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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-194904

November 28, 1979

The Honorable Joseph R. Biden, Jr.
United States Senate

Dear Senator Biden:

This is in response to your request for our Office to review the legality of certain actions taken by the Rehabilitation Services Administration (RSA), Department of Health, Education, and Welfare (HEW), with respect to the funding of so-called "minimum" States under section 110(a) of the Rehabilitation Act of 1973, 29 U.S.C. § 730(a), as amended by section 101(c) of the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, approved November 6, 1978, Pub. L. No. 95-602, 92 Stat. 2955.

Section 110(a)(3) of the Rehabilitation Act of 1973, as amended, reads as follows:

> "(3) The sum of the payment to any State (other than Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands) under this subsection for any fiscal year which is less than one-third of 1 percent of the amount appropriated under section 100(b) (1), or $3,000,000, whichever is greater, shall be increased to that amount, the total of the increases thereby required being derived by proportionately reducing the allotment to each of the remaining such States under this subsection, but with such adjustments as may be necessary to prevent the sum of the allotments made under this subsection to any such remaining State from being thereby reduced to less than that amount."

Although RSA took the position initially that it "would honor the $3,000,000 minimum provision," and apparently allocated funds to minimum States, including Delaware, on that basis in the first two quarters of the 1979 fiscal year, RSA subsequently advised State Rehabilitation Agencies that it would not be able to fund the minimum States at the $3,000,000 level in fiscal 1979. Instead, RSA claimed that because the program was operating under a Continuing Resolution, approved October 18, 1979, Pub. L. No. 95-482, which limited funding for this program in

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fiscal 1979 to the 1978 fiscal year level--during which period the $2,000,000 minimum was in effect--it could not be held accountable for implementing the new minimum provision until additional funding for the program was appropriated by the Congress. (No specific appropriation for RSA was enacted until July 25, 1979.) Moreover, RSA took the position that since Pub. L. No. 95-602, which increased the minimum allotment from $2 to $3 million, also amended the 1973 Act by adding a new subsection 110(a)(2)(A) which contained a "Hold Harmless" provision entitling each State in fiscal year 1979 and thereafter to receive at least as much as the amount the State received in fiscal 1978, RSA could not "take" any funds from non-minimum States to raise the minimum States in fiscal 1979 to the $3,000,000 level.

In accordance with our customary policy, we requested the Secretary of HEW to provide us with a full explanation of HEW's position in this matter. Only recently, by memorandum dated September 12, 1979, from HEW's Office of General Counsel, did we receive HEW's response to our request. It reads in pertinent part as follows:

> "* * * While we believe there is some slight legal support for RSA's decision to implement the 'hold harmless' provision first 3/, we believe the more literal and far better reading of the statute requires RSA to implement the minimum allotment provision prior to the 'hold harmless' provision, if it cannot do both. Our reasoning is based on the inclusion of language in section 110(a)(3) prescribing a method for obtaining the increased amounts necessary to raise any State's allotment up to the $3 million minimum: 'by proportionately reducing the allotment to each of the remaining such States under this subsection' (emphasis added). We believe this language applies both to the 'hold harmless' amount of a State's allotment under section 110(a) (2) (A) as well as to the additional amount in section 110(a) (2) (B). This would require the reduction of State allotments below the 'hold harmless' level if necessary to meet the minimum allotment requirements, provided no State's share fell below the $3 million floor.

"3/ There is legislative history indicating that Congress did not intend that the allotment changes enacted in the 1978 amendments operate to reduce any State's allotment below the level of its fiscal year 1978 entitlement. See particularly Senate Report No. 95-890, pages 5-7."

The memo went on to state that:

> "We understand that this situation has been recently remedied by the enactment of a Supplemental Appropriations bill and that all minimum allotment States as of late August have received additional funds to raise them up to the $3,000,000 floor."

Thus, it is apparent that not only did HEW change its legal position with respect to the correct interpretation of section 110(a) of the 1973 Rehabilitation Act, but it used the additional funds appropriated for this program in the Supplemental Appropriations Act, 1979, approved July 25, 1979, Pub. L. No. 96-38, to increase the amount minimum States would receive in fiscal 1979 to the $3,000,000 level.

Immediately upon our receipt of HEW's response, we advised you of this change in HEW's position and furnished you a copy of the above-cited memorandum. Subsequently, your office advised us that it was satisfied with HEW's action in this regard and no longer desired a legal opinion from our Office concerning this matter. We note that even if HEW had not revised its legal interpretation of the provision in question, the additional funds made available for the program in the Supplemental Appropriations Act would have allowed HEW to fund minimum States at the $3,000,000 level in fiscal 1979.

Accordingly, we trust that your concern in this matter has been satisfactorily resolved.

Sincerely yours,

Milton J. Socolar
General Counsel