy* (to reconfigure governing boards) that is *generally applicable* (all DDS contractors are required to abide) – and that as such the mandate is unlawful because DDS does not have the power to create the mandate without taking it through the regulation making process.

Step Seven: Approach to DDS. We wrote to DDS and to the Attorney General expressing our concerns, thinking that the regulation review process would be a healthy exercise for DDS, would identify the statute under which DDS believed it had the power to create the mandate, and provide guidance on the legal issues discussed in Step Four above. DDS responded with some ostensibly polite legal euphemisms in which we were, in substance, told to consider spending more time flying kites. Specifically DDS informed us that "*an agency is generally free to require the substantive terms in a contract that it deems in the best interest of the state*," and that a contractor (a nonprofit) "*may refuse to contract with the state or seek to negotiate changes in the provision.*"

Step Eight: Response from DDS Is Unconvincing. We discussed the DDS response with our client. While we were not surprised that DDS was sticking to its guns (bureaucracies rarely surrender power voluntarily), we expected a more reasoned response for three reasons: (a) if nothing else, the mandate's vagueness leaves the legal questions (Step Four) in need of answers; (b) DDS's assertion that it has the power to require whatever substantive terms it wants in a contract simply begs the question of whether an agency can use its power to write contracts to do an end run around the definitions in the Administrative Procedure Act by, in essence, embedding what should be a "regulation" in contract language; and (c) at the risk of sounding overly glib, the statement that a nonprofit may refuse to contract with DDS or seek to negotiate changes in the provision of a contract makes us wonder what type of liquid is being dispensed from the DDS's water coolers. The notion that nonprofits can always refuse to contract with DDS brings to mind the old adage about being careful what you wish for because sometimes you get it – because the nightmare scenario for DDS is one in which the nonprofits do just that and refuse to contract and give DDS the keys to the office and the direct care responsibilities. Given the DDS's miserly funding rates and *modus operandi*, the State is lucky to have nonprofits choosing to remain in the field. Similarly, nonprofit providers we have worked with can hardly suppress their laughter when asked if DDS has ever been open to any type of bona fide negotiation. For the DDS to suggest otherwise is just plain silly.

Step Nine: We File Formal Petition with DDS. Given the refusal of DDS to budge, we took advantage of another provision of the Administrative Procedure Act which permits interested persons to file a petition with an agency requesting that it draft regulations in an area of concern. Under this provision, if an agency does not respond within thirty (30) days, a party can file a petition with the court to force resolution of the dispute. More than 30 days have elapsed and we have not heard a peep from DDS. We are still contemplating a petition to the courts (a suit), but only time will tell if that will be the next step (number 10) we have to take.

Closing Thoughts. At the beginning of this issue we referenced the national cultural shift that began some 50 years ago, in which government assumed responsibility for human service functions that had been the domain of private charity and extended family. The deal between state government and nonprofits that was struck at that time was necessary because the service tasks were beyond the means of private charity and families. The relationship is necessary for the same reason today. However, the DDS mandate shows that the once healthy bargain between the nonprofits and state agencies has broken down, with state agencies failing to recognize that the power of the purse and wisdom are entirely different things. Perhaps the best evidence of the need to renegotiate the contract (both figuratively and literally) is the fact that our client has required that it not be identified by name to DDS because it fears retribution (a concern shared by many nonprofits). Any way you look at it, this is not a good way to run a railroad!

The Reid and Riege Nonprofit Organization Report is a quarterly publication of Reid and Riege, P.C. It is designed to provide nonprofit clients and others with a summary of state and federal legal developments which may be of interest or helpful to them.

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