

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



October 20, 2011

BY EMAIL AND U.S. MAIL

Charles J. Willoughby, Esq.
Inspector General
D.C. Office of the Inspector General
717 14th Street, N.W.
Washington, D.C. 20005

Dear Mr. Willoughby:

The Office of the Attorney General (“OAG”), and the Department on Disability Services (“DDS”), Developmental Disabilities Administration (“DDA”), acknowledge receipt of your letter dated August 3, 2011, which is addressed to both me and DDS Director Laura L. Nuss. In the context of an individual who receives services at the Judge Rotenberg Educational Center, Inc. (“JRC”) in Massachusetts, you express two primary concerns: (1) that the District may be held liable because aversive treatments are prohibited by the D.C. Code; and (2) that DDS clients in out-of-state placements may not be afforded the same protections from prohibited treatment that the D.C. Code and DDS policy preclude for clients who reside in the District. Specifically, you have recommended that the Attorney General provide the DDS Director and the Inspector General with a written opinion on whether

1. the language in DDS’s Human Care Agreement Addendum with JRC regarding the application of the D.C. Code and DDS policy is sufficiently clear and accurate; and
2. it is proper for the District to contract with a service provider in another jurisdiction who may subject DDS clients to treatments that are prohibited in the District.

To the extent the Attorney General concludes that the individual should not be subjected to such treatments, you further recommend that the DDS Director “instruct JRC to cease providing aversive treatments” and move the individual to another facility if JRC fails to comply and “amend its Human Care Agreement to require JRC’s compliance with District law and DDS policy regarding aversive treatments.” At this time, I do not feel a formal opinion is warranted; however, this letter is a joint response from DDS and OAG to the concerns expressed in your letter.

I understand from an earlier letter from you dated September 13, 2010, that the Office of the Inspector General (“OIG”) has been for the past year conducting a special evaluation of DDS to

“assess the quality and efficiency of DDA’s monitoring of clients placed in out-of-state residential facilities and whether DDA adequately assesses clients’ needs before moving them from out-of-state placements back to the District.” In the context of its special evaluation, in May 2011, OIG issued its Findings and Recommendations Compliance Form for Priority Matter and recommended based on its findings that DDA (1) amend DDA Policy 6.2 (Restricted Control Procedure/Behavioral Support Policy); (2) clarify why DDA has permitted the use of aversive treatments by the Massachusetts facility serving the District resident and what action(s) DDA has taken to rectify the situation; and (3) determine whether any current DDA clients are subjected to prohibited procedures and ensure knowledge of D.C. Official Code and DDA policy prohibitions. DDA responded to these three recommendations by letter dated May 20, 2011, along with an executed copy of the OIG Compliance Form for Priority Matter. OIG thereafter followed up with a letter dated June 8, 2011, requesting further clarification with respect to DDA’s response to recommendations 1 and 2 and a copy of JRC’s most recent human care agreement. By letter dated June 16, 2011, DDA provided OIG with the requested clarification by (a) agreeing to amend Policy 6.2 to state affirmatively that shock therapy, white noise, and bitter-tasting food procedures constitute prohibited aversive stimuli; and (b) stating that, with the exception of the individual at JRC, there are no individuals in out-of-state placements who are subject to prohibited aversive treatment or stimuli. DDA also provided a copy of Modification No. 17 to Contract No. POJA-2022-HC-1035, extending the human care agreement with JRC to June 30, 2011. I am informed that Modification No. 18 further extends the human care agreement to December 31, 2011, while efforts to work with the family to find an appropriate alternative placement proceed.

While I certainly appreciate your concerns as expressed in your letter, based on my review of the referenced communications among DDS/DDA and OIG on the matters related to the individual at JRC, it appears that there are unique circumstances here and that DDS is working hard to improve the situation. I am informed that the treatment plan for this individual was developed to address several behavior concerns including aggression, disruptive behavior, health dangerous behavior, property destruction, inappropriate behaviors that interfere with social or educational functioning, inappropriate verbal behavior, and noncompliance. This treatment plan includes the court-authorized use of Level III aversive techniques including the Graduated Electronic Decelerator, which provides an electric shock for inappropriate behaviors as a means to extinguish these behaviors. His court-appointed guardian (who is his father) and co-guardian (who is his sister) are parties to the Massachusetts probate case and expressly approved of this treatment plan, which specifically includes the statement that “[t]here are no effective alternatives to this treatment plan.” JRC is required to report quarterly to the Court, the individual’s counsel, the Court Monitor, and Massachusetts. I am informed by DDS that electronic shocks have been applied 11 times in the last 10 years in accordance with the treatment plan. The language in the referenced modification to the human care agreement is fully consistent with the court-ordered treatment plan. I believe there is little likelihood that the District would be held liable for this placement under these circumstances, particularly given the lack of an alternative available placement and the familial consent involved.

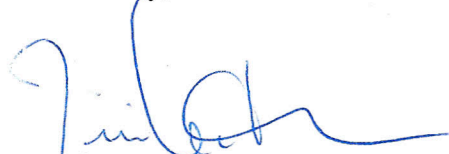
You also state that individuals in out-of-state placement are not afforded the same protections from prohibited treatment that District law and DDS policy preclude for other individuals.

However, DDS/DDA has provided written assurances to OIG in its letter dated June 16, 2011, "that there are no individuals in out-of-state placements who are subject to prohibited aversive treatment or stimuli" with the exception of the individual at JRC. Notwithstanding your statements about the authority of DDS/DDA to permit JRC to continue aversive treatments in light of D.C. Official Code § 7-1305.06 (2008 Repl.) and DDS Policy 6.2, I am aware of nothing to suggest that DDS/DDA fails to afford any other individual in an out-of-state placement with these protections. Moreover, as I understand it, the express purpose of your special evaluation of DDS was to "assess the quality and efficiency of DDA's monitoring of clients placed in out-of-state residential facilities and whether DDA adequately assesses clients' needs before moving them from out-of-state placements back to the District." As it relates to the individual at JRC, neither DDS/DDA's monitoring nor its assessment of his needs has been questioned by the OIG. Rather, the insurmountable problem to date has been that his unique needs cannot be met in the District and an appropriate alternative placement has not yet been identified despite diligent efforts involving the agency and the family. I appreciate the concerns contained in your letter and I am told that, despite best efforts, DDS Director Nuss has not yet been able to locate a facility in the District that will accommodate this particular client and his needs. Therefore, DDS had to modify the human care agreement to permit JRC to provide services to this client. Without this agreement, DDS would have been unable to make payments for these services and could have faced liability for failure to provide services to this client.

We recognize that this is not an optimal situation, but DDS is making its best efforts to resolve this matter.

Thank you for your consideration of our collective response to your letter dated August 3, 2011. Please do not hesitate to contact me if you have any further questions.

Sincerely,



Irvin B. Nathan
Attorney General
for the District of Columbia

cc: Mr. Allen Lew, City Administrator
The Honorable Muriel Bowser, Chairperson, Committee on Government Operations
The Honorable Jim Graham, Chairperson, Committee on Human Services
Laura L. Nuss, DDS Director
Cathy R. Anderson, DDS Deputy Director for DDS
Mark D. Back, DDS Acting General Counsel