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O'Connor v. Donaldson:
An Analysis and Commentary

Amicus

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O'Connor v. Donaldson: An Analysis and Commentary

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Intern Assistant
Lynn Gaertner

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news

Project Investigates Periodic Review In Massachusetts

"Periodic review must be more than merely a paper process in order to be effective," states Kathleen Ursin, NCLH Director of Education and supervisor of the Massachusetts Project on Periodic Review.

A system for the evaluation and placement of mentally retarded in institutions, the process of periodic review has been adopted by nearly every state in the country. But although it is seen as a necessary vehicle for monitoring residents' rights within the institutional structure, there are still problems in the review process which must be worked out.

The Massachusetts Project, conducted by the National Center for Law and the Handicapped, is an analysis of the effectiveness of the periodic review system and includes recommendations for improvements.

Initiated in the summer of 1974 with funding from the Department of Health, Education, and Welfare, the project is a descendant of the Brandeis Study of Periodic Review in Massachusetts, which began in 1971, and had as its chief investigators Gunnar Dybwad and Kenneth Jones, Brandeis University professors.

Massachusetts was chosen as a model state to study since it was one of the first to legislate a state-wide system of periodic review. Since that time, and as a result of pressure from the courts and legislatures which called for individual treatment and assessment programs to determine a resident's needs, most of the other 49 states have added periodic review in some form.

Headed by attorney Edward Christiansen Jr., a team of attorneys and legal interns from Massachusetts directed the project which included a multi-state survey of periodic review practices.

The project team also examined the legal aspects of periodic review and attempted to identify and outline the reasonable expectations of such a system.

Not A Cure-All

According to Christiansen, the project report gives no cause for satisfaction. "Periodic review is not a cure-all," Christiansen said. "It is at most a beginning. Our system of care and service to this class of people has been allowed to degenerate and any reform of this system will involve a struggle." Periodic review may facilitate this process, he noted, but it is only a beginning.

After a year of studying periodic review in Massachusetts, the project team presented its findings to the project advisory panel this past August. Panel members who met in Boston to review the project data were Franklin N. Flaschner, chief justice of the District Court of Massachusetts; Doris Haar, chief, Program Development Branch, Developmental Disabilities Division, HEW; and Dennis Haggerty, member, NCLH Board of Directors and co-chairperson, ABA Family Law Section Committee on Mental Retardation and the Law.

Also serving on the panel were Paul Jameson, chairman, Governor's Commission on the Legal and Civil Rights of the Developmentally Disabled; Dr. William Jones, superintendent, Belchertown School, Belchertown, Massachusetts; Richard Kurtz, professor of sociology, University of Notre Dame; Frank Laski, general counsel, Massachusetts Department of Mental Health; and Martha Zeigler, chairperson, Federation for Children with Special Needs, Boston.

Periodic Review: Problems

In assessing the system of periodic review, the advisory panel found that changes are necessary in the areas of advocacy, funding, "communitization," and coordination. The panel cites potential conflict of interest in the review process as a problem of periodic review in its present forms. Often, the person doing the review is also the person involved in setting up programming within the institution.

From direct observations made in Massachusetts institutions, the project report also notes that periodic reviews frequently have no input from outside the institutions, and some are little more than oral report sessions. In order to prevent the review from becoming a "mechanical, unguided function," the report suggests creating the position of an advocate, a person who speaks for and presents the wishes of the client whenever possible.

The advocate, however, need not be an attorney. One method suggested by the panel includes the training of lay persons in legal aspects of periodic review, with overall supervision by attorneys. In order to ensure against self-interest conflicts, the panel recommends that the advocate be independent from institutions and independently funded.

Alternatives Must Be Offered

The Massachusetts Project report also points out that in order for periodic review to be effective, possible alternatives to the type of care presently offered residents of institutions for the mentally retarded must be considered.

Deinstitutionalization, the removal of people from institutions to small community-based facilities, was listed as a goal of periodic review in 38 of 40 states surveyed in the project. One problem of successful integration of the former hospital resident into the community is a lack of on-going responsibility for coordination of services.

Within present systems there are multiple agencies and individuals, each responding to a part of the person's needs. Overall responsibility for coordinating and monitoring these diverse efforts should be a primary consideration in any comprehensive review system.

Copies of the final version of the Massachusetts Project Report will soon be available through NCLH.

Ford Signs New DD Law

October 6, 1975, President Ford signed into law the Developmentally Disabled Assistance and Bill of Rights Act (PL-94-103), authorizing Federal spending of $287 million in fiscal 1976-78 on developmental disabilities programs.

The conference legislation authorizes $150 million for state formula grants. In order to qualify for this Federal assistance, states must develop and implement deinstitutionalization programs, use individual treatment plans for residents of institutions for the developmentally disabled, and guarantee protection of the legal rights of these individuals.

To help states develop programs for the protection and advocacy of the legal rights of persons with developmental disabilities, the act authorizes $9 million.

The new law adds to the list of disabilities which qualify for Federal aid autism and dyslexia when it results from other developmental disabilities. The term "developmental disability" has been redefined to include:

> "Any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or the adaptive behavior to that of mentally retarded

Introducing *Amicus*

With this issue, the National Center for Law and the Handicapped introduces *Amicus*, a new bi-monthly publication. This new magazine replaces *Newsline*, the former NCLH newsletter.

***Amicus* has been designed to present greater in-depth coverage of developments in the law as it relates to the rights of the disabled. We will be reporting on significant court cases across the country involving these rights and on the activities of NCLH. Special features will include provocative articles contributed by professionals in the fields of law and the social sciences.**

It is our hope that *Amicus* will provide information of interest to all of our readers in an attractive and relevant format.

The term *Amicus* is, of course, the Latin word for friend, and in that spirit we hope you enjoy our inaugural edition. In future issues of *Amicus* a section of our magazine will be devoted to correspondence. We welcome your comments on our new publication and your views concerning specific articles.

persons or requires treatment and services similar to those required for such persons."

The act also authorizes spending of $65 million for special project grants, $54 million for university-affiliated facilities, and $9 million for the construction of university-affiliated facilities in fiscal 1976-78.

Consumer Conference Planned by NCLH

Traditionally, conferences and seminars are designed with professionals talking "at" other professionals about the needs of consumers. The National Center for Law and the Handicapped intends to change this concept and is currently planning a major conference on the law and the disabled designed to have consumers talking "with" experts.

The 1976 Consumer Conference will have as its basic theme the assessment of present legal advocacy goals for the disabled and the development of future goals. The expressed needs of the consumers and their individual input will play a major role in developing these goals.

The primary objective of the Consumer Conference, which will be held in Berkeley, California, in association with the Center for Independent Living, is to aid in the development of a coordinated nationwide legal advocacy network for the disabled. To be effective, the planning committee notes, a system of this type requires both professional and consumer input. It also requires thorough awareness of the needs of the handicapped and a comprehensive understanding of the legal process, especially its limitations.

A planning meeting to determine a format and strategies for the spring conference was held in August in South Bend, Indiana. A follow-up planning session is scheduled for November 15 and 16 in Washington, D.C.

Conference Planning Team

Participating in the planning of the NCLH Consumer Conference are Judy Heumann, legislative aide in Washington, D.C. to New Jersey Senator Harrison A. Williams; Dr. Richard Kurtz, professor of sociology, University of Notre Dame; Dr. George Soloyanis, executive director of the American Association on Mental Deficiency, Washington, D.C.; and James Stearns, a law student at Georgetown University and member of the national Developmental Disabilities Advisory Council.

NCLH staff serving on the planning committee are Dr. Harvey Bender, acting executive director; Kathleen Ursin, director of education; and Kent Hull, staff attorney.

Preliminary planning calls for the conference to be organized into four distinct phases over a three- or four-day period. The initial phase would involve educational sessions designed to personalize for each participant the realities of being handicapped. Phase two of the conference would include the identification of the problems of everyday living occurring as a result of a particular disability.

The third phase of the Consumer Conference would focus on identifying legal avenues to address and correct these problems; and the fourth phase would include a wrap-up session in which follow-up strategies would be developed. Seminar sessions focusing on specific topics would supplement the program.

Target groups which NCLH hopes to involve in the conference are 1) representatives of legal advocacy agencies; 2) disabled individuals affiliated with an organized advocacy group; and 3) non-disabled professionals in the field who speak for disabled persons.

Further Input Needed

The conference planning committee, small by necessity, recognizes the need for further input from organizations and disabled individuals before final plans are made. A questionnaire has been developed which will survey approximately 500 organizations and individuals as to their perception of existing barriers to societal integration for disabled persons and the legal problems involved in removing these barriers.

Responses to the questionnaire will be used in developing the final conference format.

Following the conference, NCLH will develop and provide resource packets containing edu-

cational materials for use by conference participants in planning similar local or regional programs.

Elect New Board of Directors

Dr. Philip J. Faccenda was elected president of the National Center for Law and the Handicapped, Inc. Board of Directors at a September meeting held at the Center's headquarters in South Bend, Indiana. Faccenda is general counsel of the University of Notre Dame and a member of the University's Board of Trustees.

Elected as vice president and secretary respectively were Ervin A. Derda, general manager of the Clark Equipment Company Graphic Arts Center, Dowagiac, Michigan, and Richard Cleary, vice president of Bache and Company, Inc., South Bend. Dennis E. Haggerty, an attorney with Briscoe and Haggerty in Philadelphia, Pennsylvania, was elected treasurer.

Also elected to new terms on the NCLH Board of Directors were Lawrence A. Kane, Jr., an attorney with Dinsmore, Shohl, Coates and Dupree, Cincinnati, Ohio; Robert Kugel, M.D., vice president for health services, University of New Mexico; and Brian M. McCann, Ph.D., assistant executive director for program services, National Association for Retarded Citizens, Arlington, Texas.

New directors elected to the NCLH Board include Curtis Brewer, Esq., executive director of Untapped Resources, Inc., New York, New York; Ms. Effie Ellis, M.D., quality of life consultant to the Chicago Committee on Urban Opportunity (C.C.U.O.), Chicago, Illinois; and Joseph Goldstein, Walton Hale Hamilton Professor of Law, Science and Social Policy, Yale University Law School.

Also elected were Tom Joe, management consultant, Lewin and Associates, Inc., Washington, D.C.; H. Gilbert Johnson, Merrill, Lynch, Pierce, Fenner and Smith, Portland, Oregon; David T. Link, dean of the University of Notre Dame Law School; and William B. Robertson, director of the Office of Consumer Affairs for the District of Columbia, Washington, D.C.

White House Conference On the Handicapped

It is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps.

—White House Conference on Handicapped Individuals Act

The National Center for Law and the Handicapped has been asked to provide support and assistance to the White House Conference on Handicapped Individuals scheduled for December 11-15, 1976, in Washington, D.C.

Mandated by Public Law 93-516, Title III, the White House Conference on Handicapped Individuals was created to provide a national forum for the assessment of the problems of the handicapped and to develop recommendations for solutions to these problems.

In order to utilize the experience and expertise of all persons involved in programming for the handicapped, the conference is directed to bring together representatives of Federal, state and local governments, professional and lay individuals, and the general public, including the handicapped and parents of handicapped children.

Directed by Jack Smith and chaired by Dr. Henry Viscardi Jr., the Planning and Advisory Council for the White House Conference recently began contacting specific organizations involved in advocacy and programming for the handicapped, requesting their cooperation and assistance in planning the conference.

Areas in which the conference is directed to consider strategies and new developments include the formulation of an information system about handicapped individuals, the services they receive and the seriousness of their disability.

Also to be considered is expansion of the scope of services to the severely and multiply handicapped, including the aged, the disabled veteran and the disadvantaged.

Thorough examination will be given to many other areas with emphasis on research and prevention, early diagnosis, eval-

uation and treatment, education, employment and residential treatment.

A final report of the White House Conference on Handicapped Individuals must be submitted to the President of the United States not later than 120 days following the first day of the conference. Findings and recommendations of the Planning and Advisory Council will be made available to the public.

Headquarters for the White House Conference on the Handicapped is 1832 "M" Street, N.W., Suite 801, Washington, D.C. 20036.

NCLH To Host Meeting On Transportation

The National Center for Law and the Handicapped will host a meeting of attorneys involved in transportation litigation November 21 and 22 in South Bend, Indiana.

The purpose of the November conference will be to share ideas and discuss the issues involved in many of the suits across the country challenging the adequacy of transportation to meet the needs of the disabled.

Representatives of Congress and the Urban Mass Transportation Administration have been invited to attend and provide their viewpoints regarding the feasibility of accessible transportation systems.

Also invited are experts in the field of transportation who can provide information on the technological aspects of accessible transportation.

Attorneys are expected to attend from Detroit, Philadelphia, Milwaukee, San Francisco, Houston, Texas; Elgin, Illinois; Baltimore, Maryland; Washington, D.C.; St. Paul, Minnesota; Birmingham, Alabama; Austin, Texas; Klamath Falls, Oregon; and Southfield, Michigan.

Compliance Board Accepting Complaints

The National Center for Law and the Handicapped has been notified that complaints are now being accepted by the Architectural and Transportation Barriers Compliance Board.

Created by Section 502 of the Rehabilitation Act of 1973, the A&TBCB was established to enforce those Federal laws mandating accessibility and usability by the physically disabled and elderly.

Public Law 90-480, known as the Architectural Barriers Act of 1968 and amended by the Act of March 5, 1970 (P.L. 91-205), was written to ensure that Federally financed public buildings are designed and constructed so as to be accessible to the physically handicapped.

Complaints should be directed to Peter Lassen, Director, Compliance Division, Architectural and Transportation Barriers Compliance Board, 330 "C" Street, S.W., Room 1006, Washington, D.C. 20201; or phone (202) 245-1801.

Committee Studies Bill For Education of Handicapped

A House-Senate conference committee is presently working on legislation which would greatly increase the Federal government's financial commitment to education for handicapped children.

On June 18 the Senate passed a bill (S 6) which would grant states $300 for each handicapped child aged 3-21 receiving free, appropriate educational services.

The House on July 29 passed similar legislation (HR 7217) under which local agencies would receive one half the average per pupil expenditure for each handicapped child being served.

The two bills have evolved in the wake of Federal and state court rulings, (e.g. *Mills v. D.C. Board of Education, PARC v. Pennsylvania*) that handicapped children have a right to an equal educational opportunity. The Senate Labor and Public Welfare Committee justifies increased Federal responsibility for education for the handicapped by citing these court rulings and Office of Education estimates that nearly four million handicapped children receive an inadequate education.

in the courts

Horacek v. Exon No. 72-L-299 (D.Neb.)

Parties in *Horacek v. Exon,* a suit in the Federal District Court in Omaha, Nebraska, challenging the adequacy of physical and therapeutic conditions of the Beatrice State Home and the lack of community-based facilities in Nebraska, entered into a proposed settlement agreement in August.

A hearing was held September 18, 1975, to allow objections to the proposed agreement. The proposed settlement is presently before the court for its consideration and approval.

The named plaintiffs in this class action suit, filed September 28, 1972, are residents of the Beatrice State Home. Defendants are the Governor of the state of Nebraska, J. James Exon, and four other state officials. The United States of America — Department of Justice was granted status of plaintiff-intervenor March 28, 1975.

In *Horacek v. Exon,* in which NCLH is *amicus curiae,* or friend of the court, the plaintiffs contend they were confined without treatment in a non-therapeutic and unnecessarily constrictive or confining atmosphere, Beatrice did not provide individualized treatment plans for the residents, staffing was inadequate and discriminatory, and the environment was inhumane and psychologically destructive.

Plaintiffs also allege the absence of periodic review (See News Section), involuntary servitude, failure to provide less restrictive alternatives such as community-based facilities, and cruel and unusual punishment.

In the settlement agreement, several principles have been agreed to, including the principle that mentally retarded persons have Federal Constitutional rights to adequate care and habilitation, on an individualized basis, which would provide a maximum opportunity to realize normal living and to cope with their environment.

Agreement Provisions

Major action in the proposed agreement calls for the establishment of a five-member Nebraska Mental Retardation Panel whose responsibilities would include the preparation of a Plan of Implementation, including policies and standards for all residential facilities serving members of the plaintiff class.

Additionally, the proposed agreement provides basic operating procedures for the Beatrice State Home and creates evaluation teams which will review the programmatic needs of each resident of Beatrice. It will also provide for the establishment of a state-wide plan for increasing and supplementing present community-based programs.

In addition to the Panel, the decree calls for the creation of a seven-member Consumer Advisory Board. This Board would participate in the development of the philosophy, goals and long-range plans for the treatment of mentally retarded persons in Nebraska.

A significant provision in the agreement is the reduction of the resident population at the Beatrice State Home to 250 residents or fewer within three years of the date of entry of the decree. Fourteen hundred mentally retarded persons resided at Beatrice at the time the original complaint was filed.

If accepted by the court, the consent decree and agreement in *Horacek v. Exon* could provide useful guidelines for the settlement of similar litigation in other states.

Schultz v. Borradaile No. 74-40123 (E.D.Mich.)

Schultz v. Borradaile, filed October 25, 1974, in the United States District Court for the eastern district of Michigan, is the first challenge in the United States to the constitutionality of guardianship statutes on due process grounds.

The plaintiff in this class action suit, a person found incompetent and in need of a guardian of her property and person, contends that the Michigan guardianship laws are unconstitutional and seeks to prohibit enforcement of the present guardianship statutes.

Also sought by the plaintiff is an order which would provide for due process hearings with constitutional guarantees to all persons currently under involuntary guardianship.

Defendants are the Honorable Earl D. Borradaile, probate judge for Genesee County, Michigan, and Agnes Schultz, mother of the plaintiff.

The plaintiff claims that the Michigan guardianship statutes are unconstitutional because they are vague and overbroad and violate the equal protection clause of the 14th Amendment, as well as the right to privacy.

In addition, the plaintiff claims the present Michigan guardianship laws violate the 14th Amendment due process guarantee by failing to provide adequate notice of the proceedings, counsel, trial by jury, an independent physical and mental examination, proof beyond a reasonable doubt and a right to be present at all hearings.

A three-judge court as requested by the plaintiff has been convened and the National Center for Law and the Handicapped is presently seeking *amicus curiae* status in the case.

Bartley v. Kremens No. 72-2272 (E.D.Pa.)

On July 24, 1975, in *Bartley v. Kremens,* a three-judge Federal court for the eastern district of Pennsylvania declared unconstitutional sections of the state Mental Health and Mental Retardation Act which permitted parents and guardians to place their child in mental health facilities without the benefit of a hearing or independent counsel being provided for the child.

Approximately 38 states presently have laws comparable to Pennsylvania's. Similar suits are pending in Wisconsin, Michigan, Tennessee, the state of Washington and Washington, D.C.

The court in Pennsylvania held that the United States Constitution requires that a hearing with substantial due process protections must be held on the issue of the need for institutionalization of juveniles whose parents or guardians wish to place them in mental health facilities. The court ordered that a probable cause hearing be held within two weeks of detention. The court refused to require hearings prior to detention.

The opinion in *Bartley v. Kremens* was written by Judge Daniel H. Huyett and concurred in by Judge John J. Gibbons. Judge Raymond J. Broderick filed a dissenting opinion.

14th Amendment Concerns

In commenting on the application of due process, Judge Huyett wrote: "In deciding whether the requirements of due process apply in any given case, the threshold question is whether the interest of the complaining party is within the contemplation of the liberty or property language of the 14th Amendment. (Citation omitted) ... The child who faces the possibility of being physically confined for an indeterminate period with all of the ramifications of such confinement clearly has an interest within the contemplation of the liberty and property language of the 14th Amendment."

In reaching this decision the court relied on earlier cases which decided that adults have a right to a hearing in mental commitments and that children must be given a hearing before being declared juvenile delinquents.

The court also noted that, where there may be a conflict of interest between parent and child, the child's rights must be protected and that parents, guardians or persons standing in *loco parentis* cannot waive the personal constitutional rights of their children.

Judge Huyett here wrote: "We presume that in most instances parents, proceeding in utmost good faith, acting for the child, in the child's best interests, properly guide, protect, and control their children ... Unfortunately, as such a graphic example as parental child abuse illustrates, this is not the case. In deciding to institutionalize their children, parents, as well as guardians *ad litem* or persons standing in *loco parentis,* may at times be acting against the interests of their children."

Due Process Rights

The decision in *Bartley v. Kremens* also asserts the right of the child to a lawyer (to be paid by the state if the child cannot afford one), a right to be present at the hearings and a right to confront and cross-examine adverse witnesses. The Federal court also held that the standard of clear and convincing proof as opposed to the standards of beyond a reasonable doubt and preponderance of the evidence must be applied to the hearing.

The Mental Patient Civil Liberties Project filed the suit in

November, 1972. Serving as *amici* were the American Civil Liberties Foundation of Pennsylvania, the National Center for Law and the Handicapped, the Pennsylvania Association for Retarded Citizens, the United States of America – Department of Justice and the Youth Law Center of San Francisco.

In September the state of Pennsylvania appealed the case to the United States Supreme Court. If affirmed by the Supreme Court, the District Court decision in *Bartley v. Kremens* would further expand the constitutional due process rights of juveniles, and could have major impact on similar state laws.

Snowden v. Birmingham-Jefferson County Transit Authority, et al. No. 75-G-330-S (N.D.Ala.)

June 23, 1975, a District Court judge in the northern district of Alabama granted summary judgment in the case of *Snowden v. Birmingham-Jefferson County Transit Authority, et al.* and found that disabled persons do not have a fundamental right to public transportation. The case has been appealed to the United States Court of Appeals for the Fifth Circuit.

In the class action suit filed March 21, 1975, Jane Snowden, a physically handicapped resident of the Birmingham metropolitan area confined to a wheelchair, contends that the federally funded Birmingham-Jefferson County Transit Authority (BJCTA) bus system is discriminatory since it is not accessible to physically handicapped persons, including those confined to wheelchairs.

The plaintiff cites violations of Section 504 of the Rehabilitation Act of 1973, Section 16(a) of the Urban Mass Transportation Act (UMTA) of 1964 as amended and the Fifth and 14th Amendments to the U.S. Constitution as basis for this alleged discrimination.

The plaintiff also seeks in this suit to prohibit the BJCTA from purchasing 22 new buses which are not accessible to the handicapped, including those confined to wheelchairs.

Equal Access to Transportation

In question in this case is the right of every person, including the handicapped, to have accessible transportation and travel freely. In his decision District Court Judge J. Foy Guin, Jr. declared that there was not sufficient legal precedence or other authority to sustain the plaintiff's contention that equal access to public transportation was a fundamental right guaranteed by the Constitution.

October 14, 1975, the National Center for Law and the Handicapped submitted a brief as *amicus curiae* to the United States Court of Appeals for the Fifth Circuit.

NCLH challenges the district court decision and contends in its brief that the BJCTA did not adequately provide for the public transportation needs of handicapped persons.

The brief also contends the design features found by the district court to have been incorporated are not sufficient to constitute compliance with the "special efforts" requirement of Section 16(a) of the Urban Mass Transportation Act of 1964.

The brief further contends that the federally funded purchase of inaccessible vehicles and the refusal of the BJCTA to purchase any buses accessible to handicapped persons violates the rights granted under Section 504 of the Rehabilitation Act of 1973.

Snowden v. Birmingham-Jefferson County Transit Authority, et al. is the first case challenging inaccessible transportation to reach the Federal appellate level.

Copies of briefs and documents related to the cases discussed in this section are available from The National Clearinghouse for Legal Services, 500 North Michigan Avenue, Suite 2220, Chicago, Illinois 60611. Requests from attorneys practicing in CSA-funded Legal Services projects will be filled free of charge, one copy per project. All other persons will be billed five cents per page to cover duplicating costs, plus a postage and handling charge of $1.50 for the first 30 pages and an additional $1.00 for each additional 30 pages or fraction thereof.

special report

O'Connor v. Donaldson: An Analysis

In June of 1975, the U.S. Supreme Court handed down its decision in *O'Connor v. Donaldson.*[1] In a unanimous ruling,[2] the Court held that "a State cannot constitutionally confine without more[3] a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[4] The Supreme Court determined that a United States District Court jury had heard sufficient evidence to find that Dr. J.B. O'Connor, superintendent of Florida State Hospital at Chattahoochee, where Kenneth Donaldson was confined, had deprived Donaldson of his constitutional right to freedom.

The facts of this case, briefly described, are that Kenneth Donaldson was civilly committed to Florida State Hospital at Chattahoochee in January, 1957, and was kept there for nearly 15 years. Dr. J.B. O'Connor was, at first, Donaldson's attending physician, then served a number of years as the hospital superintendent. Although Kenneth Donaldson had made numerous attempts to gain his own release, it was not until after Dr. O'Connor retired in 1971 that Donaldson was allowed to leave the hospital. Donaldson subsequently brought suit for damages against Dr. O'Connor and four other defendants, alleging that the defendants had intentionally and maliciously deprived him of his constitutional right to liberty in violation of a Federal civil rights statute.[5]

There is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the state . . . .

In November, 1972, after a four day trial, the U.S. District Court jury returned a verdict for Kenneth Donaldson and against Dr. O'Connor and Dr. John Gumanis (Donaldson's attending physician from the fall of 1959 until the spring of 1967) in the amount of $38,500, an amount which included both compensatory[6] and punitive[7] damages. The other three defendants were found not to be liable for damages.

The evidence at the trial indicated that throughout his confinement responsible persons, including a representative of a halfway house for mental patients and a college classmate, had made efforts to gain Donaldson's release and were willing to assume responsibility for Donaldson's welfare. O'Connor consistently refused to allow Donaldson to leave the hospital, and insisted that Donaldson could be released only to his parents, even though he knew the man's parents were aged and infirm. The testimony further demonstrated that Donaldson had never been dangerous to himself or others, and that he received only custodial care while in the hospital.

In deciding O'Connor's appeal, the United States Court of Appeals for the Fifth Circuit affirmed the lower court's decision in a broad opinion which recognized a constitutional right to treatment. Dr. O'Connor then successfully petitioned the United States Supreme Court for a *writ of certiorari.*[8]

In the Supreme Court, however, the case was decided narrowly on the facts and several difficult constitutional issues touched upon by the Court of Appeals were not addressed. Justice Potter Stewart carefully pointed out what the Court was *not* deciding. "Specifically, there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a non-

Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.

dangerous, mentally ill individual for the purposes of treatment."[9] There was abundant evidence, the Supreme Court found, to support the jury's findings that Donaldson was neither dangerous to himself nor to others, and that, if mentally ill, he had not received more than mere custodial care.

Although the initial commitment was not at issue, the Supreme Court held that a state has a continuing obligation to review the necessity of confinement. The majority opinion stated clearly "Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed."[10]

Furthermore, the United States Supreme Court vacated the far-reaching judgment of the Court of Appeals and expressly stated that the decision of the Court of Appeals was deprived of any precedential effect. In addition, the case was remanded to the U.S. Court of Appeals for the Fifth Circuit for reconsideration in light of recent developments on the extent to which state officials, like O'Connor, are immune from damages.

The U.S. Court of Appeals for the Fifth Circuit summarily remanded the case to the United States District Court for the northern district of Florida, where it originated. Donaldson's attorneys have filed a motion for reconsideration of the remand, and that motion is pending in the Court of Appeals.

The fundamental issue in this Supreme Court opinion concerned the constitutional right to liberty. The Supreme Court simply defined a set of circumstances in which a person cannot be confined. The Supreme Court did not, however, decide whether a constitutional right to treatment exists, as had been hoped, and as had been decided by the Court of Appeals.

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1. *O'Connor v. Donaldson,* 95 S. Ct. 2486 (1975).
2. The decision was a unanimous one, although Chief Justice Burger issued a separate concurring opinion.
3. Presumably, more than mere custodial care must be provided.
4. 95 S. Ct. 2494.
5. 42 U.S.C. Sec. 1983, which reads as follows: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
6. Compensatory damages are those which compensate for the injury sustained. Their purpose is to replace the loss caused by the wrong or injury.
7. Punitive damages are those which are awarded to the plaintiff where the wrong done to him was malicious, wanton, or oppressive, and are intended to solace the plaintiff and punish the defendant.
8. In most instances one does not have an absolute right to appeal to the U.S. Supreme Court. A petition for a *writ of certiorari* may be presented to the Supreme Court, and it has discretion to grant or deny the *writ of certiorari.* Through the exercise of its discretion, the Supreme Court can largely control its docket, and review only those cases involving significant statutory or Constitutional issues.
9. 95 S. Ct. 2492.
10. *Ibid.* at 2493.

O'Connor v. Donaldson: A Commentary

by Thomas L. Shaffer

There are lawyers who believe that the most effective way to bring a doctor to book is to raid his wallet. From that point of view, *O'Connor v. Donaldson* is a more significant case than at first appears.

It was a personal, private lawsuit. It was, at least in form, a different world than occurred to the west of Florida State Hospital, in the *Wyatt* case, when Judge Frank Johnson put the mental health system of Alabama into moral and administrative receivership.

Mr. Donaldson sought the most ancient of legal vindications — money damages from someone who had locked him up and wouldn't let him go. And he won. Dr. O'Connor owes Mr. Donaldson a lot of money.

It was Dr. O'Connor, not Mr. Donaldson, who invoked the majesty of the State of Florida, and he did it in pretty much the way Eichmann invoked the crumbled majesty of the Third Reich, or the Watergate defendants invoke national security. Those comparisons are doubtless too cruel, but the moral similarities are important enough to justify some risk of unkindness. Above all else, *Donaldson* stands for the proposition that law cannot be used as an excuse for putting citizens in mental institutions.

The critical part of this case is that the state was *not* in it. That, I am fairly sure, will be an enduring point. It is also an unusual point, since most of these cases have been public-law attacks on institutions and state governments. Officials are in the cases merely as representatives of the public force. Now the physicians who preside over mental institutions have been made to drop these public shields; they are exposed. Anyone who reads in the papers about how fearful doctors become over medical malpractice is entitled to hope for reform caused by the exposure of physicians in mental hospitals.

Beyond that, the case disappointed those of us who hope for the demise of coercive psychiatry, so much of which, as here, is merely imprisonment. *O'Connor v. Donaldson* will always be vulnerable to "distinction" from other cases, because Mr. Donaldson was not dangerous and was not being "treated" and had people to help him on the outside.

Above all else, Donaldson stands for the proposition that law cannot be used as an excuse for putting citizens in mental institutions.

On the other hand, Supreme Court opinions tend to endure as literature, despite their facts (as in — God help us — "three generations of imbeciles are enough"). Some of Justice Stewart's words may be useful in cases where people are said to be dangerous because kookie, or said to be eligible for confinement because someone says they're sick. For example:

> "...the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution... incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom..."

These words have an irony worthy of Holmes and a conviction worthy of Jefferson. They may endure to a day when the Court will have to be more daring than it was in *Donaldson.*

Thomas L. Shaffer, professor of law at the University of Notre Dame, is currently visiting professor of law at the University of Virginia. He is former dean of the Notre Dame Law School.

National Center for Law and the Handicapped, Inc.
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Accessible Transportation: Will We Get There From Here?

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Intern Assistant
Lynn Gaertner

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news

Federal Government To Share Cost of Educating Handicapped

On November 29, 1975, President Ford signed into law the Education for All Handicapped Children Act of 1975 (Public Law 94-142).

This conference legislation, which Rep. John Brademas (D.-Ind.), chairman of the Subcommittee on Select Education, praises as "one of the major achievements of the 94th Congress," establishes an escalating formula through which the Federal Government will share with states the cost of educating handicapped children.

Beginning in fiscal 1978, the Federal Government will pay five percent of the average per-pupil expenditure times the number of handicapped children being served in a state. This percentage will increase on a yearly basis until 1982, when it will level off at 40 percent for that year and all subsequent years.

The new formula, which is designed to help the states with the "excess cost" of educating handicapped children, will not go into effect until fiscal 1978. For fiscal 1976 and 1977, the new law continues the existing funding formula created in the Education Amendments of 1974 (PL 93-380) but limits appropriations to $100 million in 1976 and $200 million in 1977.

In fiscal 1978, the first year of operation of the new formula, 50 percent of the federal funds will be distributed to local school districts and 50 percent to state education agencies. Thereafter, 75 percent will go to local schools and 25 percent to state agencies.

More than One Million Not Served

The new law maintains the priority established in PL 93-380 to first use funds for handicapped children who are still unserved by public education. Congressman Brademas, the chief House sponsor of the legislation, estimates that over a million physically, emotionally, or mentally disabled children are given no opportunities for education. The second priority group includes severely handicapped children within each disability whose education is presently inadequate. The act also establishes a program of incentive grants of $300 to state education agencies for each handicapped child between the ages of 3 and 5 who is being served.

The act prohibits counting as handicapped more than 12 percent of the state's total school age population between the ages of 5 and 17. Of this percentage, only one-sixth may be children with specific learning disabilities.

State Plan Necessary

In order to qualify for federal funds, state and local education agencies are required to prove that they are developing a plan to provide a free, appropriate education to all handicapped children, providing individualized educational programs for handicapped children in the least restrictive environment, developing extensive child identification procedures, and guaranteeing complete due process rights.

"The new law," Brademas explains, "was in large part inspired by the pattern of increasing decisions by courts across the land and statutes passed by state legislatures holding that handicapped children have a constitutional right to an education appropriate to their needs."

Project Surveys Handicapped Scientists

The American Association for the Advancement of Science (AAAS), the world's largest scientific professional association, has begun a project focusing on the concerns of handicapped scientists.

Funded by the Rehabilitation Services Administration of the Department of Health, Education, and Welfare, the Project on the Handicapped in Science is studying barriers to the entry and full participation of physically handicapped persons in jobs in scientific fields. Specifically, the program seeks to examine and evaluate ways in which scientific professional associations can improve educational and occupational opportunities.

The AAAS Office of Opportunities in Science, which coordinates the project, has undertaken a systematic survey of handicapped persons in the field of science in order to produce a profile of the handicapped

scientist. This profile will aid in developing programs and resources to help overcome the problems such scientists face. Martha Redden, director of the project, noted that approximately 300 handicapped scientists have been identified.

The project will also conduct a survey to determine the accessibility of colleges and universities with science programs.

Although the AAAS Office of Opportunities in Science does not do actual job placement, Redden said that the office keeps records of employment services for all AAAS affiliates as well as a resource file of handicapped scientists.

One of the major activities to be undertaken as part of the project is making the AAAS Annual Meeting in Boston, February 18-24, 1976, accessible to physically handicapped persons. The meeting will be held at the Sheraton—Boston Hotel, which is accessible, and will include a symposium entitled "Science, Technology, and the Handicapped."

The Boston Bicentennial Exhibit, part of the week-long program, will also be accessible, and a guide to making other professional meetings accessible will be published for distribution to the 287 AAAS affiliated professional societies and academies.

Plans are being made to print the meeting's program in Braille for blind participants, and according to Redden, meeting coordinators are seeking interpreters for the deaf.

The AAAS is interested in hearing from handicapped individuals who have experienced difficulties in receiving an education in science or in finding a professional position because of their handicap. These persons should contact Martha Redden, Director, Project on the Handicapped in Science, Office of Opportunities in Science, AAAS, 1776 Massachusetts Avenue, N.W., Washington, D.C. 20036. The project will not use the names of individual scientists who respond without their permission.

NCLH Seeking Data On Legal Advocacy Programs

The National Center for Law and the Handicapped is establishing a file of organizations throughout the country involved in legal advocacy, particularly advocacy for the disabled. Information on these groups will be used as a referral source for persons contacting the Center.

NCLH has received numerous requests from state and local groups throughout the country for advice on establishing legal advocacy programs. The information collected by the Center will also be used to facilitate the drafting of models for the development of such programs.

Development of models for advocacy programs is important in light of the recently signed Developmentally Disabled Assistance and Bill of Rights Act (PL 94-103), which mandates states to set up, by September 30, 1977, programs for the protection and advocacy of the legal rights of persons with developmental disabilities. According to the act, states cannot receive state grant monies provided through this act until such systems are in effect. The act also states that the advocacy program must be independent of any state agency which provides treatment, services, or habilitation to persons with developmental disabilities.

NCLH would appreciate receiving any information you may have regarding established legal advocacy programs. Please direct all information to Ms. Barbara Robinson, Assistant Director of Research, National Center for Law and the Handicapped, 1235 North Eddy Street, South Bend, Indiana 46617, or phone (219) 288-4751.

Group Considers Western Law Center

The A. Milton Miller Memorial Fund, a non-profit corporation located in Los Angeles, is presently studying the need for and the feasibility of establishing a Western center for law and the handicapped.

Through a six-month grant from the California State Department of Rehabilitation and $5,000 in matching funds from the Easter Seals Society, Project Research Director Dr. Ivan W. Swisher is collecting information on the numbers and needs of physically and mentally handicapped people who would be served by the Western law center.

Swisher's staff also plans to determine the suitability of the center as a legitimate alternative to other legal services available to the disabled such as the American Civil Liberties Union.

Dr. Swisher has contacted the National Center for Law and the Handicapped, and NCLH has offered assistance to the Western research project. The committee will submit a report to its funding agencies in February.

Friends and associates of A. Milton Miller, a noted California attorney who advocated for the rights of the disabled throughout his life, set up the Memorial Fund in June, 1975, in his honor.

New Director Of California's Rehab Department

Edward V. Roberts, the first quadriplegic to head a major state agency, was appointed director of California's State Department of Rehabilitation by Gov. Edmund G. Brown.

Roberts assumed the position in early November. He formerly worked as executive director of the Center for Independent Living, Inc., a self-help organization of disabled and blind people in Berkeley, California, which he co-founded in 1972. He cited his close involvement with handicapped people in California as an asset to his new position and expressed the belief that his appointment will stimulate a breakdown of the attitudinal barriers handicapped people now face.

Roberts named as his immediate priority attention to the needs of severely physically disabled clients, in light of the 1973 Rehabilitation Act, which mandates attention to severely disabled persons.

Consumer Conference Attendance

The National Center for Law and the Handicapped has received numerous phone calls regarding the Consumer Conference reported in detail in *Amicus*, Vol. 1, No. 1. Because of budget limitations, as well as the need for positive interaction, it is necessary to limit conference attendance to 50 people. NCLH, with the help of the conference planning committee, has developed a list of potential participants from throughout the country and will draw from this list in making final selections.

Target groups which NCLH hopes to involve in the conference are 1) representatives of legal advocacy agencies, 2) disabled individuals affiliated with an organized advocacy group, and 3) non-disabled professionals in the field who speak for disabled persons.

The Consumer Conference, whose basic theme will be the assessment of legal advocacy systems for the disabled and the development of ideas for future advocacy programs, will hopefully serve as a prototype for regional, statewide or citywide conferences. The conference is tentatively scheduled to be held May 26-29, 1976, at the Clairmont Hotel in Berkeley, California.

Publications

A Primer on Due Process: Education Decisions for Handicapped Children, by Alan Abeson, Nancy Bolick, and Jayne Hass. Details the rights of children and their parents in the educational decision-making process. 57 pages. $4.95. Write: The Council for Exceptional Children, 1920 Association Drive, Reston, Virginia 22091.

* * *

Comptroller General's Report to the Congress: Further Action Needed to Make All Public Buildings Accessible to the Physically Handicapped. Describes and analyzes steps taken by the Department of Defense; Department of Health, Education, and Welfare; Department of Housing and Urban Development; and General Services Administration to implement the Architectural Barriers Act of 1968, Public Law 90-480. 116 pages. Two copies free. Write: General Accounting Office, Distribution Section, Rm. 4522, 441 "G" Street, N.W., Washington, D.C. 20548.

in the courts

J.L. and J.R. v. Parham No. 75-163-MAC (M.D. Ga.)

J.L. and J.R. are 12 year old boys confined at Central Georgia Regional Hospital, Milledgeville, Georgia. Each plaintiff is suing on his own behalf and as a representative of a class of persons under the age of 18 who have been, are, or may be committed by their parents or legal guardians to Georgia mental health facilities.

The complaint seeks to prohibit enforcement of the Georgia statute which permits parents and guardians of persons younger than 18 years of age to voluntarily commit those persons to state mental health facilities. Plaintiffs contend that the present statutory scheme is unconstitutional in that it conflicts with the due process clause of the 14th Amendment to the United States Constitution. Plaintiffs also seek damages in the amount of $10,000 each as compensation for violations of their civil rights.

J.L. was 7 years of age when he was committed by his adoptive mother and stepfather. At the time of his commitment, he was not afforded notice, a hearing or other procedural safeguards to determine whether or not he was mentally ill and was likely to cause harm to himself or others.

J.R. also was 7 years of age when he was committed at the request of his legal guardian, a county department of family and children services. He also was not afforded a hearing or other procedural safeguards.

J.L. and J.R., who request formal anonymity, allege that at the time of their commitment, they were neither mentally ill nor a danger to self or others. Further, they state, their continuous institutional confinement and associated treatment have caused them long-term detrimental, physical, psychological and mental effects.

Plaintiffs allege that Georgia also fails to provide any system of periodic review to insure that juveniles are placed in the least drastic environment necessary for treatment.

Since the Georgia commitment statute has statewide application, the challenge to its constitutionality will be heard by a three-judge United States District Court.

This case is similar to *Bartley v. Kremens,* a Pennsylvania case which was analyzed in Volume 1, No. 1 of *Amicus.* However, plaintiffs here seek monetary damages and emphasize the importance of periodic review to placement in the least restrictive setting.

Beauchamp et al. v. Jones et al. No. 75-350 (D. Del.)

Beauchamp et al. v. Jones et al. is a class action suit brought on behalf of exceptional children, ages 4 through 21, residing in Delaware, who are being denied a free public education. The suit was filed October 23, 1975, in the United States District Court for the District of Delaware.

Defendants are the State Board of Education, members of the State Board of Education who are being sued individually and in their capacity as members of the Board, and the State Superintendent of Public Instruction.

The suit alleges that certain members of the plaintiff class, the learning disabled, are not receiving public education from local school districts in which they reside, or from the state of Delaware. These children may, on recommendation of the local school district evaluation and placement committee, receive their education in a specialized private school located either in Delaware or in another state. In such cases, state reimbursement of private school costs is authorized, but cannot exceed the state's average expenditure per pupil. These funds, however, do not fully cover the costs involved in receiving a private education.

Plaintiffs also allege that other members of the class they represent, severely mentally retarded and autistic children, receive no educational training or services from the state of Delaware. In addition, if these children attend a private educational facility, parents must bear the entire cost of that education.

The mentally retarded children do receive custodial care in day care centers operated by the State Department of Health and Social Services. However, plaintiffs allege, these day care centers are not staffed by any educationally-trained personnel and provide no educational training.

Beauchamp et al. v. Jones et al. is an attack on sections of the Delaware Constitution and their corresponding regulations. The plaintiffs charge that these sections violate the equal protection clause of the 14th Amendment of the United States Constitution by discriminating against exceptional children. This discrimination is based on the fact that, in Delaware, normal and average children receive free public education while exceptional children do not.

The plaintiffs also contend that those class members whose parents are unable to supplement the tuition reimbursement grants are deprived of any meaningful opportunity for appropriate education, without due process guaranteed by the 14th Amendment.

The suit seeks to prohibit enforcement of the present statutes which result in denial of a free public education for certain exceptional children. In addition, the suit seeks a court order demanding the defendants to provide free public education, or an appropriate alternative, to these children, as well as full reimbursement of the cost of private education when public education is not available.

The problem of tuition reimbursement for the private education of exceptional children (when a free public education is denied) exists wherever a state grant does not equal the actual amount parents must pay. Children in families who cannot afford private schooling or cannot supplement the state reimbursement for private schooling, therefore, receive no education.

Bartels et al. v. Biernat et al. No. 75-C-704 (E.D. Wis.)

In *Bartels et al. v. Biernat et al.* Federal Judge Robert W. Warren issued a temporary injunction preventing the Milwaukee County Transit System from purchasing 100 inaccessible new buses with federal funds. The order was handed down December 24, the date the bids for the buses expired.

Judge Warren indicated in his order that the plaintiffs had demonstrated that they would suffer irreparable injury if the buses were purchased. The order prohibits the county from purchasing the new equipment until a class action suit is heard and

"In the Courts" is designed to present the readers with an accurate summary in non-technical language of important legal cases affecting handicapped persons. With the increasing number of lawsuits involving equal citizenship for handicapped persons, it is important for the interested lay person to comprehend exactly what is involved in particular legal decisions. Court opinions, consent decrees, and settlement agreements are achieved only after careful drafting by the persons involved. This precision is demanded because the document will guide the future conduct of the parties to the lawsuit.

To participate effectively in any discussion concerning the wisdom of a legal result, the policy questions it may raise, or its application to other factual situations, the lay person must have accurate knowledge of what the result does and does not mean. A recent example of inaccurate understanding is the case of *O'Connor v. Donaldson*, decided by the Supreme Court in June of 1975 and reported at length in the last issue of *Amicus*. Many commentators interpreted the Supreme Court's decision to be one affirming that involuntarily confined individuals had a constitutional right to treatment. However, as the special report in *Amicus* indicated, the Court's decision dealt solely with a constitutional right to liberty.

Misunderstandings of this sort occur easily and make it difficult for the lay person to comprehend fully and precisely what the present state of the law is with respect to handicapped persons. NCLH believes its "In the Courts" section will provide readers with accurate information and thereby enable them to knowledgeably discuss the many legal issues affecting handicapped persons.

decided, probably in early spring, 1976.

The recently filed suit was brought by Milwaukee Legal Services, Inc., on behalf of Milwaukee's disabled citizens. There are more than 2,000 persons in Milwaukee County who are "mobility handicapped," according to the suit.

Horacek v. Exon No. 72-L-299 (D. Neb.)

In *Horacek v. Exon* Judge Albert Schatz, in his decree, approved the proposed settlement agreement which the involved parties entered into in August, 1975. (Reported in *Amicus,* Vol. 1, No. 1.)

This suit, brought before the Federal District Court in Omaha, Nebraska, in September, 1972, challenged the adequacy of conditions of the Beatrice State Home and the lack of community-based facilities for mentally retarded persons in Nebraska.

After extensive negotiations, the plaintiffs, residents of the Beatrice State Home; plaintiff-intervenor, the United States Department of Justice; and defendants, Governor J. James Exon and four other Nebraska officials, drafted an agreement which they entered into voluntarily. At the court hearing held September 19, 1975, all parties to the suit expressed their satisfaction with the provisions of the agreement.

One of the provisions, the establishment of the Nebraska Mental Retardation Panel, has already been effected with Governor Exon's recent selection of its five members.

The agreement provides for the annual evaluation of each resident of state facilities. If the parent or legal guardian of a resident objects to the findings of an evaluation, a due process hearing will be held in order to insure that any decisions made are in the best interests of the resident. This due process guarantee, in addition to the establishment of a Consumer Advisory Board whose members will include parents and guardians of residents of state facilities, expands parents' and children's rights in Nebraska.

The agreement also establishes as a flexible goal the reduction of the Beatrice State Home population to 250 or fewer. The annual evaluation of residents in Beatrice, and the eventual placement of some of these residents in community-based facilities, will allow for this reduction. Concurrently, a statewide plan to increase and supplement present community-based programs will be established.

Bartley v. Kremens No. 72-2272 (E.D. Pa.)

November 17, 1975, the United States District Court for the Eastern District of Pennsylvania issued an order in *Bartley v. Kremens,* to provide and implement the relief to which the court had held the plaintiffs entitled in its July 24, 1975, opinion (reported in *Amicus*, Vol. 1, No. 1).

In that opinion, the three-judge Federal court had declared unconstitutional, under the due process clause of the 14th Amendment, sections of the state Mental Health and Mental Retardation Act which permitted parents and guardians to place their child in mental health facilities without the benefit of a full due process hearing on the need for institutionalization and an independent counsel being provided for the child.

Due Process Ordered

The November 17 order directed the defendants to hold due process hearings on future commitments. The court also ordered the defendants to either discharge, release or recommit, within 120 days, under due process procedures, all children 18 years of age or younger who had been committed under the unconstitutional statutes.

In addition, the court order directed the defendants to inform all persons over 19 years of age, who had been admitted or committed under the unconstitutional statutes, of their options for voluntary withdrawal.

Pennsylvania has appealed the case to the United States Supreme Court. On December 15, 1975, upon request of the defendants, the Supreme Court issued a stay of the order, allowing Pennsylvania to refrain from following the district court order until consideration of the case by the Supreme Court. The plaintiffs have moved to modify the stay as it applies to new commitments.

special report

Accessible Transportation: Will We Get There From Here?

Legal Advocates Discuss the Problems

On November 21 and 22, the National Center for Law and the Handicapped sponsored a conference for legal advocates on accessible public transportation for handicapped individuals.

Attorneys from across the country seeking to establish accessible transit systems for the handicapped met in South Bend, Indiana, to discuss litigation efforts, exchange information, and share mutual concerns. The attorneys were also able to gather background information from conference speakers on the subjects of engineering research and bus production, significant legislation, and consumer groups' efforts in the fight for accessible transportation.

Thomas O'Brien, project manager of the Office of Special Needs, Massachusetts Bay Transit Authority, explained to conference participants that people are surprised when they learn that disabled persons cannot get on public buses, and he encouraged public relations work in this area.

O'Brien also noted that the unemployment rate for handicapped persons ranges from 60 to 70 percent, compared with the regular national unemployment rate of 8 to 10 percent.

"The greatest barrier for handicapped persons is the attitude of people toward the disabled," O'Brien commented. "Organizations such as the Urban Mass Transportation Administration (UMTA) don't really understand that the handicapped want to do their thing and that lack of accessible public transportation is one of the main roadblocks to employment for the handicapped."

Expressing a view common to conference participants, O'Brien, who is chairman of the transportation committee of the American Coalition of Citizens with Disabilities, Inc., emphasized the need for handicapped groups to form a single-issue coalition and coordinate efforts to gain accessible transportation. One of the major problems in this area, O'Brien pointed out, is the fragmentation of information and individual efforts. "We need to pull them all together," he said.

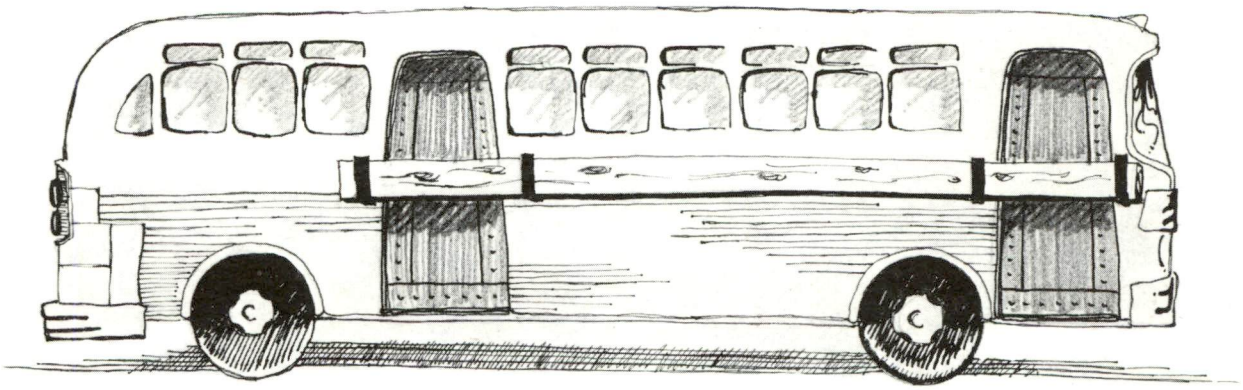
Legislative Overview

Ann Hocutt, research assistant to the Handicapped Subcommittee of the Senate Labor and Public Welfare Committee chaired by Senator Jennings Randoph (D-W.Va.), also stressed the importance of the coalition approach. Hocutt suggested establishing a letter-writing campaign in which law firms, universities, parent organizations, and rehabilitation groups would express to their congressional representatives the need for accessible transportation.

Questioned about the status of Section 504 regulations of the Rehabilitation Act of 1973, (See Special Report Legislation Listing), Hocutt said regulations have been written and are awaiting appropriate action by the Secretary of the Department of Health, Education, and Welfare (HEW).

HEW must publish these regulations in the *Federal Register* and allow a specified period of time for written comments, suggestions, or objections. Regulations have not been published to date (as of late December) and, according to Hocutt, there is no way of telling when Section 504 regulations will become final.

Hocutt added that the President's Domestic Council, in lieu of HEW action, is considering the possibility of issuing an order which would mandate every federal program to write its own regulations pertaining to Section 504 and in compliance with the Civil Rights Act.



Southern California's Bid for Accessible Buses

Dennis Cannon, consultant to the Southern California Rapid Transit District (SCRTD), reviewed the problems SCRTD has encountered since it opened bidding for 200 accessible buses last April.

Cannon, who is president of the San Fernando Valley Chapter of the California Association of the Physically Handicapped, Inc. (CAPH), stated that the roadblock in acquiring accessible buses is UMTA, not the lack of technology. After several submissions of bus specifications to UMTA and open conferences for bidding, Cannon said ROHR Industries and General Motors have expressed interest in building an accessible bus. However, UMTA, which provides funding for 80 percent of the cost of public buses after approving all specifications, has not yet given final approval to the SCRTD specifications.

The November, 1975 issue of the CAPH newsletter, *New World*, reports that the CAPH Board of Governors issued a resolution urging full congressional investigation of UMTA's handling of the Transbus project and other programs relating to the elderly and handicapped. The resolution, passed unanimously September 14, 1975, also urges Congress to "take all actions necessary to discipline those persons in the Urban Mass Transportation Administration responsible for the deliberate disregard of the intent of Congress to provide equal access to transit systems to the elderly and handicapped."

According to the *New World*, the charge in the resolution is the result of statements from a number of sources, including a transit industry source who indicated UMTA has been stalling on approving the specifications for a fully accessible bus in an apparent sabotage effort.

James Talley, staff engineer for Booz & Allen Applied Research, and Gene Hardesty, regional sales manager for FLXIBLE Corporation (a division of ROHR Industries), provided data on the technical aspects of accessible bus production.

Talley presented the results of an evaluation by handicapped persons of Transbus, an experimental bus design which incorporates wide doors, low floors, and lifts and ramps for wheelchairs. The evaluation indicated that ramps and lifts were feasible but presently inadequate, and that emergency exits and tie-down devices for securing wheelchairs still present some problems. Transbus, Talley reported, would have both positive and negative effects on regular transportation systems. "The low floors and wide doors will improve service for everyone," he said. "However, seating capacity must be reduced to allow space for wheelchairs, and the use of lifts increases traveling time between stops."

Technology Available

Representing FLXIBLE, Hardesty reported that all the necessary hardware for carrying handicapped persons on buses is now available. "We have all sizes of accessible vehicles for demand-response systems," Hardesty said. (Demand-response systems, such as dial-a-ride, serve only handicapped people on a limited, request basis.)

In explaining the status of technology, specifically ROHR's capabilities for building accessible buses, Hardesty said that the technology to design and produce buses accessible to persons in wheelchairs does exist; however, the manufacturers must be assured of uniformity in design and performance specifications to ensure the marketability of their product.

Professor Raymond Pearson, chairman of the Department of Mechanical Engineering at the University of Michigan, emphasized the importance of considering people with artificial limbs when designing accessible buses. He pointed out, however, that with the many types of handicaps, adaptations

in vehicle designs will always fall short of serving all handicapped people.

Attorneys who attended the two-day conference include Jack Achtenberg, Sepulveda, California; John Brauch, St. Paul, Minnesota; Barry Brown and Sheldon Wachler, Southfield, Michigan; Dan Dziuba, Klamath County Legal Services, Klamath Falls, Oregon; John Lancaster, Paralyzed Veterans of America, Washington, D.C.; and Bill Mahlum, St. Paul Law Center, Inc., St. Paul, Minnesota.

Also attending were Ann Pecora, Baltimore, Maryland; James Raggio, Public Interest Law Center, Philadelphia, Pennsylvania; Sterling Ross, Jr., San Francisco, California; Kenneth Streit, Milwaukee Legal Services, Milwaukee, Wisconsin; and Cleveland Thornton, Legal Aid Society of Birmingham, Birmingham, Alabama.

Accessible Transportation: A Critical Issue

If President-elect Franklin D. Roosevelt, traveling in 1933 from Hyde Park, New York, to Washington, D.C. for his inauguration, had been forced to rely solely on ordinary transportation services, he would not have arrived. He could not have walked up the steps of a bus or train. If he had chosen to fly, he probably would have been denied passage unless he had an able-bodied companion with him. Once in Washington, he would have found not only more inaccessible buses, but also a fleet of taxi drivers reluctant to pick up a wheelchair passenger.

Today a similarly disabled person would encounter the same obstacles on a journey to almost any city in the United States. It is a paradox that in the 40 years since Roosevelt reached a pinnacle of American political power and exercised that authority vigorously to reshape so much of our national life, the status of millions of his fellow disabled citizens changed very little.

Few issues are as important to disabled people as accessible transportation services. Transportation can make the difference between meaningful work and mere subsistence, between sharing the community of one's friends or being isolated, between enjoyment of the world of art, sports, and public affairs or being deprived of those dimensions of existence. The availability of accessible transportation affects directly the quality of life.

There is an additional importance to the transportation issue. Nothing symbolizes more vividly this nation's ostracism of disabled people than the inaccessibility of buses, subways, trains, and airplanes. While the non-handicapped can whiz away to the mainstream of life, the disabled are excluded from that society as if signs had been posted on the outskirts of civilization proclaiming, "Handicapped may not enter." The disabled are thus effectively banished from sight, and the non-handicapped are relieved from dealing with the discomforting aspects of physical and mental disability – its slowness, its labored moving about, its fundamental unattractiveness. Accessible transit systems would mean that our society has taken a step toward integrating the disabled into one phase of our collective life and thereby overcome at least some of its fear.

Transportation can make the difference between meaningful work and mere subsistence, between sharing the community of one's friends or being isolated . . .

The legal issues raised by the lawsuits involving accessible public transportation are at once simple and complex. The fundamental contention asserted by disabled plaintiffs is that Congress (and in some cases state legislatures) has mandated accessible transportation services for the disabled. Further, they maintain that these laws, coupled with established constitutional principles guaranteeing free-

dom of movement and equal protection, require federal and local transit authorities receiving federal funds to provide accessible services. As the plaintiff argued before the federal district court in *Snowden v. Birmingham-Jefferson County Transit Authority et al.*, "Plaintiff's position is simply that (the pertinent federal laws) require affirmative action by the recipient of federal funds . . . to assure that accessible transportation is provided to handicapped persons...."

The claims of federal and local defendants that the technology is not available for the production of such buses appears to be misleading.

The response of defendants to these contentions has been that the legislation in question is nothing more than a broad, non-imperative statement of national policy, requiring little more than the present research and demonstration programs (e.g. Transbus), and certainly not requiring any delay or significant alteration of ongoing federally funded programs. Above all, the defendants say, there is no constitutionally guaranteed "right" to accessible transportation; whatever services disabled people receive will be entirely at the discretion of America's transit policy makers.

To quote from the brief recently filed on behalf of United States Secretary of Transportation, William T. Coleman, Jr., in the *Snowden* case, now pending before the United States Court of Appeals for the Fifth Circuit, existing federal legislation "does not require that all mass transportation equipment purchased with Federal Assistance be accessible to persons confined to wheelchairs," but rather merely states a policy that special efforts be made "and leaves responsibility for determination of appropriate methods of implementing that policy to the administrative discretion of the Secretary of Transportation."

There is nothing especially novel about these contentions and responses – they are typical arguments that occur in most public interest litigation. Each side will find authority to support its position. What will be points of enthusiastic contention are the issues of technological feasibility and of system design. The resolution of these cases will depend very much on disabled plaintiffs demonstrating to courts that buses do exist or can be readily manufactured for regular use by local transit authorities. The claims of federal and local defendants that the technology is not available for the production of such buses appears to be misleading. Several major manufacturers have indicated their capacity to begin production of accessible buses, if they are given appropriate support and cooperation from the Urban Mass Transportation Administration.

In these court cases there will be a similar intense focus on system design. A question which must be answered is whether or not demand-response or dial-a-ride systems will be accepted by disabled people as interim or complementary measures, or will be regarded as inherently inferior programs which will only impede the development of totally integrated, accessible mainline systems. The inadequacies of dial-a-ride have long been apparent. But whatever the ultimate merits of the question, it is crucial that disabled groups maintain a continuing dialogue rather than permit their opponents to seize upon that dispute as an excuse for failing to provide any services.

The response of defendants . . . has been that the legislation in question is nothing more than a broad, non-imperative statement of national policy, requiring little more than the present research and demonstration programs . . .

Achieving equal access to transportation, although a critical need, remains only one part of the overall effort to secure equal rights for disabled people. While making buses accessible will not alone overcome the stigma of centuries-old prejudice, it is an indispensable preliminary step toward solving such problems as employment discrimination and other forms of prejudice which exclude disabled people from leading full lives.

Legislation

Rehabilitation Act of 1973

29 U.S.C. §794 or
Public Law 93-112, §504

This section of the 1973 Rehabilitation Act is modeled after section 601 of the Civil Rights Act of 1964 as amended and forbids discrimination against handicapped individuals under any program or activities which receive federal financial assistance.

29 U.S.C. §701

This section authorizes programs which will evaluate existing approaches to architectural and transportation barriers confronting handicapped individuals, develop new approaches, and enforce statutory and regulatory standards and requirements regarding a barrier-free construction of public facilities.

29 U.S.C. §792

By this section Congress created an Architectural and Transportation Barriers Compliance Board to examine alternative approaches to the architectural, transportation, and attitudinal barriers which confront handicapped individuals. The board is directed to determine how and to what extent transportation barriers impede a handicapped person's mobility and to bring together, in a cooperative effort, the groups necessary to achieve effective and comprehensive action.

Urban Mass Transportation Act of 1964

49 U.S.C. §1612(a)

This section declares that it is the national policy that elderly and handicapped persons have the same right as other persons to use mass transportation facilities and services. It also states that special efforts shall be made in the planning and design of mass transportation facilities and services to ensure their availability to elderly and handicapped persons. All federal mass transportation programs offering assistance under this particular program are to implement this policy.

49 U.S.C. §1604(b)

This section states that nothing in the transportation section of the United States Code shall require the charging of fares to elderly and handicapped persons. Also Section 604(m) requires that recipients of federal mass transportation assistance not charge disabled and elderly passengers more than one half the fare applicable to other persons during non-peak hours.

Senate Bill 662

This bill, proposed by Senator Harrison Williams (D-N.J.) and presently before Congress, would amend the Urban Mass Transportation Act and subject rail systems and buses to accessibility standards. The standards would be issued by the Secretary of Transportation. The secretary is empowered by this bill to make exceptions from full accessibility standards as required by the nature of the vehicle, its proposed use, commercial availability, the number of elderly and handicapped persons in the community, and the availability of alternative transportation facilities. The bill provides for the establishment of local advisory committees for geographical areas receiving assistance under the bill. Half the members of such a committee are to be elderly or handicapped persons.

Federal-Aid Highway Act of 1973
Public Law 93-87, §165(b)

In this section Congress has made explicit that mass transit projects funded by the Highway Trust Fund shall be planned and designed so that facilities and services can be used by elderly and handicapped persons.

Federal-Aid Highway Act Amendments
23 U.S.C. §142

The 1974 amendments to the Federal-Aid Highway Act state that any project receiving federal mass transit funds must be made accessible to every disabled and elderly person, including persons in wheelchairs.

Amtrak Improvement Act of 1974
45 U.S.C. §545(c)

This act provides for a national rail passenger system for the purpose of supplying modern, efficient, intercity rail passenger service. Section 545 authorizes the rail passenger corporation to take all necessary steps to insure that no elderly or handicapped individual is denied intercity transportation. This includes, but is not limited to, designing and acquiring new equipment and facilities, conducting special training for employees, eliminating architectural and other barriers in existing equipment, and complying with the highest standards for the design, construction, and alteration of property to accommodate elderly and handicapped individuals. The act includes the provision for special assistance to the elderly and handicapped when boarding and alighting and in terminal areas.

National Center for Law and the Handicapped, Inc.
1235 North Eddy Street
South Bend, Indiana 46617



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The Voice of the People:
Selectively Heard at the Polls?

Part I
No Entrance, No Vote, No Voice

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Editor
Jeannine Villing

NCLH Staff

Executive Director
Harvey A. Bender, Ph.D.

Acting Director of Legal Services
Francis X. Beytagh, Jr., Esq.

Director of Education
Kathleen G. Ursin

Assistant Director of Education
Jeannine Villing

Assistant Director of Research
Barbara Robinson

Attorneys
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Lawrence Ruemmler, Esq.
Greig R. Siedor, Esq.
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news

New Director of NCLH Appointed

Dr. Harvey A. Bender has been named executive director of the National Center for Law and the Handicapped. The appointment was announced by Dr. Philip J. Faccenda, president of NCLH. Dr. Bender has been serving as acting director of the Center since June of 1975.

A professor of genetics at the University of Notre Dame since 1960, and adjunct professor of law since 1974, Dr. Bender was a member of the NCLH organizational committee which, in 1971, established the Center. He also served on the NCLH Board of Directors from 1972 until his appointment as acting director.

A former member of the Board of Directors for the Council for the Retarded of St. Joseph County, Indiana, Dr. Bender has been a consultant on genetic counseling to the President's Committee on Mental Retardation and a lecturer for the National Foundation/March of Dimes.

From 1973-74, Dr. Bender was a visiting professor of human genetics and an associate in law at Yale University. He is a member at-large of the Yale Task Force on Genetics and Reproduction.

Dr. Bender is currently serving on a consultative panel to the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.

UMTA and APTA Hold Conference On Priorities

The Urban Mass Transportation Administration (UMTA), together with the American Public Transit Association (APTA) conducted a priorities conference last month at which the National Center for Law and the Handicapped was represented by staff attorney Kent Hull.

The Research and Development Priorities Conference, in Arlington, Virginia, was held in order to permit representatives of the mass transit operating industry, as well as suppliers and academic, governmental, consumer, and other interested groups, to express their views on how UMTA might shape a responsive research development, and demonstration (RD&D) agenda.

Topics discussed at the conference included R&D transit technology, new systems and automation, socio-economic research and special projects, transit management, planning methodology, service and methods, and public oriented issues.

In a written statement, NCLH urged UMTA to give the highest priority in its research and development efforts to the mass transportation needs of disabled persons. NCLH stressed that "special efforts" made in the past, and required by the Urban Mass Transportation Act of 1964, have been minimal and, in contrast to what could be done, emphasize the insufficiency of present plans to comply with the requirements of the law.

The 1970 amendments to the Act state that special efforts shall be made in the planning and design of mass transportation facilities and services to ensure their availability to elderly and handicapped persons. All mass transportation programs receiving federal assistance must implement this policy.

Senate Hearings Held On Rehabilitation Act

The National Center for Law and the Handicapped participated in public hearings conducted by the United States Senate Subcommittee on the Handicapped which began in February in Washington, D.C.

Kent Hull, a staff attorney representing NCLH, testified before the Subcommittee on the Handicapped regarding problems in implementation of the Rehabilitation Act of 1973. NCLH testimony concentrated on those provisions of the law, specifically Section 504, which prohibit discrimination against disabled persons in federally funded programs.

NCLH urged the Subcommittee on the Handicapped

to more vigorously monitor agencies affected by the Rehabilitation Act and to more effectively demonstrate Congressional concern for the fullest possible implementation of the law.

The Rehabilitation Act of 1973 has been regarded by disabled persons as one of the most important pieces of legislation in our nation's history. The Act includes provisions for the evaluation of existing barriers and the development of new approaches to architectural barriers in public facilities, establishment of a committee to coordinate affirmative action plans of federal agencies, and priority in vocational rehabilitation services to the severely handicapped.

To date, regulations to enforce the Rehabilitation Act of 1973 have not yet been promulgated. However, courts are increasingly receptive to cases citing discrimination in violation of Section 504 of this Act.

Partially on the basis of Section 504, a federal district court in Milwaukee recently granted a preliminary injunction prohibiting the acceptance of bids by the transit authority for an order of buses which would not have provided service to disabled riders.

In Ohio, a federal court decree enjoined a school board from refusing to allow a partially sighted student to play basketball; and in West Virginia, a federal district court has interpreted Section 504 to preclude a school district from segregating a handicapped child from classes with non-handicapped students where the handicapped child was capable of taking part in regular classes. (See, In the Courts: *Bartels, et al. v. Biernat, et al., Borden v. Rohr, et al., and Hairston v. Drosick.*)

Beytagh Named Dean Of Toledo Law School

Francis X. Beytagh, acting director of legal services for the National Center for Law and the Handicapped, has been named dean of the University of Toledo College of Law, effective July 1, 1976. He succeeds the retiring dean Karl Krastin.

A professor of law at the University of Notre Dame, Beytagh has been associated with NCLH since 1973, when he worked with the Center staff on a consultative basis. He joined NCLH in June, 1975, serving in his present capacity and as acting deputy director of the Center, with responsibility for supervising and advising the legal staff.

Beytagh joined the Notre Dame faculty in 1970 and has taught courses in constitutional law, federal courts, administrative

Director of Legal Services

The National Center For Law and the Handicapped is seeking a Director of Legal Services. This person will also serve as the Deputy Executive Director with responsibility for all legal activities, plus aiding in the integration of these endeavors with the research and educative programs of the agency.

Applicants should have strong experience in trial and appellate litigation and administration and legislative processes. Duties include directing a staff of five attorneys and approximately 12 law student interns in litigation, research, and public education activities, and assisting in the general administration of the Center. Salary is negotiable. The position is available now.

Resumes and references should be sent to Dr. Harvey A. Bender, Executive Director, NCLH, 1235 N. Eddy St., South Bend, Indiana 46617. NCLH is an Affirmative Action/Equal Opportunity Employer and encourages applications from the handicapped, members of minority groups and women.

law, legislation, appellate practice, and civil and political rights.

In 1963-64 Beytagh was senior law clerk to the late Chief Justice Earl Warren of the United States Supreme Court. After two years in private practice in Cleveland, Ohio, he returned to Washington as an assistant to the solicitor general of the United States, under Thurgood Marshall and Erwin Griswold, where he served until 1970.

Beytagh was a director of the Notre Dame Law School summer program in London, England, and a consultant to the Administrative Conference of the United States on judicial review matters. He also served as social counsel to the Virgin Islands on legislative reapportionment and was a visiting professor at the University of Virginia Law School.

Beytagh graduated magna cum laude from Notre Dame in 1956 and received his juris doctor degree from the University of Michigan in 1963.

Free Mailing Privileges Available

Our attention was recently directed to Part 138 of the Postal Service Manual, entitled "For the Blind and Other Handicapped Persons." Part 138 provides for mailing free certain matter "for the use of the blind or other persons who cannot use or read conventionally printed material because of a physical impairment who are certified by competent authority as unable to read normal reading material."

The Postal Service explains that handicaps other than visual impairments which can prevent normal reading are disabling paralysis, muscle or nerve deterioration affecting coordination and control, and confinement in iron lungs or other mechanical devices. These conditions may be caused by cerebral palsy, multiple sclerosis, muscular dystrophy, arthritis, infantile paralysis, myosthenia gravis, and diplegia.

In order to utilize the free mailing privileges one must obtain certification of such a physical impairment from a competent authority, such as a doctor, optometrist, registered nurse, professional staff member of a hospital or other institutions or agencies. The certification then should be submitted to the post office where mailings will be made or received. Post offices do not have official forms for certification; a letter on official letterhead is sufficient.

Part 138 of the Postal Service Manual sets forth certain conditions for those using the free mailing privileges. First, the matter must be for the use of the blind or other handicapped persons as described above. There must be no charge, rental or subscription fee required for such matter, or the charge must not be in excess of the cost of the matter. Third, the matter may be opened for postal inspection. Finally, the matter should contain no advertising.

Examples of items mailable free are reading matter; musical scores; sound reproductions; paper, records, tapes and other materials for production of reading matter, musical scores or sound reproductions; braille writers or typewriters, or parts thereof, used by a blind person or a person having a physical impairment as described; educational or other materials or devices specifically designed or adopted for use of a blind person or a person having such physical impairment.

Additionally, unsealed letters which are in raised characters or in 14 point or larger type may be sent by a blind person. Handwritten letters are not mailable free of charge. All materials mailed pursuant to Part 138 must show the words "Free Matter for the Blind or Handicapped" in the upper right corner of the address side.

Inquiries regarding Part 138 of the Postal Service Manual should be directed to your local post office first, then to the General Manager, Domestic Mail Classification Division, Office of Mail Classification, United States Postal Service, Washington, D.C. 20260.

White House Conference On the Handicapped Extended to 1977

March 3, 1976, President Ford signed Public Law 94-224 which extends the convening of the White House Conference on Handicapped Individuals. The conference was originally scheduled for December, 1976.

Congressman John Brademas (D.-Ind.), chairman of the Subcommittee on Select Education and principal sponsor of the resolution, said that the postponement was necessary "to provide a reasonable opportunity to conduct regional and state conferences, and to plan the very comprehensive national conference." The Congressman explained that since the National Planning and Advisory Council had not been appointed until October, 1975, there was not sufficient time to coordinate a conference of this scope by December, 1976.

Prior to the White House Conference, the Council hopes to establish individual conferences in each of the 50 states and in the territories. Federal grants are available to assist states in conducting these conferences and are based on the delivery of rehabilitation services to disabled citizens of each state, with minimum grants of $10,000 and maximum grants of $25,000.

As part of the application procedure, both recommendations and requirements have been determined to insure that overall objectives of the White House Conference are met. One of these recommendations is that state conferences be directed and coordinated by a disabled person who has demonstrated leadership and has a broad knowledge of the problems related to all disabilities.

Requirements set by the Council include holding conferences at accessible sites and discussing those topics provided by the White House Conference Council.

Mandated by Public Law 93-516, Title III, the White House Conference on Handicapped Individuals was created to provide a national forum for the assessment of the problems of the handicapped, and to develop recommendations for solutions to these problems. The Conference will address issues that concern both the physically and mentally handicapped in the areas of health, education, social, economic, and special problems, such as civil rights.

Regional planning meetings were held in late February and early March in order to provide information on the Conference and to generate involvement on the state and national level.

Publications

Mental Disability Law Reporter: Preview Edition, published by the American Bar Association Commission on the Mentally Disabled. Previews an upcoming monthly compendium of legal materials for lawyers, administrators, professionals, and advocates in the mental disability area. Free. Write: Mental Disability Legal Resource Center, ABA Commission on the Mentally Disabled, 1800 M Street, N.W., Washington, D.C. 20036.

First Report to the Congress of the United States: Architectural and Transportation Barriers Compliance Board. Describes the activities and purposes of the A&TBCB and includes reports from federal agencies describing their implementation of PL 90-480. 168 pages. Free. Write: Architectural and Transportation Barriers Compliance Board, Room 1004, 330 C Street, S.W., Washington, D.C. 20201.

The National Center for Law and the Deaf Newsletter. Provides information about the Center's plans, programs, activities, and achievements. Will be published at least three times a year. Free. Write: Linwood Smith, Editor, National Center for Law and the Deaf, 7th and Florida Avenues, N.E., Washington, D.C. 20002.

in the courts

Hairston v. Drosick No. 75-0691 CH (S.D. W.Va.)

Trina Hairston is a spina bifida child who has a noticeable limp and incontinence of the bowels. School officials refused to place her in a regular classroom unless her mother would go to the school two or three times a day to attend to Trina. Additional alternatives to school attendance offered by the defendants were homebound instruction or placement in a special education class at a school for physically handicapped children.

Mrs. Hairston, however, was unable to attend to Trina at school because she had a baby at home to care for, her own mother was living in the household and was totally incapacitated, she had no driver's license or suitable transportation to the school, and her continued presence in the home was necessary because she took telephone orders for her husband, who makes his living by delivering loads of coal for heating homes.

The Hairstons, after unsuccessful attempts to secure Trina's admission to a regular first grade classroom, filed this suit in the United States District Court for the Southern District of West Virginia. In the suit, the Hairstons alleged that the exclusion of Trina from an educational program constituted a discrimination based on her handicap, in violation of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. Sec. 794) which prohibits discrimination against and denial of benefits to handicapped persons in any program or activity receiving federal financial assistance. Secondly, the Hairstons contended that Trina had been excluded from a regular public classroom without written notice and procedural safeguards in violation of the due process clause of the 14th Amendment to the United States Constitution.

The court determined that both of the plaintiff's contentions were correct, and ordered that Trina Hairston be admitted immediately to a regular public classroom. Judge K. K. Hall, who presided in the case, also ordered that any attempt to exclude her be in accord with due process of law, and that any exclusion be reviewed by the court itself prior to such action.

Section 504 Used As Basis

Hairston v. Drosick is significant because the court concluded that the plaintiff's exclusion from a regular classroom violated Section 504 of the Rehabilitation Act of 1973 which provides that:

"No otherwise qualified handicapped individual in the United States, as defined in Section 706(c) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Although the U.S. Department of Health, Education, and Welfare was to have issued regulations to implement Section 504, no such regulations have yet been promulgated. Judge Hall, however, recognized that reliance could be placed directly on the statute.

"To deny a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of the benefits of such program in violation of the statute," Judge Hall said in his order of January 14, 1976. "School officials must make every effort to include such children within the regular public classroom situation," he wrote, "even at great expense to the school system." (Emphasis added.)

Socialization Process Imperative

The court also found alternative placement of handicapped children able to function adequately in a regular classroom unacceptable and a great disservice to these children. In his order, Judge Hall remarked, "A child's chance in this society is through the educational process. A major goal of the educational process is the socialization process that takes place in the regular classroom, with the resulting capacity to interact in a social way with one's peers. It is, therefore, im-

perative that every child receive an education with his or her peers insofar as it is at all possible. This conclusion is further enforced by the critical importance of education in this society. . . It is an educational fact that the maximum benefits to a child are received by placement in as normal environment as possible."

Garshwiler, et al. v. Marion Community Schools, et al. No. F-75-134 (N.D. Ind.)

Linda Kay Garshwiler is a 23-year-old certified secondary education teacher who is also legally blind. In this suit filed in December, 1975, Ms. Garshwiler alleged the defendants, who include the director of personnel, superintendent, a junior high school principal, and members of the governing board of the Marion (Indiana) Community Schools, unlawfully refused to interview her for an English and journalism teaching position and subsequently to employ her as a teacher because of her blindness. Ms. Garshwiler was joined in the suit by the National Federation of the Blind (NFB) and its Indiana state chapter.

Ms. Garshwiler, a graduate of a nearby Indiana college and blind since childhood, alleged that the failure to interview and hire her resulted from an "irrebuttable presumption" that blind persons could not be competent as teachers of English and journalism, and, therefore, was a violation of due process of law. She further argued that the defendant's actions denied her equal protection, since their refusal to interview and hire was allegedly based on her blindness. Finally, she claimed that this discrimination was a violation of Section 504 of the 1973 Rehabilitation Act, which prohibits discrimination because of a handicap by programs, such as the defendants', receiving federal financial assistance.

Subsequent negotiations between the parties led to a settlement agreement with the following provisions: 1) Ms. Garshwiler was hired for the position she sought; 2) she received compensation for lost wages; and 3) she will be treated normally for purposes of teacher tenure.

The position, according to Marc Maurer, Indiana NFB chapter president, is the first full-time teaching post ever won through litigation by a blind person. Ms. Garshwiler joins some 400 blind persons employed as teachers in regular classrooms nationally.

Rainey, et al. v. Tennessee Department of Education, et al. No. A-3100 (Chancery Ct., Nashville, Tenn.)

In November, 1973, *Rainey, et al. v. Tennessee Department of Education, et al.* was filed in the Chancery Court in Nashville, Tennessee. The plaintiffs, all handicapped children as defined in the Tennessee Mandatory Special Education statute, alleged non-compliance with the Tennessee Mandatory Education Law for Handicapped Children and Youth passed in April, 1972.

July 29, 1974, the parties entered into a consent agreement which provided for a program of appropriate special education services for all handicapped children, ages 4 through 21, and several due process procedures. The court retained jurisdiction of the case pending implementation of the consent agreement.

However, in September, 1974, the plaintiffs filed a petition for contempt of court and relief for those handicapped children who were still being denied their right to an appropriate and free education, based on the 1972 mandatory education

law and the provisions of the consent agreement and decree.

In their memorandum of law and facts in support of the petition, the plaintiffs alleged that the defendants violated certain sections of the consent agreement. These sections contained provisions for 1) guaranteed access to appropriate and free special education services for all handicapped children ages 4 through 21, on or before the beginning of the 1975-76 school year; 2) either withholding of funds by the State Department of Education from local education agencies (school districts) not providing such access, or the providing of needed special education services by the Department; and 3) requiring, through the compulsory attendance laws, all handicapped children ages 7 through 16 to attend school.

The plaintiffs also contended that the denial of an education to some of Tennessee's handicapped children was also a denial of these childrens' rights secured by the equal protection clause of the 14th Amendment to the United States Constitution. In addition, the plaintiffs alleged the defendants discriminated against handicapped children in violation of the Rehabilitation Act of 1973, by excluding handicapped children from participation in programs or activities receiving federal financial assistance.

Court Rules for Plaintiffs

On January 21, 1976, the Chancery Court, Judge Ben H. Cantrell, presiding, found the defendants to be "at least technically in violation of the Court's order which incorporates the consent agreement." The Court also found, contrary to the defendant's contention that they did not have the present ability to comply fully with the consent agreement, that there were funds available which had not even been utilized by the defendants.

Additionally, the Court found that the failure to provide an equal educational opportunity for handicapped children is a denial of equal protection and violates the 14th Amendment of the U.S. Constitution.

New Decree Ordered

The court ordered that a decree should be entered which incorporates the findings of the court and the following provisions:

1) That the defendants report to the court and the attorneys for the plaintiffs, within 45 days of the order, the name, age and handicap of all totally or partially excluded handicapped children within the State of Tennessee, indicating the local educational agency having jurisdiction over the children and reasons for total or partial exclusion. The report should also reflect the steps being taken to implement the consent agreement of July, 1974, and shall be supplemented and brought up to date on May 1, 1976.

2) By July 1, 1976, the defendants should provide a plan for the implementation of the consent agreement for the 1976-77 school year; and

3) The defendants will be required to enforce the Tennessee compulsory attendance requirements.

J.L. and J.R. v. Parham No. 75-163-MAC (M.D. Ga.)

A three-judge Federal court has held unconstitutional a Georgia statute which authorized the commitment of minor children by their parents or guardian to Georgia state mental health facilities without notice, hearing and other procedural protections required by the 14th Amendment to the United States Constitution.

The court, in *J.L. and J.R. v Parham*, ordered the defendants, officers of the Georgia State Department of Human Resources, to 1) provide the necessary resources and personnel for non-institutional placement of 46 children in the class identified by defendants as suitable for discharge from a Georgia State hospital, and 2) place those children "as soon as reasonably appropriate."

The court, with respect to all members of the class, ordered the defendants either (1) to commence involuntary commitment

proceedings for each such child, as outlined in Georgia law, or (2) to release the child from state custody. The defendants will be required to file semi-annual reports of the efforts taken to comply with this order.

It is possible further orders will be forthcoming, as this three-judge court decision involved only the constitutional challenge to the Georgia commitment statute. A single-judge court will decide on the remaining issues, including both the plaintiffs' allegation that Georgia fails to provide periodic review of commitment of juveniles, and the individual plaintiffs' claim for $1,000 in damages.

State ex rel. Thelen v. City of Missoula No. 543 P.2d 173 (Mont. 1975)

December 8, 1975, the Supreme Court of Montana, in *State ex rel. Thelen v. City of Missoula,* upheld the constitutionality of the Montana statutes providing community residential facilities for the developmentally disabled in all residential zones. This order, includes, but is not limited to, residential zones for one-family dwellings.

The Thelens, property owners in the city of Missoula, brought an original proceeding in the Supreme Court of Montana to prohibit the city of Missoula from interfering in the sale of their residence to the Missoula Developmentally Disabled Community Homes Council for use as a residence for not more than eight developmentally disabled persons.

Although the property was located in a one-family residential zone, in 1974 the Montana legislature amended the building regulations and zoning commission provisions of state statutes to exempt community residential facilities from the provisions of local zoning ordinances. A community residential facility serving eight or fewer persons and providing care on a 24-hour a day basis was considered to be a residential use of property.

The matter of selling the Thelen property to the DD Community Homes Council was taken before the Missoula City Council to determine what action, if any, it would take in view of these amendments. The consensus of the city council was that a law suit should be filed to test the state's authority to take over city zoning. The council stated that it did not oppose the laudable objectives of the legislation, but that it considered zoning to be a locally controlled function. The city then filed a suit for an injunction to halt the sale of the Thelen residence and prevent its use by more than one family. In response to the city's action, the Thelens, on October 29, 1975, filed a petition for a writ of prohibition with the Montana Supreme Court in order to restrain the city from further interfering with the sale.

Supreme Court Intervenes

The court found that extenuating circumstances warranted their intervention in this case. First, the court determined that the Thelens would be unable to sell their property during the pendency of the lawsuit against them. Second, the court found that the zoning regulation of Missoula had been neutralized by an act of the legislature; and third, it took note of a provision in the Montana Constitution which provides:

"The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society."

In the decision written by Justice John C. Harrison, and concurred in by Chief Justice James T. Harrison and Justices Daly and Castles, it is pointed out that the legislature's power to modify or withdraw various powers given a municipality has been recognized in Montana.

The court also noted that, since Montana's legislature determined that the constitutional rights of the developmentally disabled to live and develop within a community structure as a family unit is paramount to the zoning regulations of any city, it is the court's duty to recognize and implement such legislative action.

Borden v. Rohr, et al. No. 75-844 (S.D. Ohio)

The United States District Court for the Southern District of Ohio, Eastern Division, issued a preliminary injunction, without a written opinion, against Ohio University officials in Athens, Ohio, prohibiting their further refusal to allow a student with vision in only one eye to play junior varsity basketball. The injunction was issued December 31, 1975.

The suit, brought by the American Civil Liberties Union of Ohio Foundation, Inc., was filed on behalf of Michael Borden, a freshman junior varsity player at Ohio University. Defendants are William Rohr, Ohio University athletic director, and Charles J. Ping, president of Ohio University.

Plaintiff Borden contends that the University's refusal to permit him to play basketball deprives him of equal protection and due process of law contrary to the 14th Amendment to the United States Constitution. He also alleges that such refusal by University officials discriminates against him because of his handicap and is, therefore, a violation of Section 504 of the Rehabilitation Act of 1973.

In the complaint and memorandum in support of a motion for a temporary restraining order and a preliminary injunction, counsel for the plaintiff states that Borden was an outstanding high school player and that he was accepted for and made the Ohio University junior varsity team until his absence of an eye was discovered. According to the plaintiff, the only reason given for not being allowed to play was the "for your own good" rationale. Plaintiff's counsel also notes in the complaint that Borden has been and is willing to release Ohio University, its agents and assigns from any liability for any basketball related injury to his eye.

The plaintiff seeks a final injunction declaring the defendant's actions unlawful and/or unconstitutional, and also seeks compensation for courts costs, expenses, and attorney's fees.

According to the transcript of the December 30, 1975 court proceedings, Judge Robert M. Duncan, in issuing the preliminary injunction, stated that the University's concern about serious injury occurring to persons participating in college athletics is valuable. However, he further remarked, ". . .as I look at recent legislation passed by the Congress, as I look at recent legislation passed by the State of Ohio, there is another public interest consideration which is emerging, and that is the regard and the status in this society of those who have some sort of handicap. . .We're encouraging them to fully participate to the best of their ability and the extent of their physical resources in their own personal affairs and the affairs of our social kind of living, so we lend encouragement to them."

Note: As we went to press, NCLH received a copy of the March 8 court order dismissing this case without prejudice at the request of the plaintiff's attorney. (Dismissing the case without prejudice allows the plaintiff the opportunity to return to court and relitigate the case if defendants do not comply with the agreement.)

The motion for dismissal was made after plaintiff's attorney received a letter from the special counsel for the Attorney General's office representing Ohio University stating that, if the case is dismissed, the University would continue to abide by the decision of the court in granting the temporary restraining order and would not prevent Michael Borden from participating in either junior varsity or varsity basketball. According to the letter, Borden had already been invited to try out for the varsity basketball team next year.

Update: O'Connor v. Donaldson 95 S. Ct. 2486 (1975)

In the inaugural edition of *Amicus,* which featured an analysis and commentary on *O'Connor v. Donaldson,* it was reported that the U.S. Court of Appeals for the Fifth Circuit had summarily remanded the case to the United States District Court for the Northern District of Florida, and that Donaldson's attorneys had

filed a motion for reconsideration of the remand. That motion was denied, and the case was set for a new trial in the court where it originated. However, because Dr. J. B. O'Connor suffered a fatal heart attack in early December, no further action has been taken. Attorneys for the parties are researching the complex legal issues raised by the death of Dr. O'Connor.

Webb, et al. v. Miami Valley Regional Transit Authority, et al. No. C-3-75-67 (S.D. Ohio)

In Dayton, Ohio, on January 19, 1976, Judge Carl B. Rubin of the U.S. District Court for the Southern District of Ohio, followed the district court decision in *Snowden v Birmingham-Jefferson County Transit Authority, et al.* The court held, in a short written opinion, that it would not allow the case to proceed as a class action because the asserted class of disabled persons is "so nebulous and so diverse as to defy attempts to ascertain its limits."

The suit was filed on behalf of Betty J. Webb and the class she contended consists of "those handicapped and elderly persons who because of physical infirmities or physical defect cannot secure access to the diesel buses and trolleys of the Miami Valley Regional Transit Authority, due to the architecture barriers in the present design of the vehicles."

According to Judge Rubin's order, granting of the defendants' motion for summary judgment was based upon "the memoranda, exhibits, and other documents submitted, and upon the decision of the District Court for the Northern District of Alabama in *Snowden v Birmingham-Jefferson County Transit Authority, et al.*"

The court noted in its order that during this litigation, the Miami Valley Regional Transit Authority purchased "a number of busses that comply with the requests herein relating to facilities for handicapped persons." According to counsel for the plaintiffs, three vans, similar to those used for Dial-A-Ride service, were purchased. Since the purchase of these buses was generated by the efforts of the plaintiffs' counsel, the court awarded him $1,000 in attorney fees.

Plaintiffs do not intend to appeal this case.

Bartels, et al. v. Biernat, et al. No. 75-C-704 (E.D. Wis.)

December 24, 1975, Judge Robert W. Warren issued a preliminary injunction in *Bartels, et al. v. Biernat, et al.*, prohibiting the Milwaukee County Transit System from purchasing 100 inaccessible new buses with federal funds until the class action suit is heard and decided. In his order, Judge Warren stated that the plaintiffs had demonstrated that they would suffer irreparable injury if the buses were purchased.

According to counsel for the plaintiffs, there has been no further action in this case.

Copies of briefs and documents related to the cases discussed in this section are available from The National Clearinghouse for Legal Services, 500 North Michigan Avenue, Suite 2220, Chicago, Illinois 60611. Requests from attorneys practicing in CSA-funded Legal Services projects will be filled free of charge, one copy per project. All other persons will be billed five cents per page to cover duplicating costs, plus a postage and handling charge of $1.50 for the first 30 pages and an additional $1.00 for each additional 30 pages or fraction thereof.

special report

The Voice of the People: Selectively Heard at the Polls?

Part I
No Entrance, No Vote, No Voice

The simple act of voting, taken for granted by most people, ranges from difficult to impossible for handicapped individuals. Voter registration offices and polling places that are not accessible to the physically disabled, as well as lengthy, expensive, and often confusing absentee voting procedures, serve to discourage, if not eliminate, handicapped persons from exercising their right to vote. In Philadelphia alone, for example, it is estimated by a local organization working on behalf of the disabled, that there may be as many as 300,000 potential handicapped voters who are not registered.

Architectural barriers which make polling places inaccessible to many physically disabled persons are an immediate problem in almost all of the 50 states. According to a survey completed by the National Center for Law and the Handicapped last October, several state statutes have provisions which insure that public buildings are accessible to and functional for the physically handicapped. In the state of Iowa, for instance, such standards apply to all public and private buildings and facilities, whether temporary or permanent, and should apply to polling places. However, this is not always the case. And few states have laws which directly provide for accessible polling places.

In the state of Florida, a bill (HB 1481) mandating accessible polling places recently passed the House, but was not placed on the Senate calendar in time for consideration. Consequently, the bill must again be considered on the floor of the House.

The Florida bill requires polling places to be accessible to and usable by elderly and physically handicapped persons. It provides certain standards to assure such accessibility, such as requiring that entrances and exits be a minimum of 29 inches wide, and that curb cuts or ramps be used in areas adjacent to the main entrance to any polling place.

The Florida legislation would also prohibit the use of a polling place not meeting the accessibility standards provided in the act, unless there is no other accessible site available, and the polling place can be made accessible in the near future. If passed, the act would take effect July 4, 1976.

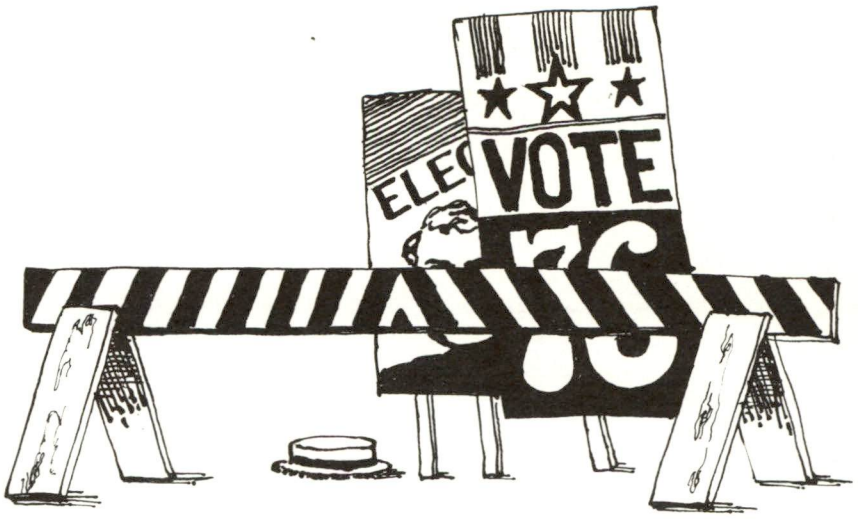
The Florida Council of Handicapped Organizations, Inc. has proposed similar legislation to the Florida legislature for the past three years. Each of these bills, however, died on Senate calendars.

The state of Maine passed a law last year which provides for accessible polling places. However, although the original bill, drafted by Stan Jones of the Governor's Committee on Employment of the Handicapped, mandated that all polling places be accessible, the present law (L.D. 1566) provides for only one alternative accessible voting place in each municipality. That alternative place is to be the office of the clerk if that office is accessible.

Another possible weakness in legislation such as Maine's, is the requirement that a disabled or elderly person wishing to vote at the accessible place notify the clerk 10 days in advance of the election. However, the law does not require election officials to give advance notice to voters as to whether or not their designated polling place is accessible. In most cases, the potential voter must make a special trip to check for accessibility.

In response to a question regarding this matter, an election official in Augusta commented that "people are familiar with the buildings here" and, therefore, she did not view this as a major problem. In responding to the same question, an official in Portland termed it "their (the disabled person's) problem."

According to representatives of the Southern Maine Association for Handicapped Persons, and the United Cerebral Palsy chapter office in Augusta,



lack of information about accessibility has been a problem for voters who are disabled. The law became effective October 1, 1975, and the real test of its effectiveness, they note, will come during the upcoming primaries and federal election.

Alternative Methods

In addition to the absentee ballot, an alternative method of voting being used in several states, in lieu of total accessibility, is "curbside" voting. If a physically disabled person is unable to enter a polling place without assistance, clerks or judges may present an official ballot to the voter at the polling place door.

A state law (California State Election Code 14423.5) providing for such methods of voting became effective January 1, 1976, in California. The new law uses permissive language in requiring that all possible efforts should be made to make polls accessible. However, mandatory language is used to require that, where polls are not accessible, absentee ballots can be brought to the poll on election day, or, if paper ballots are used, election officials can bring the ballot to the curb.

The problem of accessible polling places has become an increasingly major issue with groups working on behalf of the handicapped across the country. In Los Angeles County, California, for example, a task force comprised of representatives from the Southern California Rehabilitation Association, the Mayor's Commission on the Handicapped, the Department of Rehabilitation, and the County Registrar's Office, have been instrumental in having the county's polling booths redesigned for accessibility. According to Saralee Altman, a member of this task force, 2,000 booths will be made accessible for the June primary. The group's goal is to replace all booths within one and a half years.

Also as a result of efforts by the Los Angeles County task force, county officials choosing polling places now have a checklist which includes a set of measurements for accessibility. And, in information packets sent to every registered voter prior to the election, the national symbol for accessibility is printed on the form if a voter's designated polling place is accessible. The national emblem is also carried on a sign at the entrance to every accessible poll.

In Philadelphia alone . . . it is estimated . . . there may be as many as 300,000 potential handicapped voters who are not registered.

Probably the most discouraging barrier to political participation by handicapped persons, especially those persons who cannot get out of their homes to vote, even if polls were accessible, is the type of requirement made by state laws governing absentee ballot registration and voting procedures. Although these laws are designed to protect states from voting fraud, it is these measures which discriminate against the handicapped.

Many states, for example, require a doctor's statement and often notarization before a disabled individual can vote absentee. These statements can be expensive and difficult to obtain, and can be considered as another form of poll taxing.

An organization in the Philadelphia area known as VEEP (Very Exciting Education Program) is attempting to eliminate some of the difficulties involved in absentee ballot registration and voting for the physically disabled and elderly. A telephone information "hotline" has been established to outline the necessary steps in the filing of an absentee ballot. According to Edward Davenport, president of VEEP, doctors of elderly or disabled persons are being contacted to see if they will waive their fee for filling out the necessary forms. VEEP is also making sure that registrars go to the homes of the handicapped and elderly, and, that for those who are not confined to home and merely need transportation to the registrar's office, assistance is provided.

Few individuals or organizations, other than those working on behalf of the disabled, have attempted to remove voting barriers for the handicapped. Even the two major national political parties have done very little to facilitate the involvement of disabled individuals in the electoral process.

When asked what efforts Democrats were making to register potential voters who are disabled, a staff member of the Democratic National Committee responded by saying that "our job is to register Democrats." A staff person for the Republican National Committee noted that, although the Republicans recently ran a program aimed at registering "special groups," such as Blacks and Hispanics, handicapped persons were not included.

Although present registration and voting laws are not ideal, some states, such as Maine and California, are taking steps toward guaranteeing that the right to vote is the right of all Americans, regardless of their disability, and that restrictive requirements or architectural barriers will not prevent them from exercising this franchise.

A Case in Point: Selph, et al. v. Council of the City Of Los Angeles, et al.

January 8, 1974, Jacqueline Selph, a paraplegic confined to a wheelchair, and several organizations of disabled individuals in California, filed suit against the Council of the City of Los Angeles in the United States District Court for the Central District of California. This class action suit challenges the practice of locating polling places in buildings which are inaccessible to elderly and handicapped persons in the city of Los Angeles.

The suit was filed after Selph attempted to vote at her local polling place on May 29, 1973, in a general municipal election, and was unable to enter because of two cement steps.

This suit was based upon the equal protection clause of the 14th Amendment to the United States Constitution and upon California state statutes requiring accessibility in public accommodations and other places.

On February 13, 1975, the district court ruled against the disabled plaintiffs, stating that "a handicapped person has a constitutional right to vote, but he has no right to insist that city officials modify all polling places within the city so as to eliminate architectural barriers." In his memorandum, District Judge David W. Williams stated that the absentee ballot procedure was a reasonable alternative to full accessibility of polling places. The court refused to take jurisdiction of the claims made under California state law.

A notice of appeal was filed with the court on July 10, 1975. The National Center for Law and the Handicapped is preparing an *amicus curiae* brief

"There is a mountain of evidence which demonstrates that voters make up their minds late in the campaign."

in this case, presently pending in the United States Court of Appeals for the Ninth Circuit.

Defendants' Claims

The defendants in *Selph, et al. v Council of City of Los Angeles, et al.* claim that the criteria used in selecting polling places neither intentionally or unintentionally discriminates against the plaintiffs. They allege that wheelchair occupants are not denied the right to vote, and that if their assigned polling places do not have level access, the disabled person may vote by the alternative absentee ballot procedure or by personally casting a ballot on election day in the Office of the City Clerk.

According to the defendants, approximately 3800 polling places must be provided in order to cover the entire city of Los Angeles. They note that while high priority is given to soliciting public buildings, there are not enough of these available. At the present time, approximately 65 percent of all polling places must be in residences to comply with the requirement that polls must be placed as near as possible to the electorate they serve.

Defendants also note that approximately 100 polling places are located in residential garages. However, this has proven to be a great problem because of poor lighting and the absence of heating and toilet facilities.

Plaintiff's Contentions

The plaintiffs in *Selph, et al. v Council of City of Los Angeles, et al.* contend that, because architectural barriers block entry to the polls, physically handicapped persons are *totally* denied their right to vote. They also contend that the alternative absentee ballot procedures allegedly available to disabled voters are not adequate for several reasons.

First, the plaintiffs allege, the absentee ballot procedures operate irregularly because there has been no effort by the city to identify disabled voters and to inform them of the proper procedure for securing an absentee ballot. Additionally, even if handicapped voters know about the absentee procedure, there is frequently no opportunity for them to determine, before election day, whether or not their assigned polling places are inaccessible, thus necessitating an absentee ballot.

According to the opening brief submitted by the plaintiffs January 12, 1976, to the Court of Appeals, "Ms. Selph and all of plaintiffs' witnesses who are class members testified that on at least one occasion they did not know that their polling place was inaccessible until they arrived there to vote.

Such a right has long been recognized in the United States as fundamental. . . . Yet, certain classes of persons have been systematically deprived of the right to vote.

Because an absentee ballot must be obtained at least five days before the election, they were unable to vote either at the polling place or by absentee ballot and, thereby, were totally disenfranchised."

The plaintiffs also contend that since an absentee ballot must be mailed several days before the election, in order to insure that the ballot will be received in time for counting, disabled voters are deprived of the right to vote on election day, and make their decision on the basis of last minute impressions and information.

Mervin Field, an expert in the area of voter behavior and campaign practices, testified at the original trial that "There is a mountain of evidence which demonstrates that voters make up their minds late in the campaign." Field stated that a great number of voters make a final decision be-

tween Friday through election Tuesday, and ". . . a surprising number make up their minds at the last minute."

In addition, Field testified that if a voter makes a decision one week before the election, it is being made in a somewhat barren period. "I would have to be very attuned to the political process to make comfortable, solid choices that far in advance on a lot of races," Field said. "And it's atypical, and it's quite different than making it in the normal sense just before you vote on election Tuesday."

The plaintiffs also presented the testimony of C. Douglas Kranwinkle, manager of the gubernatorial campaign for Houston Flourney in California. According to the appellant's brief, Kranwinkle testified that 50 percent of their total advertising budget was spent during the last week of the campaign, and that the only televised debate between Flournoy and Governor Brown occurred on Sunday, three days before the election.

. . . even if handicapped voters know about the absentee procedure, there is frequently no opportunity for them to determine, before election day, whether or not their assigned polling places are inaccessible. . . .

Michael Steed, a political expert who testified for the defense, verified Kranwinkle's testimony.

Kranwinkle also testified that an opinion poll taken by his committee seven or eight days before the election indicated that Flournoy was seven percent behind Governor Brown, but during the last week that gap was closed to two and a half percent.

Field also testified, according to the brief, that persons who vote voluntarily by absentee ballot are particularly sophisticated voters and not typical of the voting public at large. Field described them, as a class, as financially well to do, well educated, and more conservative idealogically. He also said they are more mobile in the sense that they travel out of town.

An expert from the California State Department of Rehabilitation testified that the typical handicapped client assisted by the Department of Rehabilitation differed substantially from the typical voluntary absentee voter described by Field. Richard C. Wooten noted that for most handicapped individuals, mobility is nonexistent and economic resources are often limited.

Stigmatization of Handicapped

The suit also alleges that the absentee ballot procedure segregates and further stigmatizes handicapped people and that, contrary to the court's finding that accessibility to the handicapped would require "an unfair expenditure of huge amounts of money," additional expenses incurred in making polling places accessible would be minimal.

Finally, the plaintiffs contend that there is no evidence to show that accessible polling places cannot be found in each precinct without additional expense. Testimony presented by Walter C. Peterson, election supervisor, indicated that the city of Los Angeles had never attempted to investigate and locate accessible polling sites.

Chief of the Mobility Barrier Section for the State Department of Rehabilitation, Wooten testified that, in his opinion, polling places could be made more accessible very easily, and probably without cost.

"If the people going out and selecting polling places were to keep in mind the needs of the handicapped," Wooten testified, "I am sure that in almost any given area they could locate a fire station, public buildings, empty stores, garages, this type of facility that is level, easily enterable, that could be made into a polling place at probably no more cost than what is being spent right now." The only thing it's going to involve," Wooten stated, ". . . would be taking a little bit of time to educate the person who selects the polling place as to what to look for. . . ."

The plaintiffs in *Selph, et al. v. Council of City of Los Angeles, et al.* have asked the United States Court of Appeals for the Ninth Circuit to reverse the district court's decision. The plaintiffs are represented by attorney Mason H. Rose in Los Angeles.

Part II
Disenfranchisement – A Label Liability

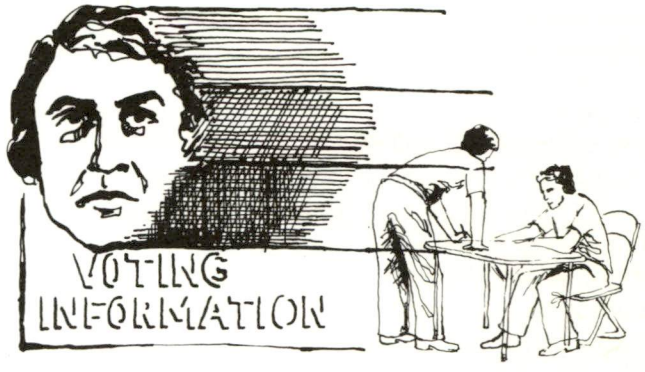
On October 3, 1974, 28 residents of the New Lisbon State School for the mentally retarded in New Jersey, presented themselves at the Woodland Township Clerk's office in order to register to vote. A week previously, five of their fellow residents completed voter registration forms which were held by the registrar.

On this day, however, the clerk refused even to allow the men to fill out the forms. The clerk claimed that they were barred from voting because they were residents of New Lisbon and, hence, were "idiots" under New Jersey law. The clerk also claimed that the men could not vote since they could not establish residency in the township for purposes of voting.

Francis Carroll, and two other residents who attempted to register, filed a class action suit in the Superior Court of New Jersey, Law Division, on October 23, 1974. A hearing was held at which the judge decided that the 28 men were entitled to register as long as they personally appeared and were able to answer the questions asked of all potential voters.

The Woodland Township Clerk, Carol Cobb, appealed this decision on May 9, 1975, and the case, *Carroll v. Cobb*[1], was decided February 23, 1976, in favor of the residents of New Lisbon State School on state law grounds. However, the Appellate Division of the Superior Court did not decide the federal constitutional issues involved.

Noting that the New Jersey statutes regarding the disenfranchisement of the mentally retarded are antiquated, the court held that a registration clerk had no discretion to reject a completed voter registration application. The court explained that the issue of competency cannot be dealt with by a voter registration clerk. Although the court stated that the residents' records were confidential and were not available to township officials, it conceded that legitimate inquiry could be made about the residents' "objective attachment" to the community for residential purposes.



In another case, two residents of a state operated facility for the mentally retarded in Massachusetts, who had been declared competent by a qualified professional, went to the Registry of Voters in the town hall of Belchertown where they attempted to register to vote. The registrar refused to permit the women to register, stating that because of their residency at the school, they were presumed to be under the "implied guardianship" of the state. Since persons under guardianship were not allowed to vote under state law, the two women were not permitted to register.

The residents filed a suit, *Boyd v. Peterson*[2], in the Supreme Judicial Court of Massachusetts, which was decided in October, 1975. The court held that voluntary residents of the Belchertown State School could not be precluded from registering to vote solely because of their residence in a state institution for the mentally retarded.

The holding was based on state law grounds, the court finding that state laws excluding persons under guardianship from voting did not preclude competent persons not under legal guardianship from voting. The court drew a significant distinction between incompetence, which may lead to the appointment of a guardian, and commitment or admission to a mental health facility. Again, the court did not determine the constitutional issues raised by the plaintiffs.

These two cases point out an important emerging legal issue – the right of the mentally retarded individual to vote. Such a right has long been recognized in the United States as fundamental, the basis of many of the other political rights citizens enjoy. Yet, certain classes of persons have been systematically deprived of the right to vote.

the standard for testamentary capacity, which is whether or not the voter can understand the nature of his act.

Various research studies conducted on the voting practices of mentally retarded persons have shown that, with proper instruction in the procedures of voting, the mentally retarded can and will exercise the right to vote.

Although such statutes are designed to protect the so-called "purity of the ballot box," they fail to define terms such as "idiot" or "moron," and offer little guidance in determining a standard of mental competency to vote.

The United States Constitution gives the states power to pass laws which set forth qualifications for voting, and from early times the states have restricted the franchise. Before the Civil War, the electorate by law was generally composed of white, property-owning males. Since the mid-19th century, sweeping changes in voting laws have opened the franchise to Blacks, women, and other minority groups. For the most part, the mentally retarded individual has not yet been included in this trend.

No Definition of Terms

Statutes in almost all 50 states contain sweeping provisions which deny the right to vote to "idiots, morons, and the feebleminded." Although such statutes are designed to protect the so-called "purity of the ballot box," they fail to define terms such as "idiot" or "moron," and offer little guidance in determining a standard of mental competency to vote. In practice, laws are often interpreted to exclude all mentally retarded individuals, whether they are severely or mildly retarded.

The courts have had difficulty in finding a workable definition of these statutory terms. Since the issue of mental competency is the key to any legal determination of the retarded individual's right to vote, some persons have suggested a standard of mental competency for voting, similar to

Institutionalized Face More Problems

It is evident that the mentally retarded voter who lives in an institution faces more obstacles than his counterpart who is fortunate enough to be living in the community. The mentally retarded voter residing in the community does not have the difficulties in proving residency as does an institutionalized voter. The resident of an institution will often be told he is not a legal resident of the county wherein the institution is located, and he must apply for an absentee ballot from his home county. However, under the requirements of many state absentee ballot laws, the institutionalized individual may not qualify for such a ballot. And because of the expense or impossibility of travel to his home county, he may be denied access to the polls.

Besides the competency and residency requirements, the institutionalized voter may find that the election officials claim that the state exercises "implied guardianship" over residents of facilities for the mentally retarded, thereby depriving such individuals of their right to register and vote. This argument, however, was strongly refuted by the court in *Boyd v. Peterson*, where it was emphasized that persons can only be deemed under guardianship after a hearing and judicial determination of incompetency.

An equally significant impediment to the exercise of the franchise is the mentally handicapped individuals' lack of information and knowledge regarding his right to vote and how to go about securing that right. Often, in schools and institutions, adequate background and understanding of basic civics is not provided.

Little has been done to alleviate the burdens placed on the mentally handicapped individual who wishes to exercise his right to vote. However, as courts, such as those which decided *Carroll v. Cobb* and *Boyd v. Peterson*, and legislatures are made more aware of the problem, effective changes will hopefully be made to secure this fundamental right for all handicapped persons.

1. *Carroll v. Cobb*, Nos. A-669-74 and A-1044-74 (N.J. Sup. Ct., February 23, 1976)
2. *Boyd v. Peterson*, No. 75-141 (Mass., October, 1975)

Guidelines for Increasing Voter Participation

Institutionalization alone does not automatically deprive mentally retarded or mentally ill persons of their right to vote. Unless the individual has been declared incompetent by a court of law, or placed under total personal guardianship in a judicial proceeding, the institutional resident should be presumed competent to vote.

However, while many institutional residents are not presently barred from voting, few exercise that right. In a 1974 survey of state laws and voter participation of the institutionalized mentally retarded, conducted by Gregory Olley and William J. Fremouw,[1] results showed that in 16 states, no mentally retarded person under the care of those states had voted. State agencies in many other states presumed that the retarded had voted, but no details were available. Five states reported organized programs for the retarded to register and vote in the 1972 national election.

Cleland, Swartz, McGaven and Bell conducted a mock election in 1973 which revealed that there is a great desire by the mentally retarded to engage in voting, and that voter education is important in their attempt to exercise this right. "The retarded, as well as some non-voting average citizens, have never received instruction in the fundamentals of the voting process," the researchers stated. "Voting is a social responsibility maintained through social interaction. Because this responsibility is learned," they emphasized, "there is justification for providing special instruction to the retarded."[2]

Given the opportunity to become involved in the voting process, the mentally retarded will be one step closer to normalization, a trend encouraged by the *Standards for Residential Facilities for the Mentally Retarded,*[3] recent court cases,[4] and federal law.[5]

A recent example of a successful voter education program in Vancouver, Washington, was reported in the January, 1976 issue of *Mental Retardation News,* published by the National Association for Retarded Citizens. According to the article, over 100 mentally retarded voters participated in a "Meet the Candidate" night sponsored by the Clark County Chapter, Washington ARC, of Vancouver. A vigorous effort by the unit's members and staff to inform its retarded citizens of voting processes, as well as a massive voter registration effort was made prior to the meeting.

The meeting, apparently, was the last and largest such function on the candidates' schedules and was attended by all office-seekers invited. According to the report, the husband of a mayoral candidate told ARC members, "I talked with one retarded man who knew more about the issues than most of the candidates." Plans are being made by the Washington ARC chapter to hold this type of function during each election year.

The following list sets out general steps that should be considered in conducting drives aimed at increasing voter participation. Its value will vary from state to state, depending on state law and existing resources.

REGISTRATION

1) Obtain a clear statement of the qualifications

necessary for a person to register to vote.
2) Find out if some of the residents have an option of where to vote, i.e., in the precinct in which the institution is located or in the precinct in which they lived before coming to the institution.
3) Find out the deadline for registration.
4) Find out the procedures for registration, i.e., must it be done in person or can it be done by mail? Will the official registrar visit the institution? (Note that residents should be encouraged to register in the same manner as other persons, for instance, at the city or county building, or at the local precinct on registration day.)
5) Inform residents about their rights to register and vote, and offer assistance, e.g., transportation, reading and writing, and aid in obtaining necessary documents.

Special Note: Investigate polling places to identify and eliminate physical barriers that will interfere with voting by physically disabled residents. Architectural barriers in polling places should be identified sufficiently in advance of election day to permit absentee balloting if it is not possible to eliminate the barriers. This will require examination of the absentee ballot laws.

EDUCATION

1) Instruct residents about the principles of democratic government, the role voting plays in the democratic process, and familiarize residents with the mechanics of voting, e.g., operating voting machines, marking ballots.
2) Insure that information about the issues and the candidates is readily available to residents, e.g., newspapers, magazines, partisan campaign literature, TV and radio, attendance at speeches and rallies. Some attempt to provide political information in a form that is comprehendable to residents should be made. However, if possible, the same information which is available to the general public should be made available to the residents in order to avoid the appearance or reality of censorship. Simplified versions should be provided in addition to, not as a substitute for the information provided to other voters.

ELECTION DAY ACTIVITIES

1) Assist residents with transportation to their polling places, or, prior to election day, in obtaining and returning their absentee ballots within established deadlines.
2) Provide information about election results to the residents.

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1. Olley, Gregory and William J. Fremouw "The Voting Rights of the Mentally Retarded: A Survey of State Laws." *Mental Retardation*, Vol. 12, 1 (February, 1974), pp. 14-16.
2. Cleland, Charles C., et al. "Voting Behavior of Institutionalized Mentally Retarded." *Mental Retardation*, Vol. 11, 4, (August, 1973), pp. 31-35.
3. *Standards For Residential Facilities For The Mentally Retarded*, Joint Commission on Accreditation of Hospitals, April, 1975.
4. *Covington v. Harris*, 419 F.2d 617 (D.C.Cir. 1969); *Wyatt v. Stickney*, 344 F.Supp. 373 (M.D. Ala. 1971); *Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D. Wis. 1972); *In re Anonymous*, 329 N.Y.S. 542 (N.Y.Sup.Ct. 1972); *Morales v. Turman*, 383 F.Supp. 53 (E.D. Tex. 1974); *Welsch v. Likins*, 373 F.Supp. 487 (Minn. 1974); *Horacek v. Exon*, No. 72-L-299 (D.Neb., 1975); *Hairston v. Drosick*, Civ. Act. No. 75-0691 CH (S.D. W.Va., 1976).
5. Developmental Disabilities Services and Facilities Construction Act, P.L. 91-517, as revised and amended by the Developmentally Disabled Assistance and Bill of Rights Act, P.L. 94-103, 42 U.S.C. 6001 et seq.

ATTORNEYS' FEES POSSIBLE

A provision in the 1975 amendments to the Voting Rights Act of 1965 makes it possible for a court to award attorneys' fees to the prevailing party in a suit based on the voting guarantees of the 14th or 15th Amendments to the United States Constitution. An attorney who brings an action on behalf of handicapped persons who have been denied their right to vote contrary to either the equal protection or due process clauses of the 14th Amendment should consider this Federal statute, which is as follows:

"In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."
P.L. 94-73, Title IV, sec. 402, Aug. 2, 1975, 42 U.S.C. Sec. 1973 1(e).

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