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Donald Paull

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THE CREATION OF AN OMBUDSMAN: THE GUARDIANSHIP AND ADVOCACY COMMISSION

*Donald Paull**

The Illinois Guardianship and Advocacy Commission recently was created by state law. It is an independent agency authorized to oversee the work of both public and private mental health care providers. The author, characterizing the agency as an "ombudsman," examines its statutory functions and projects its possible organizational structure. Rights of the mentally ill and developmentally disabled, as enumerated under the new law, are analyzed. Mr. Paull also discusses similar agencies created by other states and compares them to the new Illinois Commission.

Recognizing a need for comprehensive reform of the civil and criminal laws dealing with the mentally ill and mentally retarded,[1] the Governor of Illinois created the Governor's Commission for revision of the Illinois Mental Health Code in 1973.[2] The Governor's Commission issued its report in 1976,[3] culminating well over three years of work. This report addressed various problems of mentally ill[4] and developmentally disabled[5] individuals that were not adequately provided for in the 1967 revision of the Code.[6] Throughout its recommendations, the Commision focused upon the central themes of respect for the individual's worth, the individual's right to receive adequate services, and the right of the individual to minimal governmental intrusion in the form of restrictions on liberty and self-determination.[7] The

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* Assistant Cook County Public Defender; Adjunct faculty member, John Marshall Law School; Core faculty member, The Chicago School of Professional Psychology; Vice-Chairman, Illinois State Bar Association Commission on Mentally Disabled; B.A., Roosevelt University; B.S., A.M., University of Illinois; Ph.D., Illinois Institute of Technology; J.D., Illinois Institute of Technology/Chicago-Kent College of Law.

1. Report of the Governor's Commission for Revision of the Mental Health Code of Illinois (1976) vi [hereinafter cited as Report].

2. Exec. Order No. 10 (1973). This Commission [hereinafter referred to as the Governor's Commission] was chaired by Judge Joseph Schneider of the Circuit Court of Cook County and its members represented various professional, citizen, and consumer groups.

3. Report, *supra* note 1.

4. "Mentally ill" is defined as "subject to involuntary admission" under the Act. ILL. REV. STAT. ch. 90 1/2, § 1-130 (Supp. 1979). A person who is subject to involuntary admission is one who: (1) may reasonably be expected to inflict serious physical harm on himself or herself, or on another, in the near future; or (2) is unable to provide for his or her own basic needs because of mental illness. *Id.* § 1-119.

5. The Act defines a developmentally disabled person as one who: (1) has a disability either attributable to mental retardation, cerebral palsy, epilepsy, or autism; or (2) has another condition resulting in an impairment similar to that caused by mental retardation and requires services similar to those needed by mentally retarded persons. *Id.* § 1-106. Mental retardation is defined as "significantly subaverage general intellectual functioning" existing "concurrently with impairment in adaptive behavior" and originating before age 18. *Id.* § 1-116.

6. Approved Aug. 14, 1967. 1967 Ill. Laws 3004, S.B. No. 1349. Effective Jan. 1, 1968.

7. Report, *supra* note 1, at vi.

report contained a proposed mental health code formulating the means for resolving issues attendant to an individual's fitness to stand trial,[8] a determination that interfaces the criminal and civil mental health laws. The report also recommended the creation of three new agencies to protect the rights of defined classes of disadvantaged individuals: the Office of the State Guardian, the Mental Health and Developmental Disabilities Legal Advocacy Service, and the Human Rights Authority.[9]

In 1978, the Governor signed into law a number of acts embodying most of the recommendations of the Governor's Commission. The major focus of this article is the Guardianship and Advocacy Act[10] that merged the proposed three agencies into a single agency entitled the Guardianship and Advocacy Commission[11] (Commission). The net effect of this legislation is to create an ombudsman[12] to protect the rights of delineated classes of disadvantaged persons.[13] This article will explore the structure, purpose, and anticipated impact of the Commission in its role as an ombudsman.

THE COMMISSION

The disadvantaged persons protected by the Act cannot effectively represent their own needs or concerns. The Act solves this problem by providing, in effect, an ombudsman to speak on their behalf.[14] Since an ombudsman is a government official empowered to investigate complaints brought against other officials,[15] he or she must have clearly defined authority to function

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8. *Id.* at 6.

9. *See* Schmidt, *Illinois Proposed New Mental Health Code: The Need for Advocacy*, 66 ILL. B.J. 402 (1978), for an excellent discussion of certain proposals arising from the Governor's Commission.

10. ILL. REV. STAT. ch. 91 1/2, § 701 (Cum. Supp. 1978) [hereinafter cited as G & A Act]. The Guardianship and Advocacy Act was first enacted as two separate acts. The Guardianship and Mental Health Advocacy Act, Pub. Act No. 80-1416 (1978), 1978 Ill. Laws 1543 originated in the Illinois legislature as S. 253. It was sponsored in the Senate by Senators Daley and Schaffer and in the House of Representative Beatty, Marovitz, and Telcser. The Act was signed into law and became effective on Sept. 5, 1978. The Mental Health Advocacy Act Amendments of 1979, Pub. Act No. 80-1487 1979 Ill. Laws 2020 (amending Pub. Act No. 80-1416 (1978)), originated in the legislature as S. 273. It was sponsored in the Senate by Senators Schaffer and Daley and in the House of Representatives Sandquist, Marovitz, and Daniel Houlihan. It was passed into law and became effective on Jan. 8, 1979. Both pieces of legislation were codified as the Guardianship and Advocacy Act. G & A Act, *supra* note 10, § 701.

11. *Id.* §§ 702(b), 703.

12. *See* notes 15-16 and accompanying text *infra*.

13. The disadvantaged persons benefitted by the Act are the mentally ill and the developmentally disabled. *See* notes 4 and 5 *supra*.

14. *Id.*

15. WEBSTER'S NEW COLLEGIATE DICTIONARY 800 (1974) defines "ombudsman" as "a government official . . . appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials." According to BLACK'S LAW DICTIONARY (4th ed. 1968), the ombudsman concept is that "[a] citizen aggrieved by an official's action or inaction should be able to state his grievance to an influential functionary empowered to investigate and express conclusions." *Id.* at 1238.

with any degree of effectiveness. Although the word "ombudsman" does not appear anywhere in the Act, it is clear that in creating the Guardianship and Advocacy Commission, the legislature created such a collective "person."[16]

Differences exist between the agency created by the Act and the recommendations made by the Governor's Commission. For example, the developmentally disabled person was not directly covered by the original Act, despite the recommendations of the Governor's Commission to create agencies accommodating both the mentally ill and the developmentally disabled. This situation arose because in the interim, Illinois, under federal authorization,[17] created[18] a separate Developmental Disabilities Advocacy Authority (IDDAA).[19] Amendments to the Act,[20] however, have remedied the situation. The Guardianship and Advocacy Commission currently extends its services to all "eligible persons," defined as persons "who have received, are receiving, have requested, or may be in need of mental health services, or are 'developmentally disabled' or 'persons disabled' . . . ."[21] These services can include, but are not limited to "examination, diagnosis, evaluation, treatment, care, training, psychotherapy, pharmaceuticals, after-care, habilitation, and rehabilitation . . . ."[22] In contrast, the Governor's Commission originally intended to serve the "mentally disabled,"[23] a classification including anyone who has, or is alleged to have, a mental disorder or developmental disability.[24] It is now apparent that the Act's definition of eligible persons is sufficiently broad to allow the new agency to assume the functions of the IDDAA.[25]

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16. The ombudsman functions of the Commission are mainly concentrated in one of its divisions, the Human Rights Authority. This division of the Commission is subdivided into regional authorities whose members are appointed by the Commission. G & A Act, *supra* note 10, § 714. Extensive powers are accorded to the regional authorities to enable them to monitor and resolve complaints against state agencies. *Id.* §§ 717-28. *See also* notes 49-58 and accompanying text *infra*. The Human Rights Authority and its subsidiary regional authorities are closely associated with the other divisions of the Commission, the Office of the State Guardian, and the Legal Advocacy Service that also have ombudsman characteristics. *See* notes 59-71 and accompanying text *infra*.

17. Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1976). This act provides for an allotment of federal funds to a state with a system to protect and advocate the rights of persons with developmental disabilities. *Id.* § 6012(a)(1). Such a system must have the authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of such rights. *Id.* § 6012(a)(2)(A).

18. Ostensibly the IDDAA was created by an executive order, but no signed executive order was identified or found.

19. Federal law required that the system be independent of any state agency providing treatment, habilitation, or services to the developmentally disabled. Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6012(a)(2)(B) (1976).

20. *See* note 10 *supra*.

21. G & A Act, *supra* note 10, § 702(g).

22. *Id.* § 702(e).

23. Report, *supra* note 1, at 143.

24. *Id.* at 142.

25. G & A Act, *supra* note 10, § 702(j). The funding for the IDDAA ran out in January, 1980, and the Commission may assume some of its duties.

ORGANIZATION, OPERATIONS, AND FUNCTIONS

The Guardianship and Advocacy Commission consists of nine members who are appointed by the Governor with the advice and consent of the Senate.[26] It meets a minimum of four times a year and annually elects a chairperson.[27] The Commission generally formulates policy guidelines[28] and establishes regions[29] that become the primary focal points for the Human Rights Authority. Any action by a regional authority is subject to review by the Commission.[30] The Commission also hires a director[31] and staff,[32] reviews and evaluates the operations of its three divisions,[33] and prepares its budget[34] and annual report.[35] Private, federal, and other public funds, in addition to state funds, may be received to support the divisions,[36] and the Commission may recommend regulations for safeguarding the rights of eligible persons to any state agency or service provider.[37] In addition, the Commission is responsible for recommending legislative action[38] and taking any other reasonable action to fulfill its purpose.[39]

The Director and Staff

The Director implements the policies of the Commission and coordinates the activities of the three divisions.[40] It is the Director's responsibility to organize and administer programs providing legal counsel for all eligible persons.[41] The Director also examines the needs of individuals eligible for legal counsel and delineates the resources necessary to meet their needs.[42] In addition, the Director is responsible for instituting legal procedures that enforce the duties and powers of the Guardianship Commission.[43]

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26. G & A Act, *supra* note 10, § 704(a).
27. *Id.* § 704(c). The first chairman was elected on May 11, 1979.
28. *Id.* § 705(c).
29. *Id.* § 705(a). One way in which the regions might be organized would be to establish seven regions, corresponding to the Department of Mental Health and Developmental Disabilities regions.
30. *Id.* § 705(c).
31. *Id.* § 705(d). The first director was appointed on October 2, 1979.
32. *Id.*
33. *Id.* § 705(e).
34. *Id.* § 705(g).
35. *Id.* § 705(h).
36. *Id.* § 705(j).
37. *Id.* § 706(a). These regulations, as well as the rules and regulations for the conduct of the divisions, *id.* § 705(i), presumably will be subject to the Administrative Procedures Act, ILL. REV. STAT. ch. 127, §§ 1001-1021 (1977). G & A Act, *supra* note 10, § 706(b).
38. *Id.* § 706(b).
39. *Id.* § 706(c).
40. *Id.* § 707.
41. *Id.* § 708(1).
42. *Id.* § 708(2).
43. *Id.* § 708(3).

Certain staff positions can be identified in a report prepared by the Bureau of the Budget before the Act was passed.[44] Two such positions, the Commission Counsel and the Commission Information Officer, are directly responsibie to the Director.[45] The two primary functions of the Information Officer are to produce the legislatively mandated annual report[46] and to disseminate information about the availability of the Commission's services. The functions of the Commission Counsel are more diverse. Counsel must review rules and regulations promulgated by the Commission, advise the Director on legal disputes arising between the divisions, and coordinate litigation activities.

The report by the Bureau of the Budget allows for two Deputy Director positions, also reporting directly to the Director.[47] The position of Deputy Director for Programming and Planning can be viewed in two ways. First, the position could have the limited purpose of planning activities among the various divisions and evaluating their work. The position also can be broadly viewed as actively administering the three divisions with the advice of the Director. The Deputy Director for Management Services is in charge of various support functions such as personnel, fiscal arrangements, procurement, and informational services. An organizational alternative gives the administrative assistant the responsibility for program coordination, planning, and evaluation.[48]

The Divisions

There are three divisions of the Guardianship Commission: the Human Rights Authority, the Office of the State Guardian, and the Legal Advocacy Service. The division with the clearest function at this point is the Human Rights Authority. Its duty is to coordinate the activities of the regional authorities created by the Guardianship Commission. The Human Rights Authority is composed of several boards,[49] each consisting of nine members appointed by the Commission.[50] Each regional board elects a chairperson and then meets at least once every two months.[51] It must investigate com-

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44. *Id.* § 705(a). This report was an informal document made available to the legislative and executive arms of state government. *See* Appendix, fig. I, for a flow chart representing the Illinois Bureau of Budget's suggested organizational structure. *See* Appendix, figs. II-IV, for flow charts illustrating alternative suggestions.

45. *See* Appendix, fig. I. *See also* Appendix, figs. II-IV.

46. G & A Act, *supra* note 10, § 705(h).

47. *See* Appendix, fig. I.

48. *See* Appendix, fig. IV. For a discussion of the implication of the various proposals for the organization of the entire agency see notes 49-80 and accompanying text *infra*.

49. *See* Appendix, fig. I.

50. G & A Act, *supra* note 10, § 714.

51. *Id.*

plaints alleging violations of rights[52] and can investigate sua sponte.[53] Each regional board may conduct hearings[54] and notify the state agency, service provider, or person investigated of its recommendations.[55] It may also refer a matter for further consideration to the Commission; to any state, federal, or local agency; or to other appropriate persons.[56] It should be noted that the scope of the Human Rights Authority's function is quite broad, applying to both public and private service providers.[57]

Regional authorities are to be created under the auspices of the Human Rights Authority.[58] It is essential that adequate information be made available to the regional authorities, and ultimately to the Commission, regarding the quality of services rendered to eligible persons. Mental health professionals employed by the Commission will supply most of this necessary information. In addition, legal supervision will be required to determine whether the services provided meet legal tests established by state and federal courts and to recommend new legal actions that will advance the rights of mentally ill and developmentally disabled persons.

The second division, the Office of the State Guardian, has two major functions mandated by the Act: (1) it will serve as guardian ad litem[59] for a person for whom guardianship is sought, or as plenary or limited guardian,[60] or as successor guardian[61] of the person or estate of a ward;[62] and (2) it will offer guidance and advice to persons who request such assistance.[63] The Office of the State Guardian is not limited to representing eligible persons

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52. *Id.* § 715. The Commission, however, is not required to investigate complaints that it determines to be frivolous or beyond the scope of its authority. *Id.*

53. *Id.* § 716. A sua sponte investigation is a voluntary investigation, in which the regional board acts of "its own will or motion; . . . without prompting or suggestion." BLACK'S LAW DICTIONARY 1277 (5th ed. 1979).

54. G & A Act, *supra* note 10, §§ 720, 721. The first hearings were held on May 26, 1979, to discuss administrative matters in connection with Mantino State Hospital.

55. G & A Act, *supra* note 10, § 723.

56. *Id.* § 724.

57. *Id.* § 702(j).

58. *See* note 29 *supra*.

59. A guardian ad litem is a guardian appointed by a court to protect the interests of a minor who is a defendent in a legal proceeding and "who has no legal guardian who may answer for him." W. JONES & J. CUNNINGHAM, JURISDICTION AND PRACTICE IN THE COUNTY AND PROBATE COURTS OF ILLINOIS 345 (3d ed. 1903).

60. ILL. REV. STAT. ch. 110 1/2, § 11 (Cum. Supp. 1978). The extent of a guardian's duties or powers is subject to the discretion of the court. The court can grant full and complete custody powers to a guardian, or it can make a limited grant of custody. *Id.* §§ 11a-17, 11a-18.

61. *Id.* § 11. A successor guardian is one whose appointment by the court becomes effective without further judicial proceedings upon the initially appointed guardian's death, incapacity, or resignation. *Id.* § 11a-15. Unless modified by the court, the successor guardian's powers and duties are the same as those of the initially appointed guardian. *Id.*

62. G & A Act, *supra* note 10, § 730.

63. *Id.*

as defined by the Act,[64] or serving as the guardian for "developmentally disabled and mentally ill adults" as recommended by the Governor's Commission.[65] In following its legislative mandate, initially it must work closely with legal aid groups and the private bar.

The third division, the Legal Advocacy Service, may encounter a staffing problem. By statute, the Legal Advocacy Service must provide legal counsel to eligible persons during judicial proceedings arising out of the mental health laws.[66] Furthermore, the Legal Advocacy Service furnishes legal counsel to eligible persons in order to enforce any rights or duties created by the mental health code or related laws.[67] The Legal Advocacy Service can fulfill these obligations by referring eligible persons to available counsel, contracting for legal services, or providing its own attorneys.[68] Considering the limited budget authorized by this legislation,[69] it seems apparent that the Legal Advocacy Service will not be able to employ a full staff of attorneys during the early stages of the Commission's development. Accordingly, this division will have to provide counsel by referral or by contracting for services[70] until it is able to employ a full staff of attorneys. The services of the Legal Advocate will be made available on the basis of a financial means test with a corresponding fee schedule.[71] Realistically, it is anticipated that the bulk of these services will be provided pro bono to eligible persons.

An administrative problem also exists concerning the Legal Advocacy Service. Because a separate Developmental Disabilities Advocacy Servlonger exists,[72] there may be some difficulty in the distribution and delineation of proper legal services to each client. Another potential problem is the broad definition given to the Advocate's function: to "enforce the rights or duties arising out of any [of the] mental health or related laws . . . . ."[73] This suggests that the Advocate may be involved in such matters as the discharge of persons civilly committed following acquittal by reason of insanity,[74]

64. *See* note 21 and accompanying text *supra*.

65. Report, *supra* note 1, at 135.

66. G & A Act, *supra* note 10, § 710(1).

67. *Id.* § 710(2).

68. *Id.* § 711.

69. *Id.* § 735.

70. The Director has contracted with a consortium of four legal assistance foundations, all of which receive a majority of their funding from the Legal Services Corporation, to provide a portion of the legal advocacy services mandated by the Act. Interview with Wallace Winter, Director of the Legal Advocacy Service of Illinois (Apr. 23, 1980).

71. G & A Act, *supra* note 10, § 705(i).

72. *See* note 21 *supra*.

73. G & A Act, *supra* note 10, § 710(2).

74. *See* Comment, *Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis*, 20 ARIZ. L. REV. 233 (1978). For a comparison of the psychological characteristics of the person civilly committed after a plea of not guilty by reason of insanity with those of other persons who are civilly committed and a discussion of the implications for release, see Morrow & Peterson, *Follow-up of Discharged Psychiatric Offenders—"Not Guilty by Reason of Insanity" and Criminal Sexual Psychopaths*, 57 J. CRIM. L.C. & P.S. 31 (1966).

deinstitutionalization,[75] the patient's right to refuse treatment,[76] and a host of civil problems that arise while an individual is hospitalized or as a result of hospitalization.[77] Currently, additional liaisons with other government and private agencies, as well as with the private bar, will be needed in order to ensure adequate protection of legal rights.

Finally, two organizational issues will be top priority for the Commission early in its existence.[78] The first issue is whether the Human Rights Authority will require a full time administrator or whether a person, such as a member of the legal staff, functioning as a coordinator of affairs between the regional authorities and the Commission will suffice. The second issue is partially contingent on the resolution of the first. If it is determined that a full-time administrative head is required for the Human Rights Authority, then each of the three divisions should be represented by a Deputy Director.[79] Of course, if it is determined that the Human Rights Authority does not require a full-time administrative head, the second issue is whether the administrative heads of the Legal Advocacy Service and the Office of the State Guardian should be Deputy Directors. Designating the head of each division as a Deputy Director appears to be an equitable solution. The functions that each division head will be required to perform are of sufficient magnitude to warrant parity with, if not actual administrative hierarchical superiority over, the two Deputy Directors.[80]

The Rights Protected

The Legal Advocacy Service is specifically authorized by the Act to represent eligible persons "to enforce rights or duties arising out of any mental health or related laws, local, State or federal."[81] "Rights" are defined in the Act as "includ[ing] but . . . not limited to all rights, benefits, and privileges

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75. For a discussion of the deinstitutionalization process and the problems associated with it see Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897 (1975); Ewing, *Health Planning and Deinstitutionalization: Advocacy Within the Administrative Process*, 31 STAN. L. REV. 679 (1979); Ferleger & Boyd, *Anti-Institutionalization: The Promise of the* Pennhurst *Case*, 31 STAN. L. REV. 717 (1979); Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 STAN. L. REV. 553, 556-65 (1979).

76. For a discussion of this right see Ferleger, *Loosing the Chains: In-Hospital Civil Liberties of Mental Patients*, 13 SANTA CLARA LAW. 447, 469-77 (1973) [hereinafter cited as Ferleger]; Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755 (1969); Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1 (1978).

77. For a discussion of such problems see B. ENNIS & L. SIEGAL, THE RIGHTS OF MENTAL PATIENTS (1973); Ferleger, *supra* note 76; Wexler, *Token and Taboo: Behavior Modification, Token Economics and the Law*, 61 CAL. L. REV. 81 (1973).

78. Those issues are reflected in the four flow charts that represent the suggested organizational schemes. *See* Appendix, figs. I-IV.

79. *See* Appendix, figs. III & IV.

80. *See* Appendix, fig. I.

81. G & A Act, *supra* note 10, § 710(2).

guaranteed by law, the Constitution of the State of Illinois, and the Constitution of the United States."[82] Thus, the Act grants to an eligible person not only the full panoply of rights available to any citizen, but also the additional rights that attach to this special class of individuals.[83] The Legal Advocacy Service is responsible for upholding this "Bill of Rights" formulated by the new Mental Health Code (Code).[84]

Eleven rights are enumerated in the new Code. First and foremost is the prohibition of discrimination on account of status. The Act states that no eligible person "shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the State of Illinois, or the Constitution of the United States solely on account of the receipt of such services."[85] In addition, there is no presumption of incompetence. A finding of

82. *Id.* § 702(h). The Governor's Commission for Revision of the Code perceived this definition of rights as accomplishing two purposes. First, the definition, would establish a comprehensive investigative power of the rights in Chapter II of the Mental Health and Developmental Disabilities Code, Pub. Act No. 80-1414, ILL. REV. STAT. ch. 91 1/2, §§ 2-100 to -111 (Supp. 1979) [hereinafter cited as Code]. Second, it will allow the Human Rights Authority great discretion in determining whether a "right" has been abridged and thus whether an investigation is appropriate.

83. The Mental Health Code and the Guardianship and Advocacy Act, incorporating the Code by reference, have attempted to encompass many of the rights that have been judicially created to benefit mentally handicapped persons. *E.g.*, O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (a state may not constitutionally confine a nondangerous person merely because the individual is "mentally ill" if the person is personally capable of caring for himself or herself or can receive adequate care with the aid of family or friends); Wyatt v. Alderholt, 503 F.2d 1305, 1313-14 (5th Cir. 1974) (mentally ill and mentally retarded persons are equally entitled to individualized treatment plans in a psychologically and physically humane environment); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (individual has a statutory right to treatment, but not treatment guaranteed to effect a cure); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) (an individual has the right to receive treatment according to the "least restrictive" alternative); Karmowitz v. Department of Mental Health, Civ. No. 73-1943-AW (Cir. Ct. Wayne Co., Mich. July 10, 1973) (one who is involuntarily committed to a mental hospital cannot give informed consent to experimental psychosurgery). *See* THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, THE RIGHT TO TREATMENT IN MENTAL HEALTH LAW 46-54, 92-93 (1976) and cases cited therein; Lessard v. Schmidt, 349 F. Supp. 1078, 1101 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated on other grounds*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976) (warnings similar to Miranda warnings are required before a psychiatric examination is conducted, and the individual retains the right to invoke the privilege against self-incrimination).

The Mental Health Code, adopting this holding in part, requires the person conducting an examination for the purpose of certifying a person twelve years of age or older to explain the purpose of the examination, inform the person that there is no requirement to talk to the examiner, and alert the individual that any statements made can be used at the court hearing. Failure to so inform the person bars the examiner from testifying at any subsequent court hearing concerning the person's admission. Mental Health Code, ILL. REV. STAT. ch. 91 1/2, § 3-208 (Supp. 1979); Addington v. Texas, 99 S. Ct. 1804, 1813 (1979) (burden of proof for commitment is greater than preponderance of evidence standard applicable to other types of civil cases).

84. Code, *supra* note 82, § 2-100 to 111.

85. *Id.* § 2-100. This section establishes the presumption that a recipient of *any* mental health treatment or developmental disabilities habilitation may exercise his or her rights equally with

incompetence can be made only by a court in a proceeding separate from a judicial hearing leading to admission.[86] Each person also has a right to adequate, humane care and services in the least restrictive environment possible pursuant to an individualized service plan.[87]

Another right entitles a person residing in a mental health or developmental disabilities facility to communicate with persons of his or her choice by mail, telephone, and visitation, subject to some restrictions.[88] The person may also receive, possess, and use personal property.[89] An eligible person

other persons who have not received such services. *See* Report, *supra* note 1, at 21. This is an expansion of the former Code that only affirmed rights for those persons judicially committed or hospitalized. *See* ILL. REV. STAT. ch. 91 1/2, § 9-11 (1977). For a discussion of the rights of persons with mental disabilities, see Wald, *Basic Personal and Civil Rights: Principal Paper*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 3 (1976). Ms. Wald classifies rights into two categories: personal rights (such as the right to marry, have sexual relations, bear and rear children), and civil and commercial rights (such as the right to work, vote, contract, hold public office and serve as a juror).

86. Code, *supra* note 82, § 2-101. This section differs from the old code in that it requires separate judicial hearings on the issues of incompetency and admission, assisting the implementation of the separation actually required under the old code. *See* Report, *supra* note 1, at 22. When incompetency and hospitalization are decided in the same hearing, actual separation rarely occurs, even though the state code technically separates the two issues. *See* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 252-55 (rev. ed. 1971) [hereinafter referred to as BRAKEL & ROCK].

87. Code, *supra* note 82, § 2-102(a). This section requires the formulation of an individual services plan. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S. 2d 486 (Ct. Cl. 1968). Code, *supra* note 82, § 2-102(b) provides that a person can elect services based upon healing through prayer alone. Such "faith healing" services may be selected either for a minor by the minor's parent or guardian, or on behalf of an adult by his or her guardian.

88. Code, *supra* note 82, § 2-103. This section stresses that the communication shall be "unimpeded, private, and uncensored." It further provides for reasonable accessibility to space and materials to insure the exercise of this right. Thus, this section creates greater rights for the patient than the old code. *See* ILL. REV. STAT. ch. 91 1/2, §§ 12-2 (1977), allowing superintendents of the facilities great discretion in determining what restrictions were "necessary." *See generally* Comment, *The Committed Mentally Ill and Their Right to Communicate*, 7 WAKE FOREST L. REV. 297 (1971).

The rationale for extending the communication privilege is stated in Morris, *Institutionalizing the Rights of Mental Patients: Committing the Legislature*, 62 CAL. L. REV. 957 (1974). Communication helps reduce depersonalization and isolation. It is often an integral part of treatment efforts focusing on preparing the patient for reentering the mainstream of life upon release from the institution. *Id.* at 1007. In addition, leaving such a valuable tool and right to the discretion of employees of the institution results in arbitrary use. The new section addresses this problem by promoting communication that is unimpeded by facility discretion in addition to requiring that the materials and space for such communication to be made available.

89. Code, *supra* note 82, § 2-104. This section also states that the resident must be furnished with a reasonable amount of storage space, subject to some restrictions. Possession of property that may be harmful to the recipient or others may be restricted, provided that notice is given to all recipients upon admission to the institution. Possession of property that may cause substantial harm may be restricted by the mental health professional overseeing the services plan. All of the recipient's personal property held by the facility shall be returned upon his or her discharge.

This new section reflects professional, judicial, and legislative approval of the right to use personal property. The federal court in Vecchione v. Wohlgemuth, 377 F. Supp. 1361, 1372

may use his or her own money as desired unless he or she is a minor or is prohibited from doing so under a court order.[90] Employment is permitted if it is consistent with a person's individual service plan, and wages commensurate with the value of the work performed shall be received.[91]

A person, or his or her representative, shall have the right to refuse services unless the services are necessary to prevent the individual from causing serious harm.[92] Neither restraint[93] nor seclusion[94] may be used as a

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(E.D. Pa. 1974), perceived no "legitimate justification" for a state to interfere with a patient's control and use of his or her property in the absence of evidence that mental patients are incapable of handling their own finances.

90. Code, *supra* note 82, § 2-105. This section also states that a service provider or its agent may not be a representative payee without the person's informed consent for his or her social security payment, annuity, pension, trust fund payments, or any other form of assistance or direct payment. The former code allowd the superintendent to act as trustee for all monies found on the patient at the time of admission to the facility, accrued to the patient during the period of institutionalized care, or deposited with the superintendent by relatives, friends, or conservators of the patient. *See* ILL. REV. STAT. ch. 91 1/2, § 100-22 (1977).

The Report of the Governor's Commission for Revision of the Mental Health Code of Illinois points out that the facility's control over the patient's monies represents a classic conflict of interest situation, since the institution also collects and levies fees. By requiring the patient's informed consent before making the facility his or her representative payee, the new section attempts to ensure that the patient's monies are not confiscated by the facility's employees. Report, *supra* note 1, at 26. *See also* Kindred, *Guardianship and Limitations upon Capacity: Principal Paper*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 74 (1976).

91. Code, *supra* note 82, § 2-106. Compensating the mentally handicapped promotes the therapeutic goals. It may give the patient a sense of dignity while abating the patient's sense of powerlessness and inadequacy. Compensation for labor rendered teaches the patient how to assume responsibility, as well as enable patients to contribute money for their own or their families' care. *See generally* A. STONE, MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION 83-96 (1975).

92. Code, *supra* note 82, § 2-107. This section applies to generally accepted mental health or developmental services, as well as medication. The right to refuse treatment did not appear in the old code or the Department of Mental Health and Developmental Disabilities rules. Report, *supra* note 1, at 28. The report points out that "[t]here is an equal protection argument against treating . . . persons against their will." *Id.* For a discussion of this issue, see Schwartz, *In the Name of Treatment: Autonomy, Civil Commitment, and the Right to Refuse Treatment*, 50 NOTRE DAME LAW 808 (1975); Note, *Advances in Mental Health: A Case for the Right to Refuse Treatment*, 48 TEMP. L.Q. 354 (1975).

93. Code, *supra* note 82, § 2-108. This section prohibits use of restraint solely to punish or discipline a patient. It also delineates many procedural safeguards such as a written order, the required specifications of the order, and visual observation of the patient by a physician. No restraint may be used unless the observing physician has made a determination that the recipient may cause harm to himself or others. Report, *supra* note 1, at 29, notes that this section practically duplicates the Department of Mental Health Rule 12.02, although there is no comparable provision in the old code.

Restraint is defined as the direct restriction of a person's head, limbs, or body by mechanical means or physical force. ILL. REV. STAT. ch. 91 1/2, § 1-125 (Supp. 1979). For a widely accepted view of proper regulations concerning restraint, see BRAKEL & ROCK, *supra* note 86, at 158-61.

94. Code, *supra* note 82, § 2-109. This section outlines further safeguards for the individual. One such safeguard provides that the maximum time for seclusion before re-examination is

therapeutic measure other than to prevent a person from inflicting physical harm on another. Also, no person shall receive electro-convulsive therapy or any unusual, hazardous, or experimental treatment, including psychosurgery, without his or her informed and written consent. A parent or guardian may give such consent for a minor only if the court approves.[95] Emergency medical or dental services may be performed on a person who is not capable of giving informed consent when delay in administering those services "would endanger the life or adversely and substantially affect the health" of an eligible person.[96]

In addition to these enumerated rights, there are certain statutory duties that devolve upon the service provider.[97] These procedural duties are designed to safeguard the substantive rights granted to individuals by other sections of the Act. As such, they are clearly legally enforceable rights.

OTHER JURISDICTIONS

With passage of the Act and the amendments,[98] Illinois joins a select group of jurisdictions that have created statutorily an independent agency to oversee the functions of state and private mental health services.[99] The extent of protection given to mentally disabled persons, however, varies from state to state.

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limited to eight hours. Such treatment may not be imposed without a written order from a physician. In addition, a trained staff member must monitor the secluded person closely. Report, *supra* note 1, at 30, found that the old code contains no comparable provision, although the Department of Mental Health Rule 12.06 contains a similar safeguard.

"Seclusion" is the sequestration of an individual alone in a room that he or she is unable to leave. ILL. REV. STAT. ch. 91 1/2, § 1-126 (Supp. 1979).

95. Code, *supra* note 82, § 2-110. This section differs from Department of Mental Health Rule 12.03 in that it requires *informed* consent and refusal by a competent person to grant consent cannot be overruled by the court. For a discussion of the informed consent issue, see Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U. L. REV. 628 (1970).

96. Code, *supra* note 82, § 2-111. This section expands the former code's definition of "emergency" to allow clearly appropriate medical and dental treatment in numerous situations that are not "life-threatening." See the former code definition at ILL. REV. STAT. ch. 91 1/2, § 1-8 (1977). *See also* BRAKEL & ROCK, *supra* note 86, at 161.

97. These duties include: (1) notifying the eligible person orally and in writing of the rights guaranteed; (2) conspicuously posting a summary of these rights in public areas or facilities providing services; and (3) immediately notifying the Guardianship and Advocacy Commission, or whoever the person so designates, when rights enumerated by the Mental Health Code are restricted. Mental Health Code, ILL. REV. STAT. ch. 91 1/2, §§ 2-200 to -202 (Supp. 1979).

98. *See* note 10 *supra*.

99. The American Bar Association Commission on the Mentally Disabled has prepared a listing of mental disability advocates that includes private individuals, community advocacy programs, public defenders, legal aid services, and state agency advocates. This list indicates that only Ohio, Louisiana, Rhode Island, and New Jersey have formulated a government agency, independent of any state-controlled department of mental health, to serve as an advocate for the mentally disabled. AMERICAN BAR ASSOCIATION COMMISSION ON THE MENTALLY DISABLED, MENTAL DISABILITY ADVOCATES (1978).

Ohio established a Legal Rights Service in 1976. The first sentence of the statute creating the service, however, reads as follows: "A legal rights service is hereby created and established to protect and advocate the rights of persons with developmental disabilities . . . ."[100] Thus, it appears that the Ohio Legal Rights Service is not mandated to furnish services to persons suffering from mental disabilities. The Ohio Legal Rights Service, however, conceives its function to be broader than serving the developmentally disabled. It envisions taking responsibility for representing all persons in mental hospitals, all persons threatened with hospitalization, and all persons who have been hospitalized in mental hospitals. To date there has been no challenge to the statutory authority of the Legal Rights Service in Ohio to go beyond serving the developmentally disabled.[101]

Although the Louisiana Legislature created a Mental Health Advocacy Service in 1977,[102] no specific funding was ever made available.[103] The service, therefore, exists only on paper. In 1974, the Rhode Island mental health laws established a Mental Health Advocate[104] to be appointed for five-year terms by the Governor with the advice and consent of the Senate.[105] This Mental Health Advocate may appoint a staff[106] to assist in fulfilling duties that are essentially the same as those required of the Illinois Legal Advocacy Service.[107]

Unquestionably, the most far-reaching mental health advocacy statute is found in New Jersey.[108] In 1974, the Department of Public Advocate was created at a cabinet level. It consists of several divisions: the Division of Administration, the Office of Inmate Advocacy within the Office of Public Defender, the Division of Rate Counsel, the Division of Mental Health Advocacy, the Division of Public Interest Advocacy, and the Division of Citizen Complaints and Dispute Settlement.[109] The nature of these divisions suggests a more broadly conceived consumer-oriented advocate than the office envisioned under the Act in Illinois.

With the approval of the Public Advocate of New Jersey, the Director of the Division of Mental Health Advocacy can employ the necessary number of full-time assistants to perform the Mental Health Advocate's duties. Additionally, the Director may retain other expert assistants on a temporary basis.[110] The services of the Mental Health Advocate are limited to provid-

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100. OHIO REV. CODE ANN. § 5123.94 (Page Supp. 1979).

101. Interview with Douglas Rogers, Executive Director of the Ohio Legal Rights Service (Dec. 1978).

102. LA. REV. STAT. ANN. § 28:64 (West Supp. 1979).

103. *Id.*

104. R.I. GEN. LAWS § 40.1-5-13 (1977).

105. *Id.* § 40.1-5-14.

106. *Id.* § 40.1-5-15.

107. *Id.* § 40.1-5-22.

108. N.J. STAT. ANN. § 52:27E-1 to 52.27E-47 (West Supp. 1979).

109. *Id.*

110. *Id.* § 52:27E-22.

ing assistance to indigent mental hospital patients concerning their admission, retention, and release from confinement in a hospital, institution, or facility.[111] The Mental Health Advocate also may represent indigent mental hospital admittees in class actions, as well as individually, concerning their dealings with state, county, or local governmental departments.[112]

The mental health advocacy concept is gaining support on both state and federal levels.[113] Thus, although Illinois has joined what is presently a select group, this group will undoubtedly increase in the future. Jurisdictions that have created a state agency independent of a Department of Mental Health can serve as monitors for public and private providers of mental health services. It should be noted, however, that it is essential for the effective operation of an advocate that the position be independent of a Department of Mental Health.

PROBLEM AREAS AND THE PROMISE OF THE FUTURE

The future of the Guardianship and Advocacy Commission will be determined largely by its ability to carry out functions delineated by the Act. To do so it must resolve the problems already enunciated, such as organizational structure and staffing plans. The dedication of the Director and staff to active and creative protection of the disadvantaged groups entrusted to their aegis will set a precedent for the quality of the agency's future operation.

Various areas of concern can be anticipated. Three are articulated as questions that will be answered by the Commission when it establishes short-range goals: First, does the authority of the Commission extend to federal hospitals or facilities in Illinois serving citizens of Illinois who are admitted pursuant to the Illinois Mental Health Code? Second, does the Act's reference to private service providers constitute sufficient state action to bring them under the ambit of the fourteenth amendment equal protection clause? Third, does the extension of the Mental Health Code to minors suggest that the Commission will become somewhat of a Juvenile Advocate?

The answers to these questions ultimately may be in the affirmative. Notwithstanding an affirmative response, the methods used to arrive at answers to these and similar questions will indicate the extent of the agency's impact upon the protection of the rights of persons entrusted to it.

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111. *Id.* § 52:27E-24.

112. *Id.* § 52:27E-25.

113. *See* MENTAL HEALTH ADVOCACY: AN EMERGING FORCE IN CONSUMERS' RIGHTS (1977) (U.S. Dep't of Health, Education and Welfare Pub. No. 77-455); 2 MENTAL DISABILITY LAW REP. 65 (1977).

APPENDIX

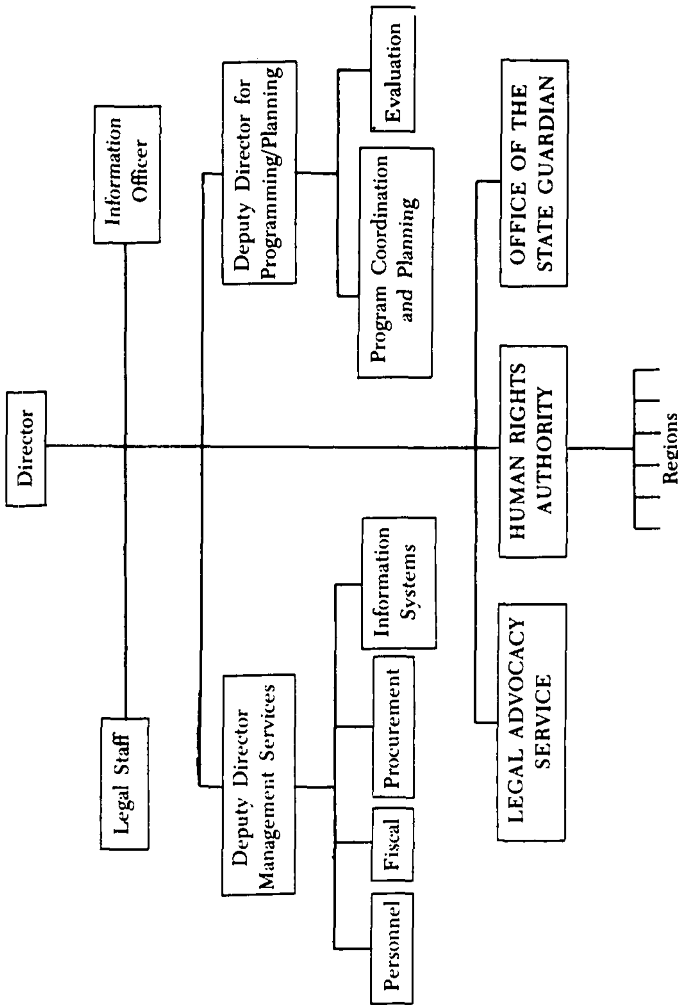


Figure 1

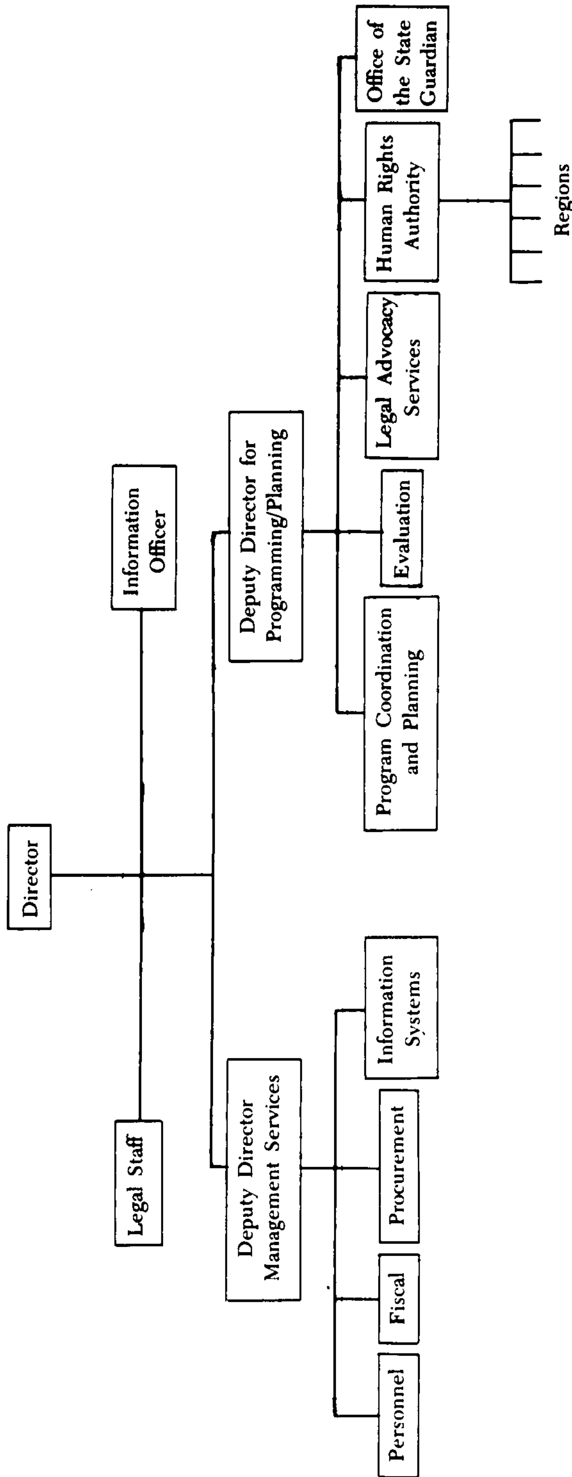


Figure 2

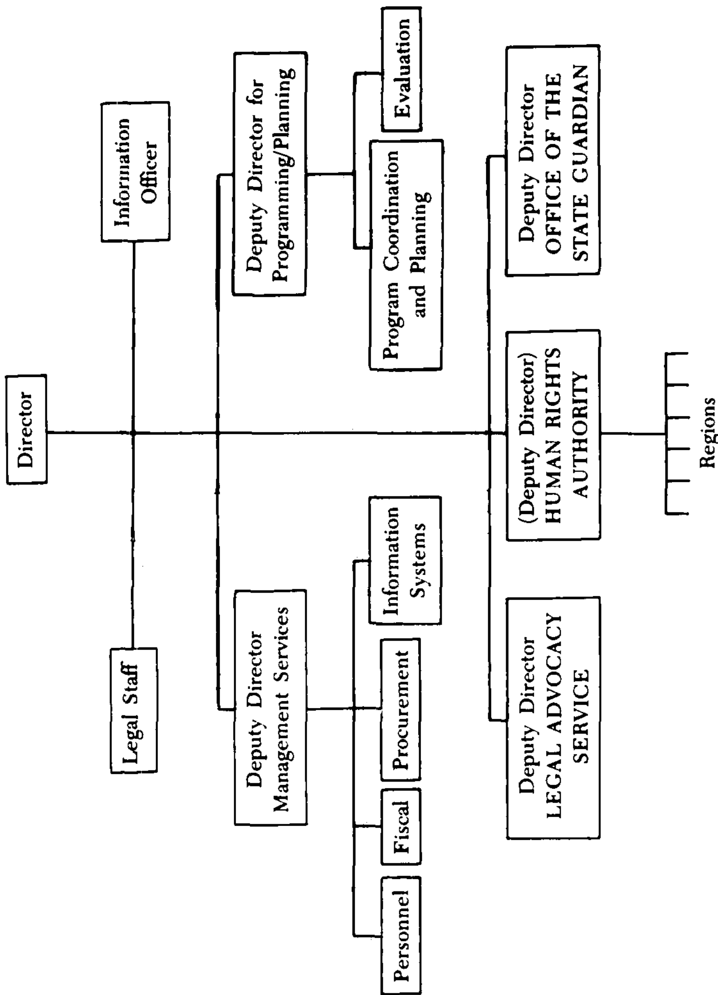
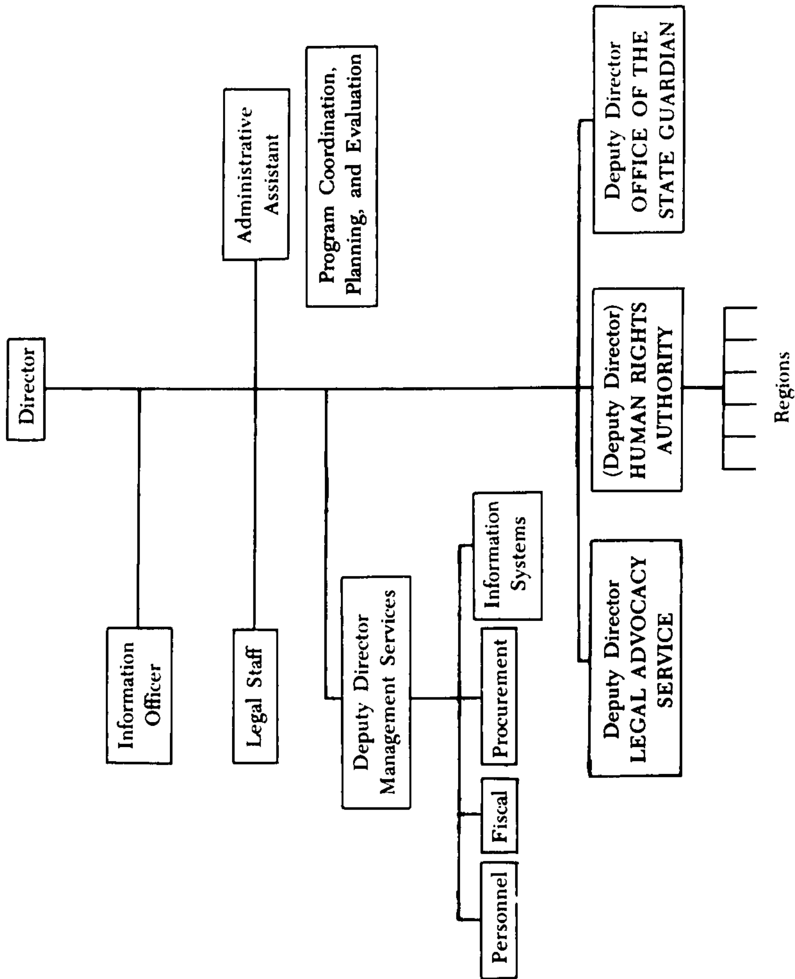


Figure 3


Director
Information Officer
Legal Staff
Administrative Assistant
Program Coordination, Planning, and Evaluation
Deputy Director Management Services
Personnel
Fiscal
Procurement
Information Systems
Deputy Director LEGAL ADVOCACY SERVICE
(Deputy Director) HUMAN RIGHTS AUTHORITY
Regions
Deputy Director OFFICE OF THE STATE GUARDIAN