

**A Study on the Feasibility of Transitioning State and Federal
Protection and Advocacy, Client Assistance, and
Ombudsperson Programs to a Private Nonprofit Organization**

**A Report to Governor Strickland and the
Leadership of the Ohio General Assembly**

**Ohio Legal Rights Service Commission
January 19, 2010**

Summary

House Bill 1 (HB1), enacted July 17, 2009, directed the Ohio Legal Rights Service Commission (Commission) to conduct a study to assess the feasibility of moving the state and federal protection and advocacy (P&A) system, client assistance program (CAP), and the Ombudsperson section of the Ohio Legal Rights Service (LRS) to a private, nonprofit organization. This report presents the findings and conclusions reached by the Commission after a thorough study.

In conducting the study, the Commission determined that its primary focus should be on the impact of any transition on the delivery of advocacy services to LRS' clients, Ohioans with disabilities. The Commission also approached the study fully aware of LRS' long history of independence, including representing clients in difficult and complex cases against state officials, and aware of the longevity, experience, and commitment of LRS' staff.

Based on its research of federal law and regulations, and as discussed below, the Commission reports that it is feasible to transition the P&A and CAP to a nonprofit organization. Nonetheless, based on the study of the potential affect on service delivery, and the effects of a transition on staff morale, the Commission finds no compelling reason to recommend a transition at this time.

The Commission also, however, recognizes that recent efforts to streamline Ohio government by state administrative and budget authorities have created some tension with the federal program and accounting mandates under which LRS must operate. These issues, and other questions that are pending around the nation, may compel a decision to transition at some undetermined point in the future. The Commission believes that these issues can and should be addressed and resolved as part of the ongoing strategic planning process for the agency.

The Commission is committed to working with the Governor's office and federal authorities to resolve any conflicts and tensions between the federal mandates and state executive directives. In the event a transition becomes inevitable in the future, the Commission will diligently work with the Governor's office and federal regulators on the terms and timing of any transition with the ultimate goal of ensuring that the Ohio P&A and CAP serve clients in as robust a manner as is possible.

House Bill 1 Requirements

HB 1 required the Commission to evaluate four issues:

- (1) The feasibility of a transition to a nonprofit organization;
- (2) The potential effects on service delivery, including client service and access to required resources, and any other service delivery advantages or disadvantages that might result from the transition to a nonprofit organization;

(3) Potential organizational effects, including cost savings and non-state funding sources, and any other organizational advantages or disadvantages that might result from the transition to a nonprofit organization; and

(4) The approximate amount of time necessary to achieve a transition to nonprofit status.

HB 1 also required that the Commission create a process plan by which a transition to a nonprofit organization by July 1, 2011, which coincides with the beginning of a new state biennial budget.

Statutory Structure

Legal Rights Service -- The General Assembly created the Legal Rights Service (LRS) in 1975 to provide legal representation to residents of state institutions for people with mental retardation [sic]. In 1976 its authority was expanded to include people in state psychiatric hospitals. The LRS Administrator was appointed by the Chief Justice of the Ohio Supreme Court, and for many years the agency functioned as part of the judicial branch of Ohio government.

LRS' mission is to protect and advocate, in partnership with people with disabilities throughout Ohio, their human, civil and legal rights, including protection from abuse, neglect, discrimination, segregation and other rights violations. In federal fiscal year (FFY) 2009, the agency managed approximately 4,900 cases and provided information about rights to another 1,200 people. Its active docket as of this report includes over 30 active cases in federal and state court or administrative hearings, including two class actions on behalf of Ohio's children with disabilities.

LRS' creation preceded federal legislation in this area by three years. The Congress, in 1978, amended the Developmental Disabilities Act to require states that received funds under the Act to designate a system to protect and advocate the rights of people with developmental disabilities. Ohio originally designated a nonprofit organization as the P&A, but by 1980 then Governor Rhodes redesignated the P&A to LRS.¹

Also in 1980, Congress expanded the P&A system to protect and advocate the rights of people in psychiatric hospitals. Since that time, Congress has augmented the P&A system with six additional programs (appendix A, list of programs and FFY 2009 grant awards). In 1998, the Governor initiated a voluntary redesignation of the Client Assistance Program (CAP) under Title I of the Rehabilitation Act from the then state department of mental retardation and developmental disabilities to LRS. The CAP is a sister program to several of the P&A grants, and provides advocacy for

¹ This redesignation predated the "good cause" and hearing requirements now in statute. The CAP redesignation discussed below, while "voluntary", still required that the Governor comply with the notice, hearing, and good cause requirements of federal law.

applicants and recipients of services from the state's vocational rehabilitation authority and centers for independent living. With the addition of the CAP, the growth in P&A programs, and increased efforts to obtain other outside funding in recent years, over 95% of LRS' funding, approximately \$5 million, is now federal or other non GRF dollars. In 2007, the General Assembly created a statutory line item to allow LRS to manage federal program income that the agency obtained through fees and court costs.

In 1986,² the Ombudsperson Section was added to LRS. The section was created to conduct non-legal dispute resolution where a complaint is made regarding a violation of the human, legal, or civil rights of a person with developmental disabilities. In 1989, the section's jurisdiction was expanded to include people with psychiatric disabilities. While originally funded at the level of six full time employees, funding has dwindled in recent years to less than \$150,000 per fiscal year, and it is expected that this funding will continue to decline for at least the next biennium.

LRS Commission -- In 1986 the General Assembly created the Commission to oversee the agency and to appoint the Administrator. The Chair of the Commission is appointed by the Chief Justice of the Ohio Supreme Court; three members are appointed by the Speaker of the House of Representatives; and three members are appointed by the President of the Senate. Members serve a three year term, and may be reappointed once. The Commission meets at least quarterly, although in recent years operational mandates, including this study, have caused the Commission to meet more frequently.

The Commission appoints the LRS Administrator (Executive Director). It advises the Executive Director on budget and strategic planning; approves policies, including a policy on litigation approval for LRS; hears appeals of LRS client grievances; provides consent prior to filing of class action litigation by LRS; approves issuance of subpoenas by LRS; and has rulemaking authority.

The Commission has adopted by-laws, and has a robust committee structure that mirrors its statutory functions. In 2002, the federal grant authority for the P&A concluded that the Commission is the "governing board" for the P&A, and that the Commission must comply with federal law regarding its composition.

The Feasibility Study

Process -- The study was conducted in three phases. First, the Commission, with input from LRS staff, approved a comprehensive plan for conducting the study. The

² Both the Ombudsperson Section and the Commission were created by the General Assembly after joint legislative hearings regarding significant problems with the mental retardation system. The Commission was created in part to mitigate the influence over LRS potentially caused where a single authority appointed the Administrator.

Commission then engaged a consultant, Laralyn Sasaki and her associate Jim Underwood (study consultants), to conduct thorough research to support the report. The review was integrated into the ongoing strategic planning efforts of LRS.

Next, in conjunction with LRS staff and AXIS, Inc., which was assisting LRS in its strategic planning effort, the study consultants conducted forums in five Ohio regions (Toledo, Columbus, Cincinnati, Athens, and Cleveland - the Cleveland area forum was held at a state psychiatric hospital in order to ensure representative input from this key LRS client group). Two separate meetings were held at each location: the first with people with disabilities; the second with families, providers of services, nonprofit advocacy groups, and state and county officials. In each case, the consultants were able to fully explore the participants' view of LRS' services, and how to improve service delivery, as well as to gauge the reaction to a possible transition out of state government.

The study consultants also spoke with a majority of LRS staff, both in groups and individually; current and former members of the Commission; the assistant attorneys general who have represented the Commission; and state officials, including members of the Governor's staff who had played a role in the decision to explore a transition. Two meetings were held with the advisory council for the mental illness P&A grant. They also spoke with officials at the federal funding agencies that would exercise oversight over any transition, and directors at other state P&As that had transitioned to nonprofits. Finally, they interviewed senior staff at the National Disability Rights Network, the Washington based membership organization for P&As, who have monitored numerous transitions over the years. In all, the study consultants interviewed approximately 200 people to inform the study.

In addition to the interviews, LRS staff provided the study consultants with comprehensive information regarding LRS' legal charter and funding; salaries and benefits, including retirement; fiscal and personnel policies; and comparisons of federal and state authorities under which LRS operates. Much of the focus of this work was to analyze federal and state access authority, which allows LRS to obtain nonconsensual access to client records at facilities. Staff also provided the study consultants with information on areas where state authority for the operation of LRS as an executive agency was potentially in flux and had created tension between LRS' federal mandates and state administrative agencies, particularly DAS and OBM. Finally, staff advised the study consultants on federal legal doctrine that was quickly evolving and presented unique challenges for state agency P&As.

In the third phase, the study consultants presented their research to the Commission and staff at meetings in October and December, 2009, and January, 2010. All LRS staff was invited to attend the Commission meeting in late December during which the Commission received the draft report from the study consultants. A

final study report from the study consultants was received by the Commission on January 19, 2010. At the same meeting, a draft report to the Governor and the leadership of the General Assembly was submitted to the Commission. After full and open deliberation, and with minor changes, the Commission adopted the report.

Federal Context – The bulk (some 95%) of LRS’ programs are federally funded. LRS is Ohio’s designated system to protect and advocate the rights of people with disabilities, and the Client Assistance Program (CAP) for people receiving vocational rehabilitation services. Any transition of services from LRS as the existing “P&A” and CAP is a “redesignation” of the program, and there are strict controls in federal law governing when this can occur and how it must be accomplished. This includes notice to the public, an opportunity for the public to be heard, and a hearing process that culminates with review by the U.S. Secretary of Health and Human Services (P&A programs) and Education (CAP). The Governor must state good cause for any redesignation, and this finding is reviewed by the Secretaries.

Findings

The Commission responds to the feasibility-related questions asked in HB 1 as follows:

(1) The feasibility of a transition to a nonprofit organization:

It is feasible to transition the programs of Ohio Legal Rights Service (LRS) from a state agency to a nonprofit organization. This transition, however, must in all aspects conform to and is controlled by federal law. Any transition must also take into account the impact upon LRS’ clients, Ohioans with disabilities.

(2) The potential effects on service delivery, including client service:

Client services could be impacted.

- Differences in state and federal law allowing access to client records, particularly in cases of abuse, neglect, or deaths, would need to be reconciled.
- Loss or further diminution of the Ombudsperson program, authorized and funded under state law, and which focuses on non-legal resolution of complaints of abuse and neglect of people with disabilities, would result in less protections for LRS’ clients. In particular, required access to major unusual incident reports from state agencies is a significant tool to allow investigations into patterns of abuse, neglect, and suspicious deaths in state licensed and managed facilities.

- LRS has, under state law, subpoena powers, civil penalties and other statutory enforcement mechanisms, including civil penalties for denial of Ombudsperson access or interference with Ombudsperson duties.
- LRS currently has rulemaking authority for client rights notification in state psychiatric hospitals.
- A potential exists for court imposed limitations on LRS authority as a state agency P&A to represent client interests in federal court, and this in turn may lead to a question regarding its authority to seek legal remedies as required by federal P&A statutes.
- Recent state administrative and budget mandates, designed to create greater efficiency in Ohio government, directly impact on client services (cost savings days); confidentiality and management of confidential client records (OIT); personnel actions and restrictions (DAS, Governor's office), and potentially conflict with federal P&A system requirements.
- LRS administrative staff increasingly deals with state agency requirements that are unrelated to LRS' mission. For example, LRS must enact a rule under recent privacy statutes (Joe the Plumber) that will essentially mirror the confidentiality of LRS records under federal and state law.
- Potential for the appearance of, if not actual, conflict of interest exists when LRS is seeking JCARR approval for its own rules while also commenting on behalf of its clients on other agency rules.

Potential effects on access to required resources:

- Access to resources would potentially be affected, depending on the feasibility of maintaining state funding for P&A and Ombudsperson services (currently \$99,930 and \$146,789 per fiscal year).
- Other questions regarding resources require discussion with federal authorities regarding transfer of federally purchased assets and liability for obligations.
- A nonprofit organization will allow for greater ability to obtain new resources as potential federal funding opportunities / mandates continue to require flexible responses from the P&A, as well as the potential eligibility for outside grants and conducting development activities.

Any other service delivery advantages or disadvantages that might result from the transition to a nonprofit organization:

- There is likely an impact on LRS staff, including possible acceleration of staff retirements or other turnover. However, significant turnover is envisioned in any event due to the significant number of employees who have a retirement window in the next five years.
- LRS staff who transition to a nonprofit organization would likely be “carryover” employees and will, therefore, maintain participation in PERS. Other benefits could be impacted, although the employee benefit package for state employees is also likely to diminish.
- A transition would afford LRS the opportunity to restructure its staff, redefine its work and use personnel resources more effectively to better deliver services to clients.
- Shifting resources and administrative priorities could open the organization to pursue programs beyond the current federal P&A work.
- The loss of decades-long staff relationships in the disability community and the accompanying institutional memory could disrupt client service delivery in the short term.
- Perceptions regarding LRS as a state agency are both favorable and unfavorable. Clients seek LRS because it is perceived as having greater resources than a local organization. Many clients value LRS’ state agency status, and its independence from Executive Branch agencies, but there is anecdotal evidence that some clients are concerned with the appearance of a conflict of interest when their case involves advocacy against another state agency. Providers of services to people with disabilities sometimes see LRS as just another regulatory agency that they must put up with, and their trade associations have used the biennial budget process and rulemaking to attack LRS’ authority. Clients’ positive perception of LRS may be derived in part based on LRS’ ability to seek legal remedies, which would also be required under federal law of a nonprofit P&A.

(3) Potential organizational effects including cost savings:

- Any short-term cost savings to the state would be based on an assumption that the Ombudsperson and other GRF funding is eliminated. This function may, however, be transferred to another agency (as originally proposed in the Blue Book), or contracted for with the nonprofit organization.
- It is unclear what obligation the nonprofit organization or the state would have for the contractual obligations of a one time bonus in July of 2011. Similarly, depending on state budget circumstances in fiscal year 2012, there

could be an opportunity to “buy out” some employees who are close to retirement.

- The nonprofit organization could see significant long-term cost savings in costs of personnel, but this would not be completely realized immediately as transitioned employees would be eligible for PERS. Other cost savings, such as fleet management and travel costs, can be obtained more quickly.

Potential organizational effects on non-state funding sources:

- The federal government’s commitment to the P&A and CAP system is strong, and at least two new programs for the P&A system are currently in bills being considered by the Congress. Other funds would be needed to meet any match requirement, which are now met with state dollars.
- LRS would be able to compete for grants that it is not currently eligible to pursue because of its agency status, although the amount of grants cannot be estimated at this time.

Any other potential organizational advantages or disadvantages that might result from the transition to a nonprofit organization:

There are numerous administrative pressures that could be alleviated, including the following areas where LRS must follow federal mandates and is not subject to state policies:

- Ongoing concerns regarding compliance with federal governing body composition requirements
- Personnel actions, particularly hiring and promotion of program staff
- Travel restrictions imposed on investigative and legal staff
- Cost saving days when employees are funded with federal dollars that cannot be remitted to the state
- Budgeting and accounting systems that are not controlled by LRS and disputes over allocation of federal dollars and direct cost accounting
- Direct access to federal dollars
- Purchasing and contracting of necessary outside services
- Data and email service updates that can be controlled and managed in a confidential manner as required by federal law

Disadvantages include fiscal issues, as federal dollars cannot be used for direct costs of consulting or otherwise creating the new entity. Federal dollars may, however, be used for salaries of LRS staff that are involved in the transition

effort. Other disadvantages are mostly related to the creation of a nonprofit organization, including

- formation of by-laws and board
- administrative tasks such as creating policies and procedures
- transactional work of negotiating leases and benefits contracts
- purchase and implementation of accounting and payroll systems

(4) The approximate amount of time necessary to achieve a transition to nonprofit status:

Any transition to a nonprofit P&A / CAP will be labor intensive. Several variables are at play in determining the timetable for such a transition, even assuming that the redesignation and transition is voluntary.³ First, the federal authorities will be closely involved. The new designee must be incorporated as a nonprofit organization under Ohio law, have IRS 501(c)(3) status, and have the capacity to comply with federal program and fiscal requirements before it can be designated by the Governor. Second, while only the Governor can make the designation, state legislative action may be necessary to “sunset” the LRS and the Commission, as well as to delineate any authority or responsibilities for the nonprofit under state law and to resolve certain questions related to LRS employees, such as negotiated bonuses and leave balances. The federal redesignation process, designed to protect the independence of the P&A and CAP from the Governor, must be followed exactly to avoid delays at the Secretary level.

The Commission reviewed the process in the most recent (North Carolina) and other transitions from state agency P&A to nonprofit, and concludes that each of these transitions had individual circumstances that reduce their value as precedent. A transition can take as little as six months (New Jersey), or as long as seven years (North Carolina), depending on external variables such as activity by the legislature or delays at the executive agencies. In Ohio, assuming that the transition is voluntary and that all preparatory work is completed in an orderly fashion, the transition will likely take between 18 and 36 months.

³ H.B. 1 also required the Commission to develop a “process plan” for the agency's transition. That plan is included as Appendix B of this report.

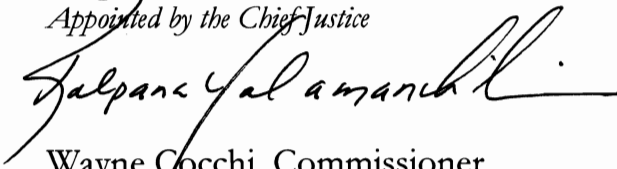
Conclusion

The Commission expresses its great appreciation to the study consultants and LRS staff for their exceptional efforts in compiling all of the information to allow this report to be completed in a very limited time.

We look forward to working with Ohio's elected leadership to ensure that advocacy services for Ohio's citizens with disabilities are delivered at the highest and best level possible.

Kalpana Yalamanchili, Chair

Appointed by the Chief Justice



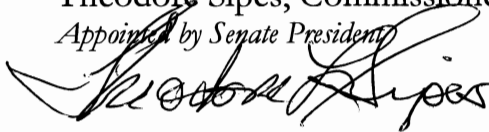
Wayne Cocchi, Commissioner

Appointed by Senate President



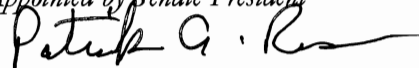
Theodore Sipes, Commissioner

Appointed by Senate President



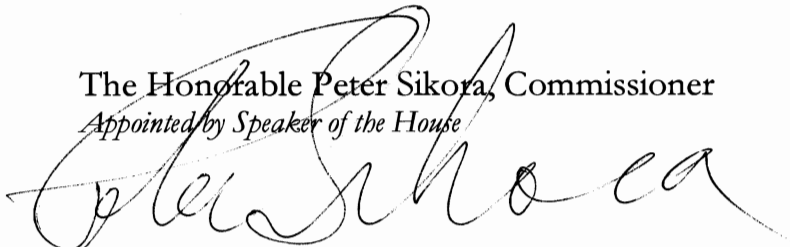
Patrick Risser, , Commissioner

Appointed by Senate President



The Honorable Peter Sikora, Commissioner

Appointed by Speaker of the House



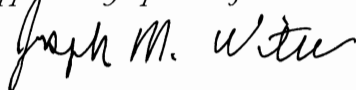
Michael Richards, Commissioner

Appointed by Speaker of the House



Joseph Witalec, Commissioner

Appointed by Speaker of the House



Appendix A

Federal statutes and regulations governing OLRs' protection and advocacy / CAP function

<u>P&A / CAP</u>	<u>Statute / Regulations</u>	<u>FFY 2009 Allocation</u>
Developmental Disabilities	42 U.S.C. §§15041 et seq / 45 C.F.R. 1386.1 et seq. (Developmental Disabilities Act)	\$1,403,949
People with Mental Illness	42 U.S.C. §§ 10801 et seq. / 42 C.F.R. '51.1 et seq.	\$1,074,273
Client Assistance Program (vocational rehabilitation)	29 U.S.C. § 732 / 34 C.F.R. 370.1 et seq. (Rehabilitation Act)	\$371,159
Individual Rights [disability but not DD, MI, or CAP]	29 U.S.C. § 794e / 34 C.F.R. 381.1 et seq.	\$538,379
Assistive Technology	29 U.S.C. § 3004 (Assistive Technology Act of 1998)	\$127,212
Traumatic Brain Injury	42 U.S.C. § 300d-53	\$81,754
Voting	42 U.S.C. § 15461 (Help America Vote Act of 2002)	\$126,303
Beneficiaries of Social Security	42 U.S.C. § 1320b-21 (Ticket to Work and Work Incentives Act)	\$222,910
<u>Benefit Planning (non P&A)</u>		
Work Incentives Planning and Assistance	42 U.S.C. § 1320b-20 (Ticket to Work and Work Incentives Act)	\$300,000

Appendix B
Process Plan for Redesignation and Transition
to a Nonprofit P&A by July 1, 2011

The process plan is based on the assumption that the Governor has determined to redesignate the P&A and CAP to a nonprofit organization (NPO). It also assumes that this is a voluntary redesignation, and that LRS staff will manage the transition to a new organization. Based on these assumptions, federal law, and the recent experience of other states with the federal authorities, the following steps will be required.

1. A specific NPO must be identified in order to receive the designation. This may be created by the current P&A, but must obtain the necessary capacity to receive the designation (number 5, below).
2. The NPO must have 501(c)(3) status from the Internal Revenue Service.
3. Negotiate final details of the transition with the Governor's office, including distribution of assets and liabilities, governed in some respects by federal regulation, including hold harmless provisions for NPO for any audit findings for prior years; preserving existing state law authority for NPO; exploring transfer of state Ombudsperson function in whole or in part to NPO; possible legislation necessary for transition to occur and possible vehicle.
4. Evaluate the need for part or full time staff at the NPO. In conjunction with National Disability Rights Network, begin process of developing by-laws, governing documents, policies and procedures, and other corporate documentation. Recruitment and training of board members occurs during this time.
5. Develop necessary business relationships, including accounting, banking, legal, IT, leasing, insurance, etc. Where possible, the NPO could rely on established relationships used by LRS (e.g. accounting, legal, malpractice insurance, and IT) and obtain pro bono assistance. Establish basic fiscal systems that will allow compliance with OMB Circular A-133 and filing of IRS 990. Determine if current lease can be renegotiated with the NPO or if new space will be required.
6. File a membership petition with PERS to obtain a determination related to carryover status for LRS employees.
7. Work in conjunction with the Governor's office to obtain guidance from the federal authorities responsible for approving redesignation, and provide these authorities with regular updates on the status of the transition.
8. The redesignation process is initiated when the Governor gives notice to the

current P&A system / CAP of intent to redesignate, names the new designee, and states good cause for the redesignation. Subsequently, there must be a detailed public notice, a 45 day comment period, and a public hearing, all of which must comply with federal law. The Governor then gives the P&A / CAP notice of his final designation decision, explaining good cause and the appeals process, and summarizing public comment. The P&A / CAP may appeal that determination, but even if no appeal is filed, the Governor must provide the Secretaries of the funding authorities with documentation of good cause. The Governor must, within 30 days of the redesignation, supply assurances to the federal authorities that the new designee complies with all federal requirements.

9. Even if preparation for the transition is fully in place by July 1, 2011, it may be necessary or advantageous to transfer the federal grants at the end of the federal fiscal year, September 30.