

MEMORANDUM OF LAW

DATE: January 30, 1987

TO: Councilman William Jones, Assistant Chief of  
Police R. W. Burgreen and Lieutenant David  
Spisak

FROM: City Attorney

SUBJECT: ADAPT -- Task Force on Teenage Drug and Alcohol  
Abuse

Through memoranda from R. W. Burgreen dated July 22, 1986 and Lieutenant Spisak dated January 5, 1987 as well as several telephone conversations and meetings with Lieutenant Spisak and Barry Schultz of Councilman Jones' office, you have asked numerous questions regarding ADAPT (Task Force on Teenage Drug and Alcohol Abuse), its Advisory Council and ADAPT Programs, Inc. (API) as follows:

1. What are the requirements under the Brown Act in respect to the meetings of ADAPT, the Advisory Council and API?
2. What liability issues face members of ADAPT, the Advisory Council and API?
3. Is the organization of and the relationship between ADAPT, the Advisory Council and API the best or should it be reorganized and restructured?
4. Is the proposed voluntary drug testing program to be run by ADAPT an appropriate activity for ADAPT?

You also requested this office to review various documents including a letter of agreement between the school district and ADAPT regarding the drug testing program, a statement of confidentiality for the voluntary drug committee members to sign, a contract to be entered into between ADAPT and American Clinical Laboratory, Inc. and an indemnity clause to be included in the voluntary drug testing application form.

In August, 1983, the City Council established a Task Force on Teenage Drug and Alcohol Abuse, later to be known as the Alcohol and Drug Abuse Prevention Task Force or ADAPT. The Task Force was established by resolution as a Charter section 43(b) committee. The members of the Task Force were to consist of elected representatives from local governmental agencies including the San Diego City Council, San Diego County Board of Supervisors, the San Diego Unified School District Board of Education and the San Diego County Board of Education. The original composition of the Task Force has been changed slightly and now includes ten members.

Charter section 43(b) authorizes the creation and establishment of committees "only for the purpose of advising on questions with clearly defined objectives, which shall be temporary in nature, and shall be dissolved upon the completion of the objective for which they were created." In Resolution No. R-258996, the City Council set forth the Task Force goals as follows:

1. Reduce the incidents sic of drug/alcohol abuse through the development and implementation of a comprehensive, regional program of prevention and education with a focus on youth.
2. Provide leadership and direction in the problem assessment, planning, program development and evaluation required to create and implement an effective strategy.
3. Development of public policy to support Task Force activities.
4. Provide maximum coordination between and among agencies.
5. Development of community financial support for programs to move away from the total dependence on public monies.

An Advisory Council has been set up which is comprised of lay persons, community volunteers and professionals in the substance abuse field. This group meets monthly as a whole or in committee and responds to questions directed to them by the Task Force, initiates program ideas and comments, reviews legislation, recommends positions to be taken by the Task Force and updates the Task Force on their activities.

In June, 1985, ADAPT Programs, Inc. (API) was formed as a nonprofit public benefit corporation for charitable and public

purposes. It was granted 501(c)(3) nonprofit, tax exempt status by the federal government. A three person board was appointed to guide the development of the corporation and to conduct necessary day to day business. The identity of the board members have not been made known to us with the exception of the identification of Terry Loftus as the initial director of and counsel for the corporation. From a review of the documents submitted to this office, it appears that Mr. Loftus' address for the purpose of service of process is 1125 West Olive Street, San Diego, California 92103; however, the address on corporation correspon-dence is City Administration Building, Tenth Floor, 202 "C" Street, San Diego, California 92101.

Other support activities of ADAPT include the appointment of Assistant Police Chief Bob Burgreen as the City Manager's representative to staff the Task Force, to be assisted by Lieutenant Dave Spisak and secretary Cathy Jagers. Further, a Staff Advisor Group (SAG) is comprised of a staff person selected

by each elected official to coordinate for that elected official issues of importance for that official, as well as to represent the official when scheduled conflicts occur.

With the above background information in mind, we now turn to your specific questions.

1. What are the requirements under the Brown Act in respect to the meeting of ADAPT, the Advisory Council and API?

The Brown Act, found at Government Code section 54950 et seq., requires that all meetings of legislative bodies of local agencies be open and public and that all persons shall be permitted to attend any meetings thereof. The definition of "legislative body" includes advisory committees created by resolution, such as ADAPT. It does not include privately created and wholly non-city sanctioned committees or a council in turn set up by ADAPT or an independent corporation such as API.

Besides requiring that the ADAPT meetings be open to the public, the Brown Act also requires that ADAPT meetings not requiring an examination of facts and data outside the territory of the local agency, here, the San Diego City limits, be held within those limits. Further, at least 72 hours before a regular meeting the agenda must be posted in a publicly accessible area giving a summary of the items to be discussed and the time and location of the meeting. Government Code sections 54952.3 and 54954.2.

2. What liability issues face members of ADAPT, the Advisory Council and API?

Individuals appointed to the Task Force or support staff were placed by virtue of positions held with the City of San Diego. Councilman Jones is a representative of the City of San Diego to ADAPT by virtue of his position as an elected official. Chief Burgreen and Lieutenant Spisak are supporting staff to ADAPT by virtue of their positions within the San Diego Police Department. The duties and responsibilities for ADAPT flow from the City and, as such, each is acting as an agent/employee of the City. As a consequence, each would be indemnified and defended by the City in the event a lawsuit is filed against them for any actions taken in their capacity as the City's representative to ADAPT as long as such conduct is within the scope of duties as set forth in the resolution creating ADAPT and the limiting language of the charter section. Once activity exceeds the purposes and goals as articulated in the resolution or the charter authorized activity of "advise and consult," each acts independently, without city authority and, consequently the City could refuse to defend or indemnify such activity.

Of particular concern here is the proposed voluntary drug

testing program to be run by ADAPT. Each member is advised that such a program would be beyond the permitted parameters of conduct as discussed above; each could be held personally liable for any such action taken or decisions made regarding the program. These same principles of liability would be applicable when acting individually, in conjunction with a committee member or other Task Force members or representing the Task Force giving speeches in the community.

The Advisory Council (committee members) would not have the same protection from personal liability as do City representatives to the Task Force or the City support staff. Because they are independent of the City, it is not our place to advise them or comment upon their activities. However, you have asked what liability you might incur in working with them and the response is that the same principles as outlined above are applicable, i.e., there would be no personal liability for those acts performed within the scope of duties contemplated by the resolution and Charter section 43(b).

3. Is the existing organization of and relationship between ADAPT, the Advisory Council and API the best?

Organizationally, ADAPT is a temporary committee which was created and established for the purpose of advising the City Council on questions regarding drug abuse and treatment for drug

abusers. The Task Force will exist for as long as it is fulfilling its goals and purposes as articulated in the resolution. API, on the other hand, is an independent corporation whose existence has neither been ratified nor recognized by the City Council. Because of this, their use of the City Administration Building as their address of record is inappropriate and should be changed. Although API has been set up as the financial arm of ADAPT, it has no fiduciary relationship with ADAPT nor financial responsibility for ADAPT activities.

As a Charter section 43(b) committee, ADAPT is strictly limited to "consult and advise." ADAPT does not have the authority to distribute or direct the distribution of funds to any individual or organization. Such activities are reserved exclusively to the City Council and may not be delegated pursuant to San Diego City Charter section 11.1. Further, it is not a legal entity and therefore does not have the legal capacity to enter into contracts. Individual members of the Task Force or the Advisory Council may enter into a contract on their own behalf but may not enter into a contract on behalf of ADAPT. If ADAPT were to incorporate, it would become independent and lose its status as a Charter section 43(b) committee; and the Task

Force members would thereby lose their protection provided by the City.

API, as an independent corporation, is not appropriately structured to handle money and support the financial goals of ADAPT. Even if the board of API included members of the Task Force or was comprised only of the Task Force members, it would still have no fiduciary duty to the Task Force. It is not for this office to advise API; however, we feel compelled to caution the Task Force that, as a nonprofit public benefit corporation organized for the specific purpose of education and dissemination of information regarding substance abuse, API must forever restrict its activities to those purposes or lose its tax exempt status.

An alternative organization could be set up through a joint powers agreement among the representative governmental agencies on the current Task Force. A joint powers agreement, authorized and regulated by Government Code section 6500 et seq., is established when two or more public agencies by agreement jointly exercise any power common to the contracting parties. The agreement must state the purpose of the agreement or the power to be exercised thereunder. It shall also provide for the method by which the purpose will be accomplished or the manner in which the power will be exercised. A joint powers agreement may provide for the creation of a separate agency or entity which is separate

from all the parties to the agreement and as such may sue or be sued, enter into contracts, leases or other transactions and invest funds. If the agreement designates a nonprofit corporation to administer or execute the agreement for the parties to the agreement, it may invest any monies held for disbursement on behalf of the parties in the same manner and upon the same conditions as local agencies. The agreement may create a governing board composed exclusively of officials elected to one or more of the governing board of the parties to the agreement in any ratio agreed to by the parties to the agreement. In other words, under a joint powers agreement, the composition of ADAPT would be just the same as it is now, only the powers of ADAPT would be expanded tremendously. The agreement could sanction the existence of API, ratify its creation and use it as the financial arm of the Task Force.

As it exists today, ADAPT is a committee created to advise the City Council within very strict limits. Under a joint powers agreement, ADAPT could become a legal entity and expand its role as an advisory body to all of the agencies entering into the agreement. Although ADAPT, under a joint powers agreement, would still have parameters of authority as articulated in the

agreement, it would have much broader powers and authority than does the existing Task Force.

4. Is the proposed voluntary drug testing program to be run by ADAPT an appropriate activity for ADAPT?

As discussed above, the proposed management of a voluntary drug testing program is outside the scope of the purpose and permissible conduct of a Charter section 43(b) committee. If you choose to go forward with the voluntary drug testing program, you may incur personal liability for any action in furtherance of the program. Furthermore, ADAPT does not have the legal capacity to enter into a contract with American Clinical Laboratory for the blood testing.

In light of the above discussion and advice, we consider unnecessary the review of the statement of confidentiality, indemnity clause to be included in the application for drug testing and the contract for laboratory services. Those documents should be reviewed by counsel for whichever agency administers the voluntary drug testing program.

As long as ADAPT remains an advisory committee in its present state, our office is available for consultation and advice. Should you need clarification or further questions answered, we would be happy to accommodate you.

JOHN W. WITT, City Attorney

By

Nina B. Deane

Deputy City Attorney

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