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VOL. 2 NO. 1 • DEC. 1976

Advocacy And the Low-Income Handicapped

- Combining Efforts
Through Outreach
- Facts About SSI

Amicus

VOL. 2 NO. 1 • DEC. 1976

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news

Architectural Barriers Act Amended

On October 18, President Ford signed into law Public Law 94-541, which amends the Architectural Barriers Act of 1968, pertaining to barrier-free design in federal buildings and facilities.

The purpose of the amendments is to impose what one congressional sponsor called "a clear statutory mandate that the federal agencies named in the act insure that public buildings are made accessible to the physically handicapped."

Specifically, the language of the new law states more forcefully and stringently than the old Architectural Barriers Act the federal government's obligation to accessibility. Where the old law provided that the administrator of general services and various cabinet officers were merely "authorized to prescribe" standards for accessibility, the new law directs that they "shall prescribe" such standards, and that such standards shall be adequate "to insure wherever possible" that handicapped persons will have access to, and use of, such buildings.

The new law also makes it clear that the buildings of the U.S. Postal Service are covered

by the federal architectural barriers laws.

Additionally, the law requires annual reports to Congress by the General Services Administration on the status of federal activities related to the Architectural Barriers Act. It also imposes on the agencies charged with enforcing the act the obligation to conduct a system of continuing surveys to insure compliance.

UMTA Issues Further Regulations Regarding Accessibility

On October 18, the Urban Mass Transportation Administration (UMTA) announced further regulations to carry out the federal statutory requirements to bring about accessible transportation services for disabled persons.

The new regulations, entitled "Completion of Transit Bus Requirements", are intended to "complete and clarify" portions of the April 30, 1976 accessibility regulations and also effectuate the August 2 UMTA Policy Statement.

The April 30 final regulations mandated the manufacture of wheelchair level change devices to be used at the option of transit systems, and an eight inch step riser height requirement for transit buses. The August 2 Policy Statement announced the intention to specify a February 15, 1977 effective date for those

requirements, and mandated a 24 inch floor height requirement.

The latest, October 18 statement now effectuates those requirements. It should be noted, however, that the October 18 announcement mistakenly specifies February 15, 1976, as the effective date for these requirements.

Background to UMTA Regulations

On April 30, UMTA announced "final regulations" to implement its responsibility under federal law requiring efforts by UMTA and recipients of federal funds to make public transportation services accessible to handicapped persons. (Reported in *Amicus*, July 1976.) The thrust of the April 30 regulations was to illustrate "a level of effort that will be deemed to satisfy this requirement with respect to wheelchair users and semi-ambulatory persons," rather than to specify a mandatory program designed to meet federal accessibility requirements.

Included in the illustrated examples given in the April 30 regulations were: a program for handicapped persons "involving expenditures of five percent of the funds a local area receives

under the principal UMTA fundings formulas"; purchase of only wheelchair-accessible buses until one-half of the fleet is accessible, or, in the alternative, provision of substitute services that would provide comparable service; or some other type of accessible system which would assure wheelchair users and semi-ambulatory persons 10 round-trip rides per week at fares comparable to mainline service.

UMTA, however, deferred decisions on the floor height requirement and its effective date, the wheelchair accessibility options, and the eight inch front step riser requirement.

Transbus Not Mandated

In its August 2 announcement, UMTA indicated that the "major objectives of the Transbus program have been met" and that it "would not mandate Transbus specifications for federally funded purchase of buses." This decision has provoked sharp criticism of UMTA by groups of disabled individuals.

UMTA stated that it based its decision on cost and feasibility factors. It also stated that a lower bus floor height "will continue to be a policy objective for the UMTA program," and that manufacturers willing to try further modification would receive UMTA support.

The new October 18 regulations effectuating the April 30 and August 2 requirements apply only to new, standard, full-size

urban transit buses to be used principally in normal local transit service.

Lawsuit Develops

In a development related to the UMTA action on Transbus, one major bus manufacturer, AM General Corporation, has brought suit against the Department of Transportation (DOT) partially on the basis of the Transbus decision.

AM General alleges in its suit filed in federal district court in Washington, D.C., that DOT and UMTA have adopted policies favoring General Motors. They contend that such policies are discriminatory and have the effect of excluding other manufacturers from participating in federally funded transit programs.

In proposed finds of fact submitted to the court by AM General, one example given of DOT-UMTA favoritism of GM was the UMTA policy on transbus, which AM General alleges was unduly favorable to UMTA.

On September 2, Judge Charles Richey granted an order restraining further action by DOT and UMTA in respect to AM General's complaint until the case is decided.

Disability Rights Group Addresses Problems With Section 501

When Congress enacted the Rehabilitation Act of 1973, the federal government committed itself to implementing a program of affirmative action hiring for the disabled. Section 501 of this Act specifically mandates that federal agencies and departments engage in programs of affirmative action hiring for the disabled.

However, a great deal of concern has been expressed about the implementation efforts of many federal departments. One agency seeking to address problems with Section 501 is the Disability Rights Center, a non-profit public interest corporation which began work in August of this year.

Funded by grants from Ralph Nader and the Max and Anna Levinson Foundation, the Center is currently involved in soliciting information from disabled persons across the country who have had problems in attempts to gain employment within the federal civil service. The Center is requesting specific information, including dates, identification of the agency involved, a brief description of the problem and how it developed, and other relevant material. All information will be kept confidential and will be compiled to assist them in identifying major problem areas.

According to the Disability Rights Center, most large agencies have at least one fulltime staff

person to administer the Equal Employment Opportunities (EEO) Program, which deals with the employment of women, Blacks, Spanish-speaking and other minority groups. However, the same agencies rarely provide a fulltime staff position for the enforcement of Section 501. Sometimes an agency will report as little as five percent of a full-time position spent on enforcement of the program, the Center notes.

No Complaint Procedure

One major problem for disabled individuals who feel they have been discriminated against by such agencies, is that no complaint or grievance procedure has been issued by the Civil Service Commission, the agency responsible for implementing Section 501. At the present time, final decisions regarding a complaint rests with each agency.

Although a complaint procedure exists for those protected by other civil rights legislation, the disabled in federal employment matters are not presently covered by either the Civil Rights Act of 1964, or by the EEO grievance procedure established to protect other minority groups. This means that a disabled individual alleging discrimination in federal employment currently does not have the right to appeal to the Civil Service Commission or to take a complaint to court in disputing an agency's action.

Agency Has Final Authority

In hearings before the Senate Subcommittee on the Handicapped May 5, 1976, John R. Ottina, assistant secretary for administration and management, Department of Health, Education, and Welfare, testified that the Civil Service Commission delegated to the agency the final authority on grievances. "That delegation," Ottina stated, "is what makes it impossible for the person to appeal to the Commission, because the agency has final responsibility." In response to questions by Senator Harrison Williams, Jr., Ottina said there is no legal prohibition preventing this process, and it depends on what action the Commission recommends in handling complaints.

In the same hearing, Hedwig Oswald, chief of Selective Placement Programs for the Commission, testified that legislation may be required to tie down the relationship between the administrative procedures and the judicial.

"Part of the problem in discrimination complaints by handicapped individuals," Ottina explained, "is that at some period in time they may have been denied an opportunity. In the case of findings like that, again using race as an example, we are able to take very specific actions that are authorized by law, including

back pay. If we wish to afford handicapped individuals the same type of protection, we would need that same kind of authorization."

At the May hearings, Oswald told the Senate subcommittee that the Commission would have something prepared shortly regarding the appeal process under Section 501.

Issue Paper Expected

At the end of October, Pat Tobin, senior program assistant with the Office of Selective Placement Programs for the Commission, told NCLH that an issue paper containing the findings and recommendations regarding a procedure would be presented to the Commissioners within the next three weeks.

Tobin said the findings reveal that new legislation is necessary in order to give the Commission the power to award back pay and to seek further remedies through the courts. However, if the Commissioners agree with the recommendations and the need to propose new legislation, the process will be further delayed until Congress reconvenes.

While the Disability Rights Center does not have the resources to represent individuals with complaints, they will provide information regarding the operation of the present system and the steps an individual can take to protect his or her rights under the law.

Based on its research activities, the Center will attempt to remedy widespread problems by conducting negotiations with agencies, publicizing the major issues, and when necessary, pursuing a remedy in court. The Center intends to issue a final report at the end of its first year of operation.

The Center will also be conducting research into the availability of consumer protection legislation to protect the rights of disabled consumers who must use such products as wheelchairs, leg and arm braces, prosthetic limbs and breasts, walkers, canes, crutches, home respiratory devices, and hearing aids.

Complaints regarding the quality of such products, pricing, sales practices, availability of warranty repair work, or injuries resulting from faulty construction, as well as employment information, should be sent to the Disability Rights Center, 1346 Connecticut Avenue, NW, Suite 1124, Washington, D.C. 20036, or phone (202) 223-3304.

SSI Amendments Signed into Law

The 94th Congress approved several new amendments to the SSI program which President Ford has signed into law.

The amendments include Public Law 94-566 dealing with community residences, services for disabled children, deeming of income, and medicaid eligibility.

PL 94-569 concerns home ownership and presumptive eligibility.

Finally, SSI interim assistance, food stamp eligibility, and pass-through are involved in PL 94-585.

For further information on these amendments, refer to the Special Report section of this issue.

Child Count Regulations Issued by BEH

Proposed regulations concerning "child count" for purposes of funding under the Education of All Handicapped Children Act (Public Law 94-142) were issued September 8, in the *Federal Register* by the Office of Education, Bureau of Education for the Handicapped, Department of Health, Education and Welfare.

PL 94-142 contains extensive amendments to the Education of the Handicapped Act (PL 93-380). These amendments include provisions which are designed to assure that all handicapped children have available to them a free public education, to assure that the rights of handicapped children and their parents are protected, to assist states and localities to provide for the education of all handicapped children, and to

assess and assure the effectiveness of efforts to educate such children.

Although most of the amendments are not effective until October 1, 1977, two requirements on reporting numbers of handicapped children required action on the part of the commissioner and the state educational agencies beginning October 1, 1976.

The two requirements are 1) assurance by the commissioner that each state provide certification of the actual number of handicapped children receiving special education and related services in that state by November 29, 1976; and 2) that the count must be made by averaging the number of children receiving special education and related services on October 1 and on February 1 of the fiscal year preceding the fiscal year for which the determination is made.

According to the latter requirement, children must be counted on October 1, 1976, and on February 1, 1977. The proposed regulations were drafted so that the count obtained on October 1, 1976, could also be used for the certified count required by November 29, 1976.

Definitions Revised

The proposed "child count" regulations revise the existing definition of "handicapped children" to conform to the language of PL 94-142 and to require that

qualified professionals evaluate all handicapped children.

Additionally, the separate definitions for "seriously emotionally disturbed" and "children with specific learning disabilities" would be deleted and made part of the definition for "handicapped children."

The proposed regulations also clarify the definition for "special education" to distinguish it from regular educational programming and to interpret the requirement that it be "at no cost to parents or guardians."

Issue Areas Discussed

In proposing the regulations, the Office of Education pointed out several significant issues. One question which needs to be clarified is whether a handicapped child may be counted if he or she is receiving a) only "special education," or b) only "related services".

The statutory definition of "related services" is limited to "services as may be required to assist a handicapped child to benefit from special education."

According to the proposed regulations, the child must be receiving special education and related services, if related services are necessary for the child to benefit from special

education, in order to be counted.

If related services are not necessary, however, a child receiving only special education can be counted. If related services are necessary, but not available, the child cannot be counted. And if a child is receiving only a related service and is not receiving special education, he or she cannot be counted.

Private vs. Public

Another issue in question is whether children may be counted if their special education is paid by a private source, other than a parent or guardian, or by a public agency, other than a state or local educational agency.

The proposed rules take the position that they can be counted, noting that the counting requirements appear to relate to all handicapped children receiving special education and related services in the state.

Also pointed out in the proposed regulations is the question of whether or not children at the postsecondary education level may be counted.

According to the regulations, the statute places no limitation on their being counted if they are receiving special education and related services.

Regulations implementing the remaining sections of PL 94-142 are projected to be published in the *Federal Register* of December 31, 1976.

SCRTD Purchases Accessible Buses From AM General

The Southern California Rapid Transit District (SCRTD) has signed a contract with AM General of Wayne, Michigan, for the purchase of 200 accessible buses. The SCRTD Board of Directors approved the purchase October 13, after receiving bids from AM General, Rohr-Flexible, and General Motors.

The purchase climaxed a two-year District campaign to persuade major U.S. bus manufacturers to meet RTD specifications.

The lift-equipped buses will accommodate the public transportation needs of an estimated 350,000 disabled people in Los Angeles County.

Equipped with doors 32.5 inches wide between the grab bars, the buses will "kneel" at stops, lower the front door lift to the curb or street level, and the wheelchair passenger will roll onto the lift.

The standard high floor buses bid also included space and securement for at least two wheelchairs.

Purchase price for the buses is \$16,181,000. The Urban Mass Transportation Administration will provide \$4 for each \$1 paid by the RTD.

Delivery of the first bus is expected about seven months

from the beginning of construction in January, 1977. The entire 200 buses are expected two months later.

In October of 1974, the RTD Board of Directors passed a resolution that any new buses purchased must be accessible to the elderly and the handicapped.

NCLH Holds Conference To Plan Judicial Manual

A conference-workshop of judges, attorneys, and others involved in the area of mental health was conducted by the National Center for Law and the Handicapped (NCLH) November 20 in Chicago.

The nine-member panel met with NCLH staff to discuss areas of concern to courts in institutionalization proceedings for persons alleged to be mentally disabled.

The Center sponsored the workshop as background for the preparation of a judicial manual which will contain information regarding the legal, social, and scientific issues which should be considered in conducting such proceedings.

Serving as panelists in the workshop were Honorable David L. Bazelon, chief judge of the U.S. Court of Appeals for the District of Columbia; Honorable Joseph Schneider, of the circuit court in Cook County, Illinois; Honorable Maurice Cohill of the Federal District Court for the Western District of Pennsylvania;

and Honorable P. Charles Jones, circuit court judge for Dane County, Wisconsin.

Also attending as panelists were Robert Plotkin, Esq., a staff attorney with the Mental Health Law Project; Frank Laski, Esq., staff attorney, Public Interest Law Center of Philadelphia; Harry Fulton, Esq., an attorney with the Public Defender Service of St. Elizabeth's Hospital in Washington, D.C.; and Dolores Norley, special consultant to the President's Committee on Mental Retardation.

NCLH Comments on Proposed DD Regulations

Proposed regulations implementing provisions of the Developmental Disabilities Services and Facilities Construction Act of 1970 (Public Law 91-517), as amended by the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (PL 94-103), were published in the *Federal Register* of August 30, 1976. (Reported in *Amicus*, September 1976.)

The Act is designed to assist states in developing a comprehensive plan to increase the provision of quality services to

persons with developmental disabilities.

The following are selected comments regarding the proposed regulations which the National Center for Law and the Handicapped (NCLH) submitted to the Developmental Disabilities Office, Office of Human Development, Department of Health, Education and Welfare.

Section 504

NCLH notes that Section 504 of the Rehabilitation Act of 1973 is noticeably absent in the proposed regulations. Because Section 504 was intended by Congress to be a civil rights act for the handicapped, federally financed programs must be implemented with that provision in mind. Therefore, NCLH suggests that Section 504 be incorporated into the regulations and should prevail over any interpretation of the policies and procedures.

Although the proposed regulations provide for a reasonable volume of services to be furnished to persons unable to pay, NCLH objects to the implication that only a limited and select volume of services will be provided to the poor. The Center recommends that the Act guarantees services regardless of a person's ability to pay, in compliance with Section 504, as well as the constitutional right of equal protection.

The Center also opposes the incorporation of the architectural standards of the American

National Standards Institute, Inc. (ANSI). That proposed regulation may lend itself to policies which may result in the segregation of handicapped individuals. NCLH believes the regulations should state categorically that accessibility and usability of facilities is mandated by Section 504 and will be required by the Department in its enforcement of any architectural standards.

The ANSI Standards or any other building code, the Center claims, may not assure full accessibility and, therefore, should not be accepted as final authorities. Even if the ANSI standards are followed, compliance still may not result in accessibility. Furthermore, ANSI is a private organization and faces no penalty if inaccessibility results.

The Center further recommends that the ANSI standards should be promulgated in the *Federal Register* before becoming

effective, and public comment should be invited. In addition, NCLH suggests the formation of a committee to continually update the standards, with the ultimate goal of a barrier free environment.

State Planning Council

The Act provides for the establishment of a state planning council to supervise state plans and to serve as an advocate of the developmentally disabled. NCLH is concerned that the council should be as free as possible from political influence. The Center, therefore, suggests that the regulations specify the removal of members "only for good cause".

Alternative suggestions offered for establishing the council's independence include: 1) terms of office for council

members longer than that of the governor, 2) removal by two-thirds consent of the legislature, 3) members appointed by the assembly from the governor's list or vice versa, and 4) notice and hearing before a designated state official before removal.

Advocacy Program

NCLH is also concerned with the independence of the advocacy program which the Center considers to be one of the most important provisions of the Act. In order to assure its independence, NCLH recommends that the governor may designate the agency to administer the program, but thereafter it should be independent of the governor's office. Ohio's advocacy program was offered as a model which demonstrates how independence can be assured.

The advocacy program should not be limited to those who are receiving treatment, services, or habilitation, as stated in the proposed regulations, but should benefit all developmentally disabled persons in need of services.

Moreover, the regulations should specify the various functions of an advocacy system which exist to protect the rights of the developmentally disabled. Those functions may include representing individuals or organizations, providing information, engaging in legislative advocacy, conducting training sessions, negotiating with appropriate agencies, and appearing as *amicus curiae*.

CHANGE OF ADDRESS

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Also, if you are aware of *Amicus* being sent to an individual who no longer is employed with your organization, please let us know. This will help us to avoid unnecessary duplications wherever possible.

Thank you for your help.

Less Restrictive Environment

Further recommendations in the area of advocacy focus on protecting and advocating the rights of the disabled who are residing in institutions, as well as those residing in the community. Emphasis in the advocacy systems should be placed on preventing the institutionalization of those who may be cared for in a less restrictive environment. The advocate should represent the rights of the developmentally disabled in such matters as zoning, landlord and tenant issues, consumerism, criminal law, and all due process issues.

Furthermore, the advocacy program, although emphasizing legal advocacy, should not exclude lay, parental, or other professional advocacy programs.

In addition, NCLH objects to the unrealistic minimum annual allotment of \$20,000 for the advocacy program which, the Center notes, requires at least one attorney for every 150,000 people.

The Center suggests that if a state plan does not comply with federal requirements, benefits should be limited to those sections of the state plan which meet the requirements. Furthermore, no benefits should be provided unless an advocacy program exists by October 1, 1977, which also meets federal requirements.

Final Revisions to ANSI Standards Due in January

Final revisions to the American National Standards Institute (ANSI) Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped (A117.1) are expected to be submitted to ANSI January 1, 1977.

Under the direction of Edward Steinfeld, revisions to the ANSI standards are being drafted by a committee at the Syracuse University School of Architecture Research Office.

According to the ANSI procedures for management and coordination of American National Standards, a 60-day public comment period will be held as soon as the final revisions are received from the Syracuse University committee. A notice of this comment period will be published in the Institute's bi-weekly publication, *Standards Action*.

Anyone interested in receiving a copy of the revised standards and submitting comments should write to the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018.

Legislation — Federal and State

FEDERAL LEGISLATION Public Law 94-375 Housing Act Amendments

The amendments allow additional loans for low-cost housing for the elderly and handicapped over the next three years. Averaging approximately \$2.5 billion a year, the loans are expected to result in construction of 30,000 units annually. Provision is also made for a lower interest rate for nonprofit sponsors of the housing, which would result in lower rental costs to the elderly and handicapped.

In addition, the law exempts housing subsidy payments as income for Supplemental Security Income (SSI) purposes. The housing payments, therefore, will no longer reduce monthly SSI payments.

Public Law 94-439 Labor - HEW Appropriations

The law specifies that \$90 million which was appropriated in the Second Supplemental Appropriations Act of 1976 (PL 94-303) will remain available through September 30, 1977. The funds, allotted in May, 1976, for state grants for education of

the handicapped, were not spent by the Office of Education prior to September 30, 1976, when they were scheduled to expire.

The Office of Management and Budget had withheld the \$90 million when President Ford proposed that the appropriation be cancelled. Ford vetoed the Labor-HEW bill September 29, leaving Congress only one day to override the veto in both houses.

Public Law 94-471 National Science Foundation (NSF) Authorization Act of 1977

Amendments to the Act contain special provisions for handicapped persons. The law allocates \$500,000 in part "to encourage and assist. . . handicapped individuals to undertake and to advance in careers in scientific research and science education."

Provision is also made for special recruitment programs for handicapped individuals. NSF is directed to intensify its search for qualified handicapped individuals to fill executive level positions in the agency and positions on advisory committees and panels.

Public Law 94-401 Social Services Amendments

The amendments to Title XX of the Social Security Act permit social services for the blind, elderly, and disabled on a "group eligibility" basis. If it is

determined that substantially all of the residents of a certain area have income below 90 percent of the state's median income, the income of any particular individual is not considered.

Public Law 94-559 Attorneys' Fees

Under this law, judges are now authorized to award payment of attorneys' fees to the winning parties in lawsuits brought under a variety of civil rights laws, including Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The new law allows both plaintiffs and defendants who win to ask for and be granted payments for their costs of going to court.

The bill was passed following a decision by the U.S. Supreme Court that judges do not have discretion to award attorneys' fees unless the statute under which the suit is brought specifically authorizes such payment.

STATE LEGISLATION Maryland

A new law prohibits employers from asking questions about an applicant's psychiatric or psychological condition or

treatment unless the question has specific bearing on the prospective employee's ability to do a particular job. The law is intended to prevent employers from using irrelevant health-related questions to deny an equal employment opportunity to applicants. A physician is permitted to evaluate whether an individual is fit for a job.

Tax Break Granted For Removal of Architectural Barriers

Included among recent changes made by Congress in the Tax Reform Act of 1976 is a provision granting a deduction for the cost of removing architectural and transportation barriers for handicapped and elderly persons.

The new section of the tax code, originally proposed by Senator Dole, and later supported by Senator Mondale, provides an elective current deduction for the removal of architectural and transportation barriers to handicapped (including deaf and blind persons) and elderly persons (age 65 or over) in any facility or public transportation vehicle owned or leased for use in a trade or business. Deductions are limited to \$25,000 for a taxpayer for any taxable year.

To qualify for the deduction, the barrier removal must satisfy the standards of the Secretary of the Treasury. In cooperation with the Architectural and Transportation Barriers

Compliance Board, the Secretary is required to establish those standards within 180 days after the Tax Reform Act became law.

The provision for the deduction applies to taxable years beginning after December 31, 1976, and ending before January 1, 1980, and is found in Section 1323 of the Tax Reform Act of 1976 and Section 190 of the Internal Revenue Code.

Publications

Access to America — Monograph Number One, published by the Michigan Center For A Barrier Free Environment. A compendium of federal and state legislation pertaining to the removal of environmental barriers affecting persons with mobility limitation, including curb cuts, license plates, transportation, architectural barriers, and polling places. 309 pages. \$15 including postage. Write: Michigan Center For A Barrier Free Environment, 22646 Woodward Avenue, Ferndale, Michigan 48220.

Thinking/Learning/Doing Advocacy: A Report on the National Advocacy Project of United Cerebral Palsy Association, Inc. This report shares the knowledge gained through the UCPA project, and attempts to help UCP affiliates and others to examine and come

to grips with their advocacy role in protecting the rights of persons with developmental disabilities and insuring that the service delivery systems meet the needs of these persons.

Free. Write: United Cerebral Palsy Associations, Inc., 66 East 34th Street, New York, New York 10016.

Legal Challenges to Behavior Modification: Trends in Schools, Corrections and Mental Health by Reed Martin. Reviews current legal developments affecting many behavior modification programs and services rendered by schools, correctional institutions, and mental health facilities. Also presents steps for implementing a behavior change program, from the decision to intervene through final record keeping. 179 pages. \$5.95. Write: Research Press, 2612 N. Mattis Avenue, Champaign, Illinois 61820.

Freedom of Choice: Report to the President and to the Congress on Housing Needs of Handicapped Individuals, Volumes 1 and 2. Published by the Architectural and Transportation Barriers Compliance Board. Volume 1 contains a summary of the testimony from the board's public hearing on housing for handicapped individuals held in June, 1975; general information, and recommendations. Volume 2 is an edited transcript of the testimony. Free. Write: Architectural and Transportation Barriers

Compliance Board, Washington, D.C. 20201.

Washington Liaison and Attorney Join NCLH Staff

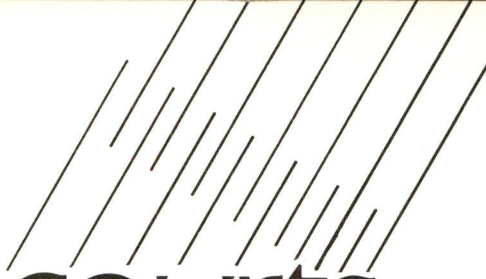
Thomas H. Countee, Jr., legislative counsel in the Office of Management and Budget, Executive Office of the President, has been named as Washington liaison for the National Center for Law and the Handicapped (NCLH).

A quadriplegic, Countee is also currently serving as general counsel for New Life, Inc., a Washington, D.C. minority organization which promotes employment and recreation counseling to disabled persons.

As Washington, D.C. liaison, Countee will establish contacts and coordinate NCLH efforts with legal advocacy and consumer-provider organizations in the D.C. vicinity.

New Attorney Appointed

Joining the NCLH legal staff is Brian J. Linn, Esq. Linn served as a staff attorney with Legal Services for Northwestern Pennsylvania, working primarily with the Mental Health-Mental Retardation unit of the Pennsylvania program. He has also been actively litigating issues relating to benefits denied to physically handicapped persons.



in the courts

***Colorado Association
for Retarded Citizens,
et al. v. State
Department of
Education, et al.***
No. C-4620 (D. Col.)

After more than three years of litigation, the plaintiffs in the Colorado Association for Retarded Citizens "right to education" lawsuit voluntarily moved to dismiss the case. The three-judge federal court panel hearing the suit has granted their request for termination.

The case, which began in December, 1972, was a major factor in bringing about the passage of Colorado's Handicapped Children's Education Act in 1973. The Act specifies "the obligation of the state of Colorado to provide educational opportunities to all children which will enable them to lead fulfilling and productive lives."

While the plaintiffs recognize that there are continuing problems in the implementation of appropriate educational programs for handicapped children, they determined that the federal court was not the best forum to bring about further changes.

The federal court had continually urged the parties to voluntarily work out plans and procedures for implementation of the Colorado Act. At the same time, the court rejected attempts by the defendant school districts and the State Board of Education to dismiss the case merely because of the passage of the Colorado Act.

The court held in June, 1974, that the "mere enactment of legislation without actual implementation" would not satisfy the claims asserted by the plaintiffs in the suit.

In October, 1975, the court emphasized that "the importance of meaningful education for handicapped children within the state will not be ignored." The plaintiffs felt that such stern judicial pronouncements, together with the passage of the Colorado Act, had the effect of getting Colorado school authorities moving in the right direction to meet the needs of handicapped children.

One source of continuing controversy will be regulations adopted by the State Board of Education to implement the Colorado Act. Questions were raised by NCLH, an *amicus curiae* in the case, concerning compliance of the regulations with federal law, and concerning provisions which may lead to misclassification of children as handicapped and to undue segregation of disabled students. Aspects of the due process procedures were also questioned by NCLH.

Counsel for plaintiffs expressed the hope that in the future these problems may be worked out directly with the state board and through the resolution of individual case situations.

***Kruse, et al. v.
Campbell, et al.***
**No. 75-0622-R
(E.D. Va.)**

In *Kruse, et al. v. Campbell, et al.*, a three-judge district court for the Eastern District of Virginia ruled in favor of the plaintiffs' petition alleging that Virginia's system for providing special education tuition grants for handicapped children is unconstitutional.

In its order of September 9, 1976, the court directed the plaintiffs to submit a new plan for tuition reimbursement.

The suit, filed December 1, 1975, contends that the present system denied "handicapped children of poor parents the ability to obtain an appropriate education, when such is not available in the public schools, except if the parents agree to relinquish custody of their children to the welfare department."

Plaintiffs in this class action suit are all disabled children and their parents who have been or will be eligible for tuition assistance grants, but who are unable to pay the proportional costs of an appropriate, private education, not covered by the grants, due to lack of financial resources.

Defendants include the superintendent of the Virginia Department of Education, the division superintendent of the Fairfax County School Board, the Virginia Department of Welfare commissioner, and the director of the Fairfax County

Department of Social Services, individually and in their official capacities.

The Virginia system provides state tuition grants to parents of "certified" handicapped children for 75 percent of the actual tuition charged for placement in an "approved" private educational program. Under the Virginia Code, the grants need only conform to statutory maximums: \$1,250.00 for placement in a nonresidential facility and \$5,000 for a residential school.

High Tuition Costs

However, according to the complaint, "the great majority of 'approved' private schools charge more for tuition than the maximum reimbursement grant allows . . . usually as much as \$2,000 to \$3,000 in excess of the state tuition grant, and many times it is even more."

All parents receiving such grants must pay a minimum of one quarter of the tuition and, the complaint alleges, in most cases considerably more. For children of parents who do not have the finances to meet these costs, this means no education.

Although the local Department of Public Welfare will provide the full cost of an appropriate, private educational placement for children whose parents cannot afford their share

of the tuition cost, the department will only do so if the parents give up custody of their child. The plaintiffs point out in their complaint, however, that this policy "has the direct and unnecessary effect of causing a disintegration of family stability and integrity and serves only to deny to the affected children that which they need the most: a stable and loving relationship with their parents."

Plaintiffs alleged that the Virginia system violated the First, Ninth and Fourteenth Amendments to the U.S. Constitution, as well as Section 504 of the Rehabilitation Act of 1973, and the Social Security Act.

In the Plaintiffs' Memorandum Respecting Relief, submitted according to the court order, the plaintiffs reinforce their request for a declaration that defendants are obligated, under the equal protection and due process clauses of the 14th Amendment and Section 504 of the Rehabilitation Act of 1973, to fully fund an appropriate, private education as long as an appropriate public education is not available.

Plaintiffs define full cost as the total charges of the private school, including, but not limited to tuition, psychological, psychiatric, and other specialized services required to provide an appropriate education program, transportation, and, for residential schools, room and board.

In addition, the memorandum asks the court to declare that the welfare defendants provide, without requiring custody, the full costs of an appropriate,

private education, for as long as an appropriate public education is not available. This request includes those children who have already been placed in foster care for such purposes.

Custody Issue Emphasized

Plaintiffs emphasize in their memorandum that "the custody issue presents a grievous problem requiring the most expeditious action and no local department should be allowed to delay the return of custody to parents while attempting to secure funding from school authorities."

The plaintiffs also request "injunctive relief requiring the education defendants to provide to plaintiffs and the class they represent the full funding to which they are entitled under the requested declaratory judgment."

The memorandum also calls for the court to order the state education defendants to provide full funding for the current and future school years, and to submit to the court a plan for carrying out this funding. Plaintiffs stipulate that such a plan include procedures for enforcing full and timely compliance on the local level. They also note that the plan should provide for full state funding should local compliance be delayed.

***Simon v. St. Louis
County Police
Department, et al.***

No. 76-963C (2)

(E.D. Mo.)

and

***Carmi v. The
Metropolitan St. Louis
Sewer District, et al.***

No. 76-934C(3)

(E.D. Mo.)

Two lawsuits have recently been filed in St. Louis on behalf of handicapped individuals alleging discrimination in employment practices by the St. Louis County Police Department and The Metropolitan St. Louis Sewer District.

Both cases have been filed in Federal Court for the Eastern District of Missouri.

The plaintiffs charge that the discriminatory practices violate the 14th Amendment due process and equal protection clauses, in addition to federal civil rights statutes, including the anti-discrimination provisions of the Rehabilitation Act of 1973, Sections 503 and 504.

In *Simon v. St. Louis*, Gary E. Simon, a former policeman who was paralyzed when shot in the line of duty in 1971, asserts that he went through "extensive rehabilitation" after his injury. In January, 1976, he requested that the police department "re-hire him in his previous position together with reasonable accommodations for his paraplegia."

The complaint alleges that the police department refused to rehire him in his previous position "solely" because of his handicap.

Simon argues that the department's refusal was illegal, not only because of the Rehabilitation Act's prohibition of discrimination by federal contractors and recipients of federal funds, but also because the determination not to hire him was arbitrary and unreasonable in that his medical condition would not interfere with his ability to perform the job for which he applied.

Simon's attorney indicated that the purpose of the lawsuit was to secure for Simon an administrative position in the police department, but with the rank and salary of a police officer. Simon requests, in addition to reinstatement to the police department, lost wages resulting from the alleged discriminatory action.

Carmi v. St. Louis Sewer District

In the second case, Paul D. Carmi, a pernal palsy, sought employment with the Metropolitan St. Louis Sewer District as a storekeeper in a plant operated by the District. The District's subsequent refusal to hire him, Carmi alleges, was based "in whole or in part upon plaintiff's diagnosed condition of pernal

palsy." He asserts that his medical condition "in no way interferes with his ability to perform the job for which he applied and for which he was otherwise qualified." Carmi's legal arguments against the defendants are similar to those made by Simon.

The plaintiffs in both cases are being represented by attorneys with the Legal Aid Society in St. Louis.

***Smith and Doe v. U.S.
Postal Service***

No. 76-2452-S

(D. Mass. 1976)

This employment discrimination suit was initiated by two mentally retarded postal workers on behalf of all physically and mentally handicapped persons employed by the defendant, the United States Postal Service.

The complaint, filed June 21, 1976, in the U.S. District Court in Massachusetts, charges the postal service with depriving the employees of their seniority rights, and consequently their job security, solely because of their handicap.

The plaintiffs' claim they were not permitted to accrue seniority until having worked with the postal service for over six years.

Although John Smith and James Doe began work on May 29, 1967, and June 6, 1966, respectively, they were not allowed to accrue seniority rights until September 29, 1973. Because of their low seniority status,

the plaintiffs were placed within a group of the 56 most-junior employees who were all removed from their positions at the South Postal Annex in Boston. On April 24, 1976, Smith and Doe were moved from full-time mail-handlers earning \$511.92 every two weeks, to jobs as part-time handlers earning only \$31.80 every two weeks.

The plaintiffs allege that if the postal service had not discriminated against them because of their handicap, they would not have been included within the group of most-junior employees and would not have lost their positions.

Rehab Act Cited

The complaint asserts that the discriminatory treatment is in violation of the Rehabilitation Act of 1973 which mandates affirmative action programs in hiring, placement, and advancement of qualified handicapped individuals in federal agencies.

The plaintiffs also claim a cause of action under the Postal Reorganization Act of 1970, and the federal regulations governing the treatment of handicapped persons in the federal service.

The postal service, the plaintiffs allege, also violated their constitutional right to equal protection based upon the due process clause of the Fifth

Amendment to the U.S. Constitution. The complaint asserts that equal protection was violated when the defendant created two classes of employees in administration of its seniority system — the handicapped and the non-handicapped — and discriminated against the first class by denying it the seniority rights afforded the second.

The final cause of action is based upon the denial of plaintiffs' rights under the labor-management contracts entered into by the defendants. The plaintiffs assert they were denied fair representation by the unions which, they claim, are obligated to represent their interests.

As part of their relief, the plaintiffs are seeking a temporary restraining order and a preliminary injunction enjoining the U.S. Postal Service from failing to increase the work hours per week of the plaintiff class from part-time to the full-time hours worked prior to April 24.

They also are asking for preliminary and permanent injunctions enjoining the Postal Service and Unions, as defendants, from failing to treat the seniority date as the date of their actual commencement of employment, along with the rights and benefits accruing from that seniority date.

Also included in the relief plaintiffs are seeking are an award of damages, with interest, equivalent to the difference between their rate of pay prior to their removal from their full-time positions and their present rate of pay, and attorneys' fees.

The defendants have filed a motion to dismiss the case to which the plaintiffs have responded.

North Carolina Association for Retarded Children, et al. and United States v. State of North Carolina, et al. **No. 3050** **(M.D. N.C. 1976)**

A three-judge federal court has upheld the constitutionality of substantially all of North Carolina's new involuntary sterilization statute which relates to mentally retarded persons. The court ruled that this statute does not violate the due process clause of the U.S. Constitution, is not overly broad or vague, and does not deny equal protection of the law.

This case arose as a challenge by the United States as intervenor and the original plaintiff to the constitutionality of Article 7 of Chapter 35 of the North Carolina General Statutes as it provides for sterilization of mentally retarded persons (G.S. 35-36 through G.S. 35-50). Previously this same statute had been upheld by the North

Carolina Supreme Court, *In re: Joseph Lee Moore*, 221 E. 2d 307 (N.C. 1976) (Reported in *Amicus*, May 1976).

Under Section 35-39 of the statute it is the *duty* of the "petitioner," i.e., the director of the institution or the county director of social services, to institute sterilization proceedings under specific circumstances. These involve situations when the public servant himself is concerned either with (1) the best interest of the retarded person or (2) the best interest of the public, or both, and (3) that he act to begin the procedure only when in his opinion the retarded person would either likely procreate a defective child or would himself be unable to care for his own child or children.

The court struck down a fourth situation which enabled the next of kin or legal guardian of the retarded person to require the public servant to initiate the sterilization procedure for any reason or for no reason at all. This subparagraph, which the court said granted "the power of a tyrant," was held unconstitutional.

Compelling State Interest

In commenting on the plaintiffs' allegations, the court noted in their decision of October 1, 1976, that the legislative dual purpose — to prevent the birth of a defective child or the birth of a nondefective child that cannot be cared for by its parent — reflects a compelling state interest

and the classification rests upon a difference having a fair and substantial relation to the object of the legislation. . . ." For these reasons the court, therefore, felt the statute does not violate the equal protection clause of the 14th Amendment to the U.S. Constitution.

The court also held that the statute is not overly broad. "Although it permits initiation of the sterilization procedure against any and all members of the class," they commented, "it does *not* contemplate that all members of the class will be sterilized. . . . As we have made clear in our findings of fact, we are convinced that competent medical doctors and geneticists can predict in some cases with reasonable accuracy the likelihood of birth of a defective child and also the likelihood of whether the parent will be able to care for his child."

The constitutionality of the remainder of the entire statutory scheme was upheld with the court construing the statute in the following manner:

1) that a sterilization procedure may be initiated only by the director of the institution in which the retarded person resides, or by the county director of social services; and 2) that before an order of sterilization can be entered, there must be a finding from evidence that is clear, strong, and convincing that the subject is likely to engage in

sexual activity without using contraceptive devices, and that either a defective child is likely to be born or a child born that cannot be cared for by its parent.

Crouse and McGinnis, et al. v. Murray, et al. No. S75-191 (N.D. Ind.)

A class action suit was filed November 17, 1975, in Federal District Court in South Bend, Indiana, on behalf of patients at Beatty Memorial Hospital, a state owned and operated mental institution.

Plaintiffs in this right-to-treatment suit claim that confining civilly committed mental patients without providing them with the individual treatment necessary for a realistic opportunity to be cured or to improve their mental condition is unconstitutional and violates state statutes.

Defendants are the Indiana Department of Mental Health, state and deputy commissioners of mental health, and various administrators of Beatty Memorial Hospital.

The plaintiffs are involuntarily confined in the Maximum Security Division of the hospital, having been adjudged incompetent and in need of psychiatric care to restore them to mental competency. They claim having received negligible beneficial treatment to improve their mental condition, and, in the case of Erbitt Lee McGinnis, having been given excessively large dosages of

sedatives and other drugs which have little, if any, therapeutic value and serve to impair his creativity and mental abilities.

According to the complaint and based on findings by the Joint Commission on Accreditation of Hospitals (JCAH), general conditions at the hospital are poor. In 1974, the JCAH denied the hospital a renewal of its accreditation, and the Indiana State Board of Health has denied the hospital accreditation for Medicare. In addition, the complaint cites a computer program run at the hospital by the Department of Mental Health which revealed seriously inadequate staffing.

The plaintiffs allege that inequality of treatment exists between the Maximum Security Division, to which they are confined, and the Civil Division, where patients do receive some treatment of therapeutic value.

They contend that this disparity of treatment violates the equal protection clause of the 14th Amendment. Both plaintiffs have requested therapy, and Crouse sought a transfer to the Civil Division; however, the requests were denied.

Crouse and McGinnis also allege that because the defendants placed them and members of their class in Maximum Security without a hearing, their right to due process of law guaranteed by

the 14th Amendment was violated.

The plaintiffs are suing for damages and to obtain an injunction ordering the defendants to prepare and file with the court a program of treatment which incorporates minimum standards of treatment necessary for compliance with the U.S. Constitution and Indiana Code, established by *Wyatt v. Stickney*.

Washington Urban League, Inc., et al. v. Washington Metropolitan Area Transit Authority, Inc.
No. 776-72 (D. D.C.)

In an important development concerning accessibility of the Washington, D.C. Metro Railway transportation system, the United States District Court for the District of Columbia has refused to modify the requirements of its October 23, 1973 injunction. The injunction enjoined the metropolitan transit authority from operating the system until all transit facilities are accessible to physically handicapped persons.

At the same time, however, Judge William B. Jones indicated that resolution of this case, *Washington Urban League, Inc., et al. v. Washington Metropolitan Area Transit Authority, Inc.*, may possibly now be the responsibility of the Architectural and

Transportation Barriers Compliance Board (A&TBCB).

Defendants Seek Clarification

The latest action by the court taken August 31, 1976, resulted from efforts by disabled plaintiffs in the case to seek clarification of the court's 1973 order with regard to "the nature of the facilities which (the transit authority) must install and make operational before it would be permitted . . . to operate commercially in the Gallery Place stations."

The Gallery Place stations are segments of the transit system which, in July, 1975, Judge Jones refused to permit to open because of inaccessibility. Prior to the plaintiffs' motion for clarification, a group of Washington, D.C. businessmen known as the National Capital Downtown Committee, Inc. (or Downtown Progress) intervened in the case as parties and asked the court to permit operation of the Gallery Place station.

Amicus Curiae Requested

In response to the action by the disabled plaintiffs and the Washington, D.C. businessmen, Judge Jones requested *amicus curiae* briefs from the General Services Administration, the A&TBCB, and the District of Columbia Government. After consideration of the briefs and arguments of the parties, the court rejected the contention

of the businessmen that the Gallery Place stations should be permitted to open despite the fact that the facilities still fail to comply with the Architectural Barriers Act of 1968.

In their arguments, the businessmen alleged that "... the number of non-ambulatory handicapped who would use the station is minimal and certainly insufficient to close its use to the entire public, including the ambulatory handicapped. . . . The injunction helps no one, and harms everyone."

Judge Jones, however, held that "the inconvenience occurring to the public from the closing of Gallery Place is minimal." He pointed out that there was another station "a mere two blocks" from Gallery Place and that the downtown area was being served effectively "albeit with slight inconvenience to certain persons." More importantly, Judge Jones affirmed, was the court's opinion that the danger that the transit authorities would in the future fail to comply with the Architectural Barriers Act continued to be "substantial".

Architectural Standards Must Assure Accessibility and Use

In the course of his decision, Judge Jones also took the opportunity to make a significant comment interpreting the meaning of the Architectural Barriers Act:

"Plaintiff-intervenor's argument that a building, which has been designed and constructed for accessibility, but incapable of use by handicapped persons, does not violate the Act

effectively stands the Act on its head. No matter how 'simple' and 'straight forward' the Act was intended to be, it was also intended to insure 'ready access to, and use of' defendant's building and structure. If the statute is not to be bereft of its very purpose, those words must clearly mean that the required facilities for the handicapped be operative, not merely in the process of installation."

Judge Jones has directed the parties to submit briefs to him on the question of whether or not the federal court should continue to retain jurisdiction of the case. He has suggested that because of the creation of the A&TBCB, and the development of its authority to enforce the Architectural Barriers Act, that Board may be a proper administrative agency for further resolution of this case, and that the court should defer to Compliance Board efforts before taking further action.

This case began in 1972 when groups of disabled persons and community organizations brought suit to enforce compliance by the transit authority with the Congressional mandate in the Architectural Barriers Act of 1968 (as amended in 1970) that the District of Columbia Metro Railway transportation system be made accessible.

Judge Jones' injunction on October 23, 1973, restraining transit authorities from operating the system unless the system was accessible, was one of the first accessibility-case court victories

achieved by handicapped people. The plaintiffs are represented by James A. Dobkin of the law firm of Arnold R. Porter in Washington, D.C.

***United States v. Solomon, et al.* No. 74-181 (D. Md. July, 1976)**

The federal district court in Maryland has dismissed a suit brought by the United States Department of Justice in February, 1974, challenging practices used in administering Maryland's programs for the care and training of mentally retarded citizens.

The court dismissed the case, *United States v. Solomon, et al.*, on the basis that the executive branch of government has no statutory or constitutional authority to bring such a suit under the 13th and 14th Amendments. The court reasoned that policymaking in that area is primarily entrusted to Congress.

In his decision of July 8, 1976, Chief Judge Edward S. Northrop focused upon the separation of powers, noting that Congress, by enacting the Developmentally Disabled Assistance and Bill of Rights Act provided a scheme by which the federal government can accomplish much of what the Attorney General was attempting to do.

The court also found a great potential for conflict if, while one branch of the federal government (HEW) was trying to imple-

ment a congressional plan within a state, another branch (Justice Department) was in court attacking the state's existing programs.

"... Congress has devised what it hopes will be an effective carrot-and-stick method of improving the lot of the mentally retarded in America. This Court simply cannot believe that Congress intended or expected that while an elaborate plan to improve the lot of the mentally retarded was being implemented by the one federal agency (the Department of Health, Education, & Welfare) with expertise in the field of mental retardation, another government agency (the Department of Justice) with no expertise in the solution of the very difficult problems posed by mental retardation would simultaneously be making wholesale attacks on a state's mental retardation programs under the guise of protecting thirteenth and fourteenth amendment rights. Surely, if Congress had wanted two agencies to be involved in ameliorating the state's efforts to help the mentally retarded, it would have at least provided some legislative guidance as to procedures for preventing the conflict and contradictory goals that can and do occur when two federal agencies independently act on the same matter."

In addition to Maryland, the United States Department of Justice is suing state officials in two other states: *Gary W. and United States v. Stewart* in Louisiana, and *Horacek v. Exon* in Nebraska, reported in this section of *Amicus*.

The U.S., on September 29, 1976, was also dismissed as plaintiff in *United States v. Mattson, et al.*, a right to treatment suit in Montana.

Update :

Horacek, et al. v.

Exon, et al.

No. 72-L-299 (D. Neb.)

The United States of America, plaintiff-intervenor in *Horacek v. Exon*, has filed a motion for setting a new hearing date, as well as for enforcement of certain provisions of the consent decree entered into on October 31, 1975, and amended November 10, 1975.

The suit, brought in September, 1972, challenged the adequacy of conditions of the Beatrice State Home, now the Beatrice State Developmental Center. Also challenged was the lack of community-based facilities for mentally retarded persons in Nebraska. (Reported in *Amicus*, November 1975 and January 1976.)

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.

However, discovery into the case was reopened on May 4, 1976, at the request of the United States.

In their motion filed September 9, the United States charges that the defendants have failed to fully implement the consent decree. The U.S. also alleges that the mentally retarded persons who constitute

the plaintiff class, including residents of the institution at Beatrice, Nebraska, continue to suffer severe and widespread deprivations of their federal constitutional rights.

Community-Based Programs

One provision of the agreement calls for the placement of some of the residents in community-based facilities, including a statewide plan to increase and supplement such programs.

However, according to the motion of the plaintiff-intervenor, "instead of the anticipated expansion of community-based programs . . . the direct opposite has occurred; namely, mentally retarded persons formerly resident in community-based programs have been returned to the Beatrice State Home and other institutions serving class members during the past year."

This action has occurred, the motion notes, because of cuts made by the defendant Governor of Nebraska in the amount of federal funds available to such community-based programs.

However, the settlement agreement binds defendants to sustain the level of services and programming available to the

plaintiff class on the date of the agreement.

Legislature Restores Funds

The Nebraska legislature has subsequently restored funds for the community-based programs, and appropriated \$1 million for returning residents of Beatrice to such programs beginning July 1, 1976.

In their motion, the U.S. commends the legislature's action, but expresses grave concern as to whether or not the \$1 million will be fully spent on "methodical placement in community-based programs of current Beatrice residents who could benefit from such programs."

"The Plan of Implementation and Joint Evaluation Team process as provided for in the settlement agreement would have addressed these issues," the United States points out, "and the presently defunct Panel, as a monitoring mechanism, would have assisted in insuring that the desired result was accomplished Present circumstances can only result in chaotic community placement, if any placement at all," they note.

The settlement agreement also recognized that mentally retarded persons who constitute the plaintiff class have federal

constitutional rights to adequate care and habilitation. The U.S. contends that violations of these rights still continue. They cite the continued inadequacy of professional and direct care staffing, as well as the lack of and inconsistency in programming.

Also provided for in the settlement agreement is that "objections by parents or legal guardians shall not be used to preclude the placement of any member of the class in any program or facility to be in the best therapeutic interests of such person." The agreement provides that a due process hearing be held if an objection is made.

According to the U.S. motion, however, only after discovery was reopened in the case did the defendants draft and hold hearings pursuant to the promulgation of rules and regulations to carry out these provisions.

The U.S. charges that these proposed rules and regulations violate fundamental notions of due process and, "as such, have the purpose, intent or effect of frustrating community placement."

Mental Retardation Panel

One of the provisions of the agreement, initiation of a Mental Retardation Panel, was seen as an extremely important part of the agreement. The Panel was to serve as a monitoring mechanism to insure full and complete implementation of each provision of the consent decree.

The Nebraska legislature, however, refused to appropriate any monies for the operation of the panel, and alternate sources of funding have not been found. The U.S. notes that the Governor reduced the Panel's budget request by 71 percent in his proposed bill submitted to the legislature for fiscal year 1976-77.

In their motion, the United States requested that a new hearing be set for November 8. However, on November 8, no date had yet been set by the court.

Dismissal Motion Filed

On November 9, the defendant State of Nebraska filed a motion to dismiss the United States as plaintiff-intervenor. The state alleges that the United States does not have authority, and therefore no legal standing, under the Constitution and statutes of the United States to intervene in this case.

In their brief supporting the motion to dismiss the U.S., the defendants cite two recent district court decisions, *United States v. Solomon, et al.* (D. Md., July 8, 1976) and *United States v. Mattson, et al.* (D. Mont., September 29, 1976) in which the U.S. was dismissed as plaintiff.

**United States v.
Masthers
No. 74-1602
(U.S. App. D.C.)**

The United States Court of Appeals for the District of Columbia, in reversing a Washington, D.C. district court decision, has ruled that the due process rights of mentally retarded defendants require extraordinary safeguards.

According to Chief Judge David L. Bazelon's opinion of April 14, 1976, "the conviction of an accused who is mentally incompetent violates due process." Bazelon ruled that when there is a substantial doubt as to the competency of the accused a hearing must be held.

Consequently, the three-judge court ordered a hearing for Johnny Masthers to examine the nature and extent of his disabilities and to determine whether he voluntarily and knowingly pleaded guilty to charges of armed robbery, robbery, and assault.

Earlier Conviction

On March 28, 1974, the trial court convicted Masthers of those charges which stemmed from a robbery of a gas station and a station attendant.

At the pretrial appearance, Masthers had difficulty writing his name and responding to questions. His counsel stated that the appellant had not

"knowingly and intelligently waived his Fifth Amendment rights", and the prosecutor admitted that the confession might not be admissible. Consequently, the counsel suggested prior to sentencing that his client's psychological state should be considered and a suitable program of rehabilitation should be devised. The appellant's low level of intelligence was stressed at that time and at sentencing.

The trial court, however, imposed a sentence of two to six years and subsequently denied a motion for reconsideration and reduction of sentence.

Decision Reversed

In reversing the district court decision, the appellate court cited *McCarthy v. U.S.* which held that if a plea is not "equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover . . . it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

Judge Bazelon observed that based on federal rules of procedure a petitioner who lacked the mental capacity to enter an intelligent plea may withdraw the plea or attack the conviction and sentence. In addition, the petitioner must be given an opportunity to present evidence at a hearing, unless it is clear that he is entitled to no relief.

Legal Rights Ignored

The question of the defendant's mental capacity was not raised prior to sentencing because stated Judge Bazelon, relying on the Mental Health Law Project's *amicus* brief, "where the defendant in a criminal case is retarded, the fact is rarely learned. One of the most pressing problems of the mentally retarded is that by default . . . their legal rights are often ignored, disregarded, or simply violated."

Significantly, the court noted that Masthers' counsel recognized the signs of retardation after his plea was entered, but that was not surprising, since the mentally retarded often "demonstrate an exaggerated suggestibility and need to cooperate, and retardation frequently goes undetected."

Judge Bazelon ruled that those grounds did not support the denial of relief without a hearing. The Judge also stressed that trial judges should be aware of various sentencing alternatives for the retarded offender. He cited statistics showing that 10 percent of the prison population is retarded, compared to a 3 percent incidence in the general population, and that in some areas the retarded may comprise more than 24 percent of the prison population.

Circuit Judge Hastie filed a concurring opinion, prompted by a sharp dissenting opinion from Judge Robb who stated that "the majority creates a lack of responsibility not amounting to insanity. The decision licenses every illiterate moron to violate the law with impunity."

Outreach Efforts In the Southwest

An Interview With Earl Long of Project Impact

The following interview was conducted with Earl Long, coordinator of Project Impact. Sponsored by the National Association for Retarded Citizens (NARC), the southwest program establishes and promotes outreach programs for low-income mentally retarded citizens. Long also serves as a member of the National Center for Law and the Handicapped Advisory Council.

AMICUS: First of all, can you tell us what year Project Impact began, and then describe the goals and purposes of the program.

LONG: Project Impact began July 1, 1973. The goals of the Project are mainly targeted towards low-income families in the southwestern region of the United States. One of our goals is to increase the amount of participation these people have in planning, developing, and delivering services. This means placing them on advisory boards and commissions, increasing their employment within the service delivery system and in the administration of programs. Another goal is to increase their access to services.

AMICUS: To what do you attribute their absence in the service delivery system? Is it the lack of contact with agencies, or a lack of education?

LONG: Well, I think it's a cycle of things. For example, you don't see many minority people employed throughout the service delivery system. You may see them in clusters. And you don't see them employed or involved in the leadership of the advocacy agencies, or the boards or councils, whether state, local, or national. You don't see them participating that much in the system itself. The typical attitude is: if they need anything we'll give it to them, rather than involving them in it from the beginning and building it all right into the system as it develops.

AMICUS: Is that typical of local Associations for Retarded Citizens?

LONG: It is not only typical of ARCs, it is typical of the whole service delivery system, from the White House down to the little ARC with five members. And not just typical with mental retardation. What I think you have to understand when you talk about mental retardation among low-income people is that you are not just talking about ARCs, Councils for Exceptional Children, the Department of Mental Retardation, Vocational Rehabilitation. These are the classic community service providers for the mentally retarded. You are also talking about the Office for Economic Opportunity (OEO) because they deal with low-income people. Chances are they know more low-income people who have mentally retarded children, even though the people who work in those agencies themselves do not know what mental retardation is or how to deal with it.



And chances are those OEO agencies see more of these people than anybody else. But the system as it exists has become very fragmented. And I blame this on the middle-class operation of system organizing.

For instance, a group says: We are going to establish a heart organization, and we are going to deal with people who have heart problems. It is usually organized by middle-class people and it is these people who have contacts with individuals who can get something going. However, once they establish themselves they see themselves as only a heart program. When welfare recipients come to them in need of heart services, they can give them the heart services, but they don't have the slightest idea of how to handle their socio-economic problems. So I think those are the kinds of things that you have to deal with, and I think this is particularly true of the legal profession.

The legal profession as it is today in some communities is very socially aware. But, generally speaking, they are not in the forefront of providing consumer advocacy and social action type programs.

AMICUS: What do you as a project director see the legal profession doing for programs like Project Impact, or for the mental retardation system as a whole?

LONG: I think that the people who have talents, whether lawyers, teachers, psychologists, ministers, whatever the case may be, should begin to realize that parts of the community are either turned off by them, afraid of exposing themselves to them, or just unaware of them.

I think all professionals have to develop systems over and above those which we are taught in schools, like reaching out to people if necessary. They have to be creative enough to develop new systems.

As a board member, I think the National Center for Law and the Handicapped is in a good position to establish certain precedents. I believe in coalitions. I think coalitions are very difficult to work up, but they are the kinds of things that serve low-income people best, simply because you

can utilize a coalition of professional people or a coalition of recipients.

Specifically, I can think of a case where we are trying to set up a day care center in Connecticut. The funding agencies said they had enough funds for two programs. So everybody went to war — the whole town, all the different communities.

Finally, a few of us got together and said: Look, this is ridiculous. Why fight over it? Let's consolidate our interests, and then we will ask for one grant with all of those things.

And that is the way I think we have to learn to work with low-income families — to pool our resources instead of making each community fight for the very few professionals that are available.

AMICUS: From your experience with local projects and your work with low-income people, do you feel involvement in litigation is needed; or do you see attorneys involved in a "sit back" advocacy role, primarily working on legislation?

LONG: I think that is what we have to rely upon the legal profession to find out. I think we have to rely upon them to clarify what would be the best, most effective approach if we were given certain choices.

But there are areas in which I feel the law can combine forces with other disciplines, such as people who are involved in some aspect of social welfare — either service delivery or advocacy.

The atmosphere that many professions operate under has a tendency to cause misuse of those professions. I think law, for example, is a mystery to people. From a lay point of view, it is seen as such a technical field that people don't know what they can do.

But I'm sure there is first-aid legal action that can be taken by a non-lawyer. For instance, the legal paraprofessional could do some of the simple kind of first-aid things that lawyers do, and that are needed by low-income people, but which they can't afford. The existing advocacy programs are overwhelmed because they have so many cases. I

think legal paraprofessionals can take some of this work off their backs.

AMICUS: Other than with NCLH, has Project Impact worked with any lawyers in the southwestern region of the U.S.?

LONG: No, not generally speaking. It has been done in isolated situations where we have local projects or specific clients. But when I discussed this opportunity with NCLH, we both did a little research, and we could find no evidence anywhere that this type of endeavor had ever been attempted before. So, in a sense, it may not be a brand new concept, but it is an initial effort.

AMICUS: Do you have any plans to put an attorney on the staff of Project Impact?

LONG: I don't think that it would be appropriate. I would like to see more placement of legal interns outside of the National Center, however, and hopefully NCLH could encourage other law schools to participate.

I would like to see attorneys go where they are really needed, that is in the local communities where people actually need someone to keep them out of jail, or to keep their kids from being taken away from them, or to protect their jobs. I think that is more important right now than the type of theoretical investigative research that can be done on a project. We need to continue that, but we can do that with interns.

AMICUS: Do the interns need any special skills or special knowledge in the various areas with which they might work? For example, the Indians on reservations might have different kinds of problems than the Blacks in Los Angeles.

LONG: What we are finding out is that the problems are of a different variety, but they belong to the same sociological family. Indian problems may

be centered around the lack of services. This may be due to the political administrative set-up on the reservation which may funnel everything to the Bureau of Indian Affairs, or which might restrict them from being subject to certain state funds.

Nonetheless, they may not have day care programs, they may not have adequate knowledge of their protections and their privileges under the law. The same thing exists in east L.A. The same thing exists in Watts and among the migrant workers in Imperial Valley.

I think we are working somewhat like a space program. We are talking about getting the rocket off the ground first. I don't think we need workers who have to be either Chicano, Black, or Indian to deal with these minorities. I think it is an advantage to have them since they don't have to go through the orientation that those who don't belong to various ethnic groups would have to go through. And their perspective may be closer to their clients, but it is not essential. However, as you get closer to the clients, serving the clients and delivering services, I feel that it is important to be culturally aware.

In hiring neighborhood workers, the number one qualification insisted upon is commitment. That's easily said and very hard to find.

AMICUS: Can you explain the neighborhood worker concept?

LONG: The neighborhood worker's job varies because each local community sets its own objectives. They abide by the goals of the Project; however, they pick their own target areas, and they establish their own methods.

A neighborhood worker is required to identify low-income people. That's the major job. But, the first step in that process is to know your community. A worker has to be able to identify the resources in a community so that when they identify the first person, they should be able to help that person. The idea is to assist the people with their problems, not with the agency's problems.

For example, if a child isn't enrolled in a day care center, this is probably because the mother

can't meet her budget. And, in this case, the child might not have shoes. Normally, you would think that this is not a problem of an agency dealing with the mentally retarded. But if the lack of shoes is keeping a mentally retarded child out of a day care center, then I think it is our problem. And our workers have to know where to get shoes for that child.

Then, hopefully, after working with the families, we can bring them together in a discussion group where they can satisfy their own quest for knowledge, where they can develop a sense of self-efficiency, where they no longer have to lean on the neighborhood worker. Once they reach that point they decide in what direction they wish to go, and the neighborhood workers assist them with resources.

AMICUS: Is there any antagonism or fighting for funds or services among the various ethnic groups or geographical areas in which you work?

LONG: If you look at any type of human services in our country, there are certain institutions that get theirs right off the top. There are other institutions that will get their share if they play ball, and there are those involved in what I call a ping pong approach; that is, they are put into a ping pong tournament and have to keep banging the ball from one side to the other.

The mentally retarded, for example, now find themselves in that position. Blacks have to compete with Puerto Ricans, Mexican-Americans with Asians and Indians, and vice versa, and that is part of the game.

I think minorities now are becoming sophisticated enough to know that they have been had during this, because today you get the crumb and if you're good you get a slice. But along comes somebody who says: Hey, let's give the slice to somebody else. You then have two groups fighting over the crumb, and neither one has gotten the slice.

The mentally retarded are in that same boat. For a while, the mentally retarded were fighting with epilepsy and cerebral palsy to see who was going to get the crumb. Finally somebody had

enough brains and enough guts to say: Hey, you are acting stupid. You're still fighting over crumbs, and even if one of you polishes off the other two, all you're going to end up with is the crumb. So why don't you unite your efforts and at least fight for a slice. I think that is the point the minorities have reached.

AMICUS: Do you feel it is better to deal with low-income people through local ARCs or separate components like Project Impact?

LONG: Well, Project Impact is separate only in that we are separately funded. We receive funds directly from the Community Service Administration. But, we are an integral part of the National Association for Retarded Citizens' southwest region. However, because of the nature of the program, there is a certain amount of flexibility in what we do.

The idea is to bring the ARCs and low-income people together, and so we are sort of standing in the middle trying to do this. My experience has been that you have to get the job done, and you need someone who knows how the job can be done in different ways. If the ARCs are not ready for it, there are other agencies and organizations out there that are. So you get them involved and enthusiastic and then plug them in to the ARCs and they'll do the job for you.

AMICUS: Do you feel more optimistic about the program now, and that it will tend to spread?

LONG: One of the diseases of this is that you hit ups and you hit downs. Usually when I'm disgusted, something happens; something pays off. I think generally speaking that if you can look at it strategically, rather than tactically, I think it's not only worthwhile, but it's a necessity. The United States of America cannot afford to continue isolating people and setting up outreach programs. We are going to have to develop programs that bring everybody into the system and let them participate. That way they are designed efficiently. They aren't designed to keep social workers working and to make sure that lawyers have jobs. They aren't designed for the professionals; they are designed for the people.

A Legal Advocate's Experience

"The legal profession will simply have to take a more aggressive role in bringing about social change. It's not enough to make laws in a vacuum."

Linda Stockdale, a third-year student at the University of Notre Dame Law School and a legal intern at the National Center for Law and the Handicapped (NCLH), served as a summer associate this year with Project Impact in Burlingame, California. Her assignment was in association with that part of the NCLH internship program which is designed to place students in off-site service and legal advocacy programs.

Project Impact, serving the areas of Arizona, California, Hawaii, and the Hopi and Navajo Reservations, was established to promote outreach programs for low-income mentally retarded persons. It is sponsored by the National Association for Retarded Citizens.

Ms. Stockdale visited numerous programs in order to identify the legal problems of the clients of those programs, to help find appropriate resources for dealing with those problems, and to help promote the visibility of services to the consumers.

In the following article, Ms. Stockdale comments on her experiences and offers suggestions toward solving the unique problems of low-income minority handicapped individuals.

By Linda Stockdale

During the first week on the job at Project Impact, an organization serving low-income handicapped in the southwest region of the United States, I became painfully aware that here was a sizeable segment of the developmentally disabled population who had never heard of *PARC v. Pennsylvania*, *Wyatt v. Stickney*, or any of the other important class action suits or federal legislation affecting the rights of the disabled.

In Mexican American families in San Diego, I saw retarded children 18 or 19 years old who had never attended school, and who were not involved in a rehabilitation program of any kind.

On the Navajo Reservation in Arizona, I learned that there are virtually no residential, educational, or rehabilitative services, and that the Navajo mentally retarded are placed in facilities outside the reservation and far away from their families.

I visited the home of Navajo Project Impact worker Pauline Yellowhair, and listened to her recount the multiple problems facing her in her efforts to make services available on the reservation so that the Indian retarded children could be returned to the reservation.

I gradually realized that no discussion of the results of my research of legal issues affecting the disabled or legislation tracking would even begin to alleviate Ms. Yellowhair's problem or the problems of other neighborhood workers.

Unique Problems

Low-income and ethnic minority handicapped persons have unique cultural, social, and economic attitudes which tend to create barriers to their receiving the full benefits of legal services and the full enjoyment of legal rights to which they have become entitled through various lawsuits and legislation.

Generally speaking, low-income and ethnic minority handicapped persons have not been as aggressive in demanding services as have middle-

class persons who have often organized their own advocacy groups. Therefore, it was not surprising to learn that problems facing Project Impact workers in their efforts to promote the use of available services among low-income families were not centered around whether a recent federal court decision went far enough in prescribing which services must be provided. Rather, these workers were attempting to assist clients who were not

. . . one socio-economic phenomenon clearly emerged: the low-income handicapped child's disability has a very low priority among family problems. . . .

aware that *any* services were available, or that they were entitled to services, and who were not familiar with the administrative procedures necessary to receive services.

Ethnic and cultural sensitivities are partially responsible for the lack of awareness of the availability of services. Project Impact workers have found that among some Blacks, Chicanos, and Native Americans there is a shared view that mental retardation or any physical or mental disability is an insult to the masculinity of the father. Thus, the cultural outlook of these persons does not permit acceptance of such disabilities as medical or treatable problems.

In certain Black families, moreover, workers have found that the extended family system and deeply religious roots, as well as the attitude that retarded children are "special", operate to keep the child insulated from the outside community and revered and protected within the family unit.

Project Impact worker Virginia Lopez summarizes the barriers to services in the Mexican-American community in San Diego this way: "The main problem is that there is a lack of awareness that the services are available. Mexican Americans have a fear of taking aggressive steps toward locating services. For example, they fear facing a

social worker who does not understand their personal needs. Part of the reason for this fear is that many of these clients have parents who are here illegally. They feel that if they do inquire about a service, someone will come into their home to investigate and force the family to go back to Mexico. Many of these families are being deprived of available services because of this fear."

Ms. Lopez also explained that in the Spanish-speaking culture the mother seldom takes the first step. She must get permission from the father to seek services. Even when an aggressive mother does seek services, she noted, the father will invariably protest, and not permit "outsiders" to take care of his family. Therefore, home visits invariably require a response to the client's current family crises and concerns, whether financial, marital, or police involvement, before the subject of the disabled child can be discussed.

Workers who have attempted to assist Asian Americans in obtaining services have discovered that the problem they face initially is the deeply ingrained "face saving" aspect of Oriental culture. It seems that while the "face saving" barrier is very similar to the "macho" threat experienced in the Mexican American community, it is even broader in scope, since the fact of retardation or any disability seems to be an affront to the entire extended Asian family. As one worker noted, "In the Asian community there is a strong cultural stigma against abnormalities. Rather than seek help, the families tend to hide in the closet just as they did here in America 50 years ago."

As I visited the homes of these clients, one socio-economic phenomenon clearly emerged: the low-income handicapped child's disability has a very low priority among family problems, since invariably these families have other unrelated problems that seemed to be more immediate. There was Josefina F., who on the day we visited her home had just received a notice from the immigration service which the neighborhood workers had to translate for her. Josefina was obviously distraught and was certain that she was going to be deported. It was apparent that our talk with her about a new infant stimulation program for which her 18-month-old daughter was eligible left little impact on her that day.

Another deterrent to full utilization of services for low-income persons is the non-existence of a structured form of legal advocacy adapted to their needs.

It was with this new appreciation for the kinds of barriers to services facing low-income and ethnic handicapped persons that I began my assigned task:

- (1) to visit the various Project Impact programs and to identify the legal problems of the clients of those programs, and
- (2) to classify the problems in terms of recognizable categories, such as personal legal problems, and problems in dealing with providers of health, education, or other services.

Several specific areas of legal problems emerged: (1) a lack of legislation and administrative practices relating to social service agencies responsible for licensing community care facilities for the developmentally disabled in California that are responsive to the actual needs of these residents, (2) the non-existence of a structured form of legal advocacy for the handicapped in low-income areas, and (3) a lack of a thorough understanding of the unique problems of the handicapped Native American families residing on the reservations.

Community Facilities

As part of my work with Project Impact, I met with over 70 operators of community facilities who unanimously stated that they are subjected to harassment by placement workers. They complained of social workers' arbitrary and capricious placement, and withdrawal of disabled children from their homes without the benefit of due process hearings or notice.

The common practice of placement, as related by these operators, appears to be simply that a residential care operator will receive a call from a social worker informing the operator that a child will be placed in his or her home within a short

period of time — usually within a few days to a few hours. Often, no exchange of documents or information takes place between the operator and the social worker.

One case related to me involves a woman who is just now recovering from the effects of a nervous breakdown brought on by her two-year battle to retain custody of one of her "children" whom the social worker suddenly decided "needed 24-hour institutional care".

The stories are endless, but perhaps one of the most succinct statements describing the situation as it seems to exist with some residential care operators was made by a social worker: "You operators have no status whatsoever. These children belong to the agency to do with as they see fit."

While this is a complex and involved issue, it appears that, at the least, residential care operators have an undefined legal status in relation to

... it appears that, at the least, residential care operators have an undefined legal status in relation to the children they serve.

the children they serve. There are neither admission contracts nor any other agreements defining contractual rights and liabilities between the state agencies and the operators. Further, it appears that some social workers are treating these operators as foster parents, even though there seems to be no actual legal basis for doing so. The basic criticism of this approach is that it has the effect of establishing residential care facilities as

interim placement facilities for the disabled, rather than as long-term alternative living arrangements.

For the low-income disabled persons served by these operators, it appears that their only rights to habilitation and care is not that suited to their needs, as upheld in the case of *Wyatt v. Stickney*, but that suited to the needs and whims of their social workers.

Legal Advocacy

Another deterrent to full utilization of services for low-income persons is the non-existence of a structured form of legal advocacy adapted to their needs.

In Arizona, Robert Beckett, the attorney for the Arizona Association for Retarded Citizens, expressed serious concern that parents are not aware of the rights and services that are available to their children. He noted that there are numerous low-income persons who are not being served today, even though legislation providing these services was enacted 20 years ago. Legal advocacy on behalf of these unserved clients, Beckett feels,

Legal advocacy . . . should be with a view toward equipping these parents to be decreasingly dependent on advocates.

should take the form of educating the low-income parents of handicapped persons as to the rights and services available to them under existing legislation, with emphasis on appeal rights in all areas, coupled with information concerning the desirability of individualized programs, especially in the area of education. "Legal advocacy," Beckett stated, "should be promoted with a view toward equipping these parents to become decreasingly dependent on advocates."

After visiting and working at both the Hopi

and Navajo Reservations, it was my impression that legal advocacy on behalf of these communities should include parent organization and education regarding the legal rights of the handicapped. In an interview with Sophie Thompson of the Dine Association for Retarded Citizens (DARC), a Navajo parent group, she agreed that "advocates are needed on the reservation to serve as parent organizers and educators regarding the rights and services to which the mentally retarded are entitled."

Any form of legal advocacy, of course, presupposes a working knowledge of the applicable law. Since Native Americans are governed by treaties with the United States government, there may be preliminary legal questions involved in incorporating federal and state legislation affecting the rights of the developmentally disabled into existing treaties, and/or Indian law.

Advocacy Through Regional Centers

In California, although the Lanterman Developmental Disabilities Act states that its 21 regional centers "may provide advocacy for, and protection of, the civil, legal, and service rights of developmentally disabled persons," none of the regional centers have such a program.

Herman Fogata is the Director of the Eastern Los Angeles Regional Center for the Developmentally Disabled. This regional center serves a predominantly Mexican American population and is in one of the lowest income areas of Los Angeles.

In an interview with Mr. Fogata he stated, "I have become aware of many situations and issues which require the skills of someone trained in law and capable of taking issues to court. There are situations where families have been denied services to which I feel they are entitled. However, our lack of understanding of the technicalities of certain laws and certain acts that have been passed prevents us from being able to provide the kind of consultation which would help parents deal with these situations more effectively. For example," Fogata points out, "guardianship of a person can be effected without the person whose rights are

being taken away having any kind of legal consultation."

Mr. Fogata also feels that any form of advocacy should include organizing parents and educating them about their rights, and how these rights can be exercised on behalf of their children.

Native Americans

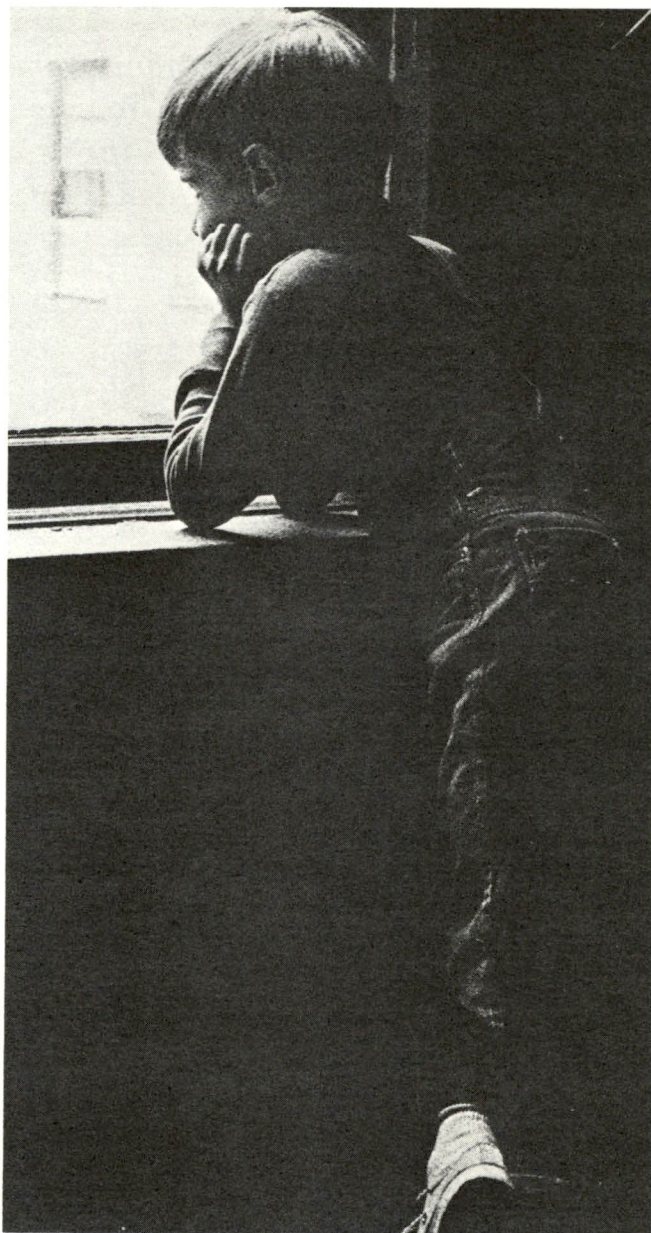
The fact that mental retardation can be treated is slowly being accepted by Native Americans living on the Navajo Reservation in Arizona. Until very recently it was generally felt that the medicine man could treat the retarded child; there was strong resistance to permitting anyone outside the tribe to interfere with the child.

Families of the retarded are now working to establish service facilities so that their handicapped children can return to the reservation. Although there are no service facilities at the present time, at least the first barrier to receptivity to services — the cultural non-recognition of the problem — has been penetrated.

Now the Navajos are faced with the serious problem of lack of transportation on the reservation. My tour of the facilities for the handicapped on the Hopi and Navajo Reservations, and visits to the sites just in the eastern portion of the Navajo Reservation and on the Hopi Reservation entailed approximately 400 miles of travel.

Currently, Ms. Yellowhair is the only Project Impact worker serving the clientele on the Navajo Reservation. Traveling with her to visit clients revealed that distances between them is as great as 90 miles one way. She notes that she is severely hampered in her efforts to organize parent groups since it is difficult to communicate information, and even when she manages to inform the parents of scheduled meetings, few parents have a means of traveling to the meeting place. Telephone service on the reservation is also very limited.

I was deeply encouraged to learn that at least some of the problems facing Native Americans are being brought to the attention of the Department of Health, Education, and Welfare and other federal, professional, and voluntary agencies. The



... it seems almost mandatory that a nucleus of attorneys and other advocates trained not only in the law of the handicapped, but able to interpret that law to meet the socio-legal needs of low-income handicapped persons, must be developed.

first Annual Inter-Tribal Symposium on Mental Retardation was held at Window Rock, Arizona, on May 5 and 6 of this year. This meeting was called by the DARC with the encouragement and cooperation of the President's Committee on Mental Retardation.

Hopi Center

The Hopi Reservation is completely encircled geographically by the Navajo Reservation. The Hopi Center for Human Services, under the direction of Mr. Harvey Paymella, is an impressive facility. Located in isolation in the deserts of the Hopi Reservation, it serves as an institutional care facility for some 15 trainable, severely, and profoundly mentally retarded Native Americans — both Hopi and Navajo. It is the *only* facility on the reservation where structured services are provided. The Center is currently in the process of building a sheltered workshop which, when completed, will be the only such workshop in northern Arizona, on or off the reservations.

The Center for Human Services serves a total of approximately 8,000 Hopis residing on this reservation. Of that total population, it is estimated that half of one percent are mentally retarded. The center has identified 40 mentally retarded Hopis to date, although there are others who have mental disorders, and three developmentally disabled persons.

Although the Hopis are making steady progress in their efforts to provide services for the handicapped residing on the reservation, they too, are faced with serious problems of transportation.

Parental Action

The specific problems discussed above are unique to low-income handicapped persons. Yet there seems to be one universal requirement to full realization of rights to services: *organized* parent education.

Attorneys and other advocates must be committed to improving the low-income citizens access to services by organizing parents around human service issues, and by involving low-income persons in planning and determining priorities and services within their communities. We must also become sensitive to the sociological, cultural, and ethnic attitudes about mental and physical disability among low-income families.

In order to integrate effectively this segment of the handicapped into the developmentally disabled civil rights movement, it seems inescapable that a nucleus of attorneys and other advocates trained not only in the law of the handicapped, but able to interpret that law to meet the socio-legal needs of low-income handicapped persons, must be developed. These advocates must have the practical skills to effectively organize and guide parents to achieve specific results.

Low-income parents of handicapped children are generally not aware of rights and services available to them. The legal profession, I feel, must 1) assume the leadership responsibility of educating parents as to their rights under existing legislation, 2) be prepared to organize parent groups around issues affecting rights and services of the handicapped, and 3) be able to plan and coordinate action to achieve locally determined objectives.

I am convinced that parent pressure *can* be more effective than litigation.

Special Education Needs of American Indian Children

Concerned parents and educators of handicapped American Indian children, for years ignored by funding agencies, are looking toward fiscal year 1978 to bring a substantial increase in funds for special education programs.

"We feel we are sitting on the edge of greater success," says Max Harriger, department chief of the Division of Continuing Education for the Bureau of Indian Affairs (BIA). Harriger's optimism is based upon the anticipated effects of Public Law 94-142 and the Bureau's transfer from the House Interior and Insular Affairs subcommittee to the Labor and Welfare subcommittee which, states Harriger, "is much more concerned and knowledgeable on education matters."

PL 94-142, to become effective October 1, 1977, is the Education for all Handicapped Children Act which establishes special education requirements for states in order to receive federal financial assistance.

According to Harriger, BIA has submitted a state plan, but the Bureau is not yet in full compliance with PL 94-142. He anticipates approximately \$2 and a half million from the Act as well as \$4 and a half million from other sources for fiscal year 1978, in contrast to a total of \$970,000 allocated to special education programs for fiscal year 1977.

The Bureau, however, has requested a budget of \$12 million every year since 1972, which Dr. Robert Hall, BIA director of special education, has stated would be required to service all handicapped children.

Harriger notes that "we've been defeated every year from one agency or another; sometimes by the Department of the Interior, sometimes it's BIA. Trying to get the Interior Department to understand what is needed just in complying with the law is a phenomenal task."

Addressing a national conference in Albuquerque, New Mexico in November, Dr. Hall said that "immediate steps will be taken by BIA to develop local programs incorporating additional or enlarged school buildings, hiring of teaching personnel, and providing transportation facilities to meet the special education requirements of 12,000 handicapped Alaskan and Indian children who are either not now attending school because they do not know that there are educational services available to them, or who are not getting the training they need and to which they are entitled."

The purpose of the conference, according to Jerry Hill, special education coordinator for BIA, was "to develop an awareness in the people who have the responsibility for educating and caring for handicapped children regarding PL 94-142 so people can begin coordinating programs. Within the Bureau we have schools in 17 states as well as health care services, social services, etc. Many more of the parents of handicapped children are insisting that these services be provided. We wanted to make them (BIA) aware that the parents, as well as the children have rights. We also wanted to communicate what needs to be done in order to comply with the law and develop a comprehensive plan for delivering services."

CEC Notes Lack of Services

Prior to the conference, in April, 1976, the Council for Exceptional Children (CEC), in a statement to the Select Interior Subcommittee of the House Committee on Appropriations, said that "while there is some evidence that significant progress has been made toward these goals (of equal educational opportunity) for exceptional

children in general, the situation for many American Indian, including Alaskan Native exceptional children has remained virtually unchanged; they continue to be deprived of appropriate educational services."

CEC also noted that the deprivation of services was especially true for exceptional children attending BIA operated schools on or near Indian reservations. U.S. Office of Education testimony before the House Subcommittee on Elementary, Secondary, and Vocational Education in July, 1975, estimated that of the 19,500 handicapped children enrolled in BIA operated schools, only 4500, or 23 percent of those children were receiving services. Harriger says the figures currently are between 5 and 6,000 being served.

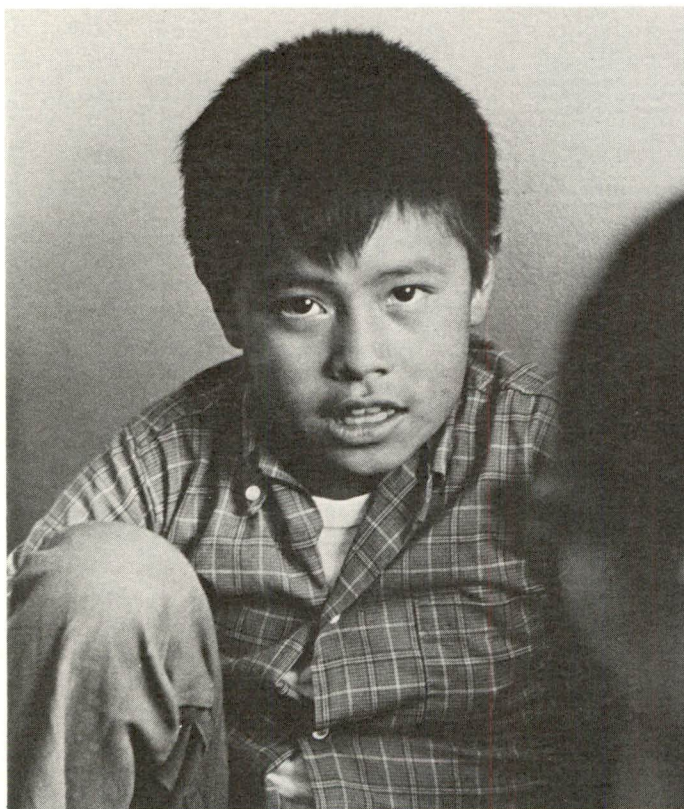
Although, under the provisions of PL 94-142 the BIA is committed to a full service goal for handicapped children, according to CEC, there is no budget line item for special education in BIA operated schools, or legislation clearly defining BIA's jurisdiction with regard to special education.

In addition to a lack of political support, Indian attitudes and traditions have equally hampered the progress of educating and serving the handicapped, according to Jerry Hill.

Hill believes that "their perception of handicapping conditions is different than generally held around the country; a situation which has affected their receiving services. They won't talk about the problems. When I've visited reservations, it was as if I was talking to the air."

Hill notes, however, that "for whatever reason, within the last five years the trend has begun to change. Parents are beginning to see that kids who were sent away to institutions were not being provided with a cultural experience or an education. So they are bringing the severely and profoundly handicapped back to the reservations and the communities. And that has brought about a greater willingness to talk."

The unique cultural and geographical milieu of American Indians also creates further obstacles to the education of the handicapped. For example,



it is difficult to find adequate numbers of American Indian special education teachers, administrators, and diagnosticians. Communication with parents of exceptional children must be conducted in the primary language of the home in order to comply with due process guarantees. Care must be taken to avoid racial or cultural discrimination in testing and evaluation. Furthermore, the special status of trust areas creates confusion as to who is ultimately responsible for identifying unserved handicapped children.

Attention to Problems

Exceptional Indian children have received little attention from national organizations. However, on a local level the Navajo Department of Special Education and a few community based programs provide some services to these children.

Also on a local scale, Indian advocacy groups for the retarded have been established. They include the Hopi Tribal Parents' Association for Retarded Children and Adults, the Sicangu Association for Retarded Citizens, and the Dine Association for Retarded Citizens (DARC).

In May of this year, the DARC sponsored the first Annual Inter-Tribal Symposium on Mental Retardation at Window Rock, Arizona. The meeting received widespread interest and received the encouragement of the President's Committee on Mental Retardation.

The recent funding from BIA and the potential funds from PL 94-142 should have a significant impact on the special education programs. According to Hill, the monies will be spread among the 12 area offices within the BIA which provide direct services, based upon such factors as the number of children requiring services, and the type of handicapping conditions. In addition, Hill's office is required to use the funds for those children not already receiving services.

Although full service for all exceptional American Indian and Alaskan Native children will probably not be reached by 1978, hopes are being raised that legal mandates, as well as increased parent, government, and administrative concern and support will greatly improve the services and educational opportunities for those children.

Court Rules for School Districts Serving Indians

The United States District Court for the District of Columbia has ruled that all school districts providing special education to handicapped children and children with specific learning disabilities are entitled to federal aid under the Impact Aid Act (Public Law 81-874) for *all* Indian children, not only those with a parent in the military service.

PL 81-874 provides money to school districts which, by reason of the federal presence within their boundaries, are deprived of local property tax dollars with which to support their schools.

Although federal aid has been provided under this Act since 1950, in 1974 Congress amended the Act and enacted a new subcategory composed of handicapped children and children with specific learning disabilities.

The amended section sets forth a per-pupil formula for determining a district's Impact Aid entitlements for certain children who are handicapped or learning disabled. Each entitlement is half again as great as it would be were the child not handicapped.

Regulations promulgated by the Department of Health, Education, and Welfare (HEW) interpret that section to mean that in order for a district to obtain the higher entitlement for any handicapped or learning disabled child, the child must have a parent on active duty in the uniformed services.

In their complaint of July 6, 1976, the plaintiffs, three Arizona school districts located on the Navajo Indian Reservation, allege that HEW's interpretation directly contravenes the statutory language and the intent of Congress. They contend that Congress intended that children residing on Indian lands be treated the same as children with a parent on active duty in the military, and that a district, therefore, can obtain the entitlement for any handicapped or learning disabled child who lives on Indian lands.

Judge Thomas A. Flannery, in his memorandum opinion of October 18, noted that the language of the statute is clear on its face, but the legislative history is ambiguous.

"Despite language in that legislative history suggesting that the reason for the bill was to relieve school districts with high concentrations of military personnel," Flannery commented, "the fact remains that the House version would have awarded

incremental aid for all federally-connected handicapped children, not just those with parents on active military duty. . . . It is entirely possible. . . that the additional aid for handicapped children was intended to extend beyond military personnel, even though the legislation was concerned primarily with children of the military."

In his order, Judge Flannery also certified the suit as a class action.

Facts About SSI

The Supplemental Security Income (SSI) program was established in October, 1972, to replace the old state welfare programs which were funded by the federal government and run by the states. Similar to the old welfare programs, SSI beneficiaries must be aged, blind, or disabled and must be in need of money for the basic necessities of food, clothing, and shelter. Unlike the old program, however, SSI provides direct cash benefits to individuals in need, and is operated by the federal government rather than the states.

Although the Social Security Administration (SSA) is responsible for running the SSI program, supplemental security should not be confused with Social Security. Social Security benefits are considered to be income which is deducted from SSI benefits.

The current maximum monthly SSI cash benefit for an individual is \$167.80, and \$251.80 for a couple. The payments are not meant to meet individual needs, but are designed to provide the basic living requirements. Other needs, such as medical care, transportation, etc., are not intended to be met with the SSI payments.

In addition to the cash benefits provided by the federal government, there are also two types of state supplementation. In one case, if an individual had been receiving greater benefits under the old welfare system, the state is required to pay supplements to assure that no recipient's welfare payments were decreased by the conversion to the new SSI program.

In the second case, each state has the option

of providing additional supplementary payments if it believes that the federal cash benefit is insufficient. This allows states with well-developed welfare systems or simply higher costs of living to better provide for their needy aged, blind, and disabled. Currently, 39 states offer the optional supplementary assistance.

The SSA will also administer state supplementary programs at the state's option. This works as an incentive to the states providing supplementary programs, since the federal government essentially shoulders the cost of administration.

Recipients of SSI benefits must meet specific eligibility requirements and must be able to prove their eligibility. Evidence is needed for such things as age, disability, blindness, citizenship, residency, income, resources, marriage, and living arrangements.

An individual's eligibility for SSI can be affected by institutionalization, depending upon the type of institution, the length of stay, and whether the care provided in the institution is covered by Medicaid.

An application from a Social Security office should be filed by the individual, or by the person caring for the individual, or by a legal guardian, but proof must be submitted that the applicant is authorized to file.

Because of the frequently lengthy amount of time for the processing of applications, an emergency advance payment may be provided in some cases. This is an immediate payment of up to \$100 for an individual, or \$200 for a couple.

In order to qualify for emergency funds, a claimant must be "presumptively eligible"; that is, it is apparent from the facts initially presented that the applicant will eventually be determined eligible. Furthermore, the person must be faced with a real financial emergency and with insufficient resources to meet the emergency before receiving the first SSI check.

In most cases, the applicant will not have to provide proof of the emergency other than a statement of facts. The emergency advance, however, is deducted from the first month's SSI check, or if the individual is found to be ineligible, the SSA may attempt to recover the funds.

Some states also offer interim assistance to applicants. In that situation, the SSA will forward the first SSI check to the local welfare office where the amount of interim assistance is then deducted from the check and forwarded to the individual. Following checks are then sent directly to the recipient.

A disabled or blind person may apply for "presumptive eligibility" payments which also provide funds prior to a final decision as to SSI eligibility. Unlike emergency advance payments, presumptive eligibility funds are the full monthly benefit to which the individual would be entitled, and the payments can continue for three months. Furthermore, the agency cannot attempt to retrieve the funds if SSA decides the individual is not disabled or blind. In order to qualify, the applicant must meet all other eligibility requirements and must provide sufficient evidence of disability or blindness.

Treatment Requirement

All certified disabled individuals whose disability can be treated so that they can eventually work must accept that treatment before they can receive SSI benefits. In addition, blind and disabled SSI recipients under age 65 may be referred to the local state vocational rehabilitation agency. The agency will then decide whether they can offer appropriate services for that individual. Refusal of services may be granted for "good cause".

An SSI claimant or recipient may also request

vocational rehabilitation services. If refused, the individual may then ask for a hearing in order to obtain the desired services.

Appeals Process

Most determinations by a Social Security office can be appealed to higher officials of SSA. Three levels of appeals within the SSA must be exhausted in their appropriate order before a federal court suit can be initiated.

SSI has proposed regulations which would require a 60-day time limit for filing appeals of any kind.

The first level of appeals is called a reconsideration. A request for reconsideration of the initial SSA determination must be made in writing within 60 days of the receipt of that decision. However, the 60-day requirement can be waived for "good cause". A case review may be requested in which the applicant is given the opportunity to present oral and written evidence to the Social Security office. The original decision will be reviewed and a "reconsideration determination" made.

Where the initial determination does not involve medical issues, anyone may also request an informal conference. In addition to having the right to present oral and written evidence, the applicant may also present witnesses and review all the evidence in the SSI record. The conference is conducted by a Social Security employee who also determines the reconsideration decision. Applicants must receive notice of the conference at least 10 days in advance.

Whenever a Social Security office intends to terminate, reduce, or suspend the SSI benefits of a person already receiving payments, a formal conference may be requested. The challenger has the same rights provided for in the case review and informal conference, as well as the right to subpoena witnesses and cross-examine adverse witnesses.

An impartial Social Security employee conducts the conference and renders the reconsideration decision. Notice of the conference is required. Furthermore, notice of all reconsideration decisions are mailed to the applicants.

Any initial determination which was decided at the reconsideration level may be appealed to a judge or examiner for a hearing. An exception to the appellate process is in the case of decisions upon medical conditions, which may be appealed directly to the hearing level.

At a hearing the appellant has the right to appear in person or by representative, to present evidence, to make arguments, and to question or cross-examine witnesses under oath.

The individual may also elect for the hearing to be decided on the basis of the written evidence already in the file. Any help that the appellant may need with regard to the trial may be obtained from the district office. A decision must be rendered within 90 days, except in cases which have no time limit, such as those involving a disability.

The highest appellate level is the Appeals Council review; however, the Council is not required to review a case. Generally, only cases involving questions of law or of vital importance to the administration of SSI will be reviewed.

If the final decision of the Appeals Council is unfavorable, or if the Council refuses to review an unfavorable hearing decision, the next recourse would be to file a law suit in a federal court.

When a Social Security office decides to reduce, terminate, or suspend SSI benefits of any person already receiving SSI, they must first send the recipient a notice explaining the action Social Security intends to take. The recipient then has 30 days to appeal the action. If the decision is appealed within 10 days, however, the SSI benefits will continue at the same level as before the notice was sent.

Furthermore, if a timely appeal is made, the same benefits must be continued until the reconsidered determination or hearing decision is made and mailed to the recipient.

For further information concerning the federal rules for the SSI program, any interested individual may examine the handbooks and manuals at any district office of the Social Security Administration. If a problem still exists, the director of district office operations in one of the ten regional offices and/or a legal services office should be contacted.

New Supplemental Security Amendments

On October 20, 1976, President Ford signed into law a series of amendments to the Supplemental Security Income (SSI) program. Many of these amendments, which were approved by Congress only hours before adjourning for the year, are extremely significant to the handicapped.

The new laws, Public Law 94-566 and PL 94-569, feature the following major reforms, among other provisions:

Community Residences

The Keys amendment, sponsored by Rep. Martha Keys (D. Kan.), allows individuals to live in publicly-operated or sponsored community residences serving 16 or fewer persons without losing their SSI payments.

The amendment also permits state and local governments to subsidize room and board costs, as well as medical and remedial services furnished by an institution to an SSI recipient. Those payments for residential care will no longer be considered unearned income which reduces the recipient's SSI benefits.

In addition, states will be required to develop and enforce standards for community residences. It is hoped that this provision will upgrade the quality of group homes and residential facilities which have hampered the deinstitutionalization process.

Disabled Children

The new law provides for \$30 million to pay for services to SSI-eligible disabled children under the age of 6 or over the age of 6 who have never attended public school. The money is designated for services relating to the child's self-sufficiency.

The Secretary of HEW will be required within four months to initiate rulemaking proceedings to determine who is an SSI "disabled" child. The

current standard used for this determination is inadequate.

The new law also contains an important provision relating to child referral services. The governor of each state must develop a state plan for service referrals and designate an "appropriate" state agency to administer these plans. The amendment is intended to assure individual service plans for each child which are appropriate to the child's handicap.

Home Ownership

This amendment prohibits HEW from taking the value of an individual's home into consideration

in determining eligibility for SSI. Previously, HEW placed an upper limit on the value of the eligible individual's home. If the home exceeded this value, it was considered a resource in determining whether an individual was eligible for SSI benefits.

Deeming of Income

The new law eliminates deeming of income, which is the practice of counting the income of one person as the income of a second person. The amendment provides for the separate determination of a husband and wife's income in determining

SSI Eligibility Requirements

There are essentially three eligibility requirements that individuals must meet in order to receive SSI payments:

Residency and Citizenship

Recipients must be U.S. citizens who have lived in the U.S. since birth or plan to live permanently in the U.S. Benefits are not given to recipients who travel outside the U.S. for a full month, but they will again become eligible after having returned for 30 days. Aliens legally living in the U.S. may also qualify for SSI benefits.

Aged, Blind, or Disabled

Individuals must fall within one of the three categories of eligible individuals. These are:

Aged: Anyone who has attained the age of 65 years or older.

Blind: Anyone who has vision in the better eye no better than 20/200 with glasses, or anyone who has tunnel vision to the extent that the field of vision in the better eye is no greater than 20 degrees.

Disabled: Anyone over 18 who has a

medically determinable physical or mental impairment which is expected to result in death, or last for at least 12 months, which renders the individual unable to engage in substantial gainful activity. Also, any child under 18 who meets the definition of disability.

Blind and Disabled: Anyone who was receiving aid (or improperly denied aid) under the old welfare programs and still meets those requirements is also eligible.

Income and Resources Test

The recipient's monthly countable income must be below the maximum monthly SSI cash benefit for any individual. Countable income is determined by subtracting the exclusions from the total income.

Several kinds of income are excluded, such as child support payments, tax refunds, etc.

The individual's resources are limited to \$1,500 and \$2,250 for a married couple. Certain exclusions include resources necessary for self support, such as a car worth up to \$1,200, and household goods worth up to \$1,500.

eligibility for SSI where one spouse is institutionalized.

Presumptive Eligibility

HEW is now authorized to make benefit payments for three months to individuals who are presumptively blind. Previously these funds, which are available prior to a final decision as to SSI eligibility, were provided only to presumptively disabled individuals. The benefits are not considered overpayments, even if the final determination is that the individual is not disabled. Therefore, they cannot be reclaimed.

Medicaid Eligibility

The amendment provides that SSI recipients will not lose their medicaid eligibility when their social security benefits are increased. Previously, if an SSI recipient became ineligible for SSI benefits because of a cost-of-living increase in social security benefits, the individual would also lose eligibility for medicaid.

Interim Assistance and Food Stamp Eligibility

PL 94-585, signed July 14, 1976, by President Ford, makes permanent what was a temporary program of reimbursement to the states for interim SSI payments. The payments are designed to alleviate hardships caused by the delays in the processing of claims for individuals who apply for SSI benefits. Provision is also made for extending food stamp eligibility for SSI recipients until July 1, 1977.

Pass-Through

PL 94-585 also requires that states can no longer reduce their supplementary payments when the federal benefit levels are increased. In the past, when the federal SSI benefits were increased because of cost-of-living increases, many states reduced their optional supplementation payments by the same amount. Consequently, the recipients were denied an increase in their total benefit.

SSI Appeal Suggestions

The following suggestions for presenting a case in appeal of an SSI decision were offered by Robert L. Trachtenberg, director of the Bureau of Hearings and Appeals and chairman of the Appeals Council, Social Security Administration.

The recommendations were excerpted from a presentation by Trachtenberg before the National Federation of the Blind Annual Convention in Los Angeles July, 1976, as reported by the October, 1976 issue of the Braille Monitor.

"I thought that no presentation could be complete if it didn't provide some useful hints should you ever be presenting a case before an ALJ (Administrative Law Judge). May I suggest the following: (1) Obtain from your local Social Security Office the reasons for the unfavorable determination and the applicable provision of law. (2) If you are unable to fully understand the reasons and the provisions

of the law involved, get someone to represent you. Obtain an attorney or some other knowledgeable individual. (3) Obtain all the evidence available to support your claim. (4) If you are having any difficulty in securing evidence, your local Social Security Office and the ALJ will be glad to assist. (5) Submit any additional evidence early. The ALJ may be able to rule in your favor without holding a hearing. (6) Be sure to carefully study the notice of hearing which will state the issues to be decided and on which the evidence will be taken. (7) Prior to the hearing, you will be given an opportunity to examine the documents in your file. Make sure that you do examine those documents and make certain that the information contained therein is correct. (8) Make arrangements to have any witnesses available who can testify as to the facts in your case. You can have your physician testify, and, if not available, make sure that he or she has submitted a full report on your condition, bearing in mind that all impairments may be considered in deciding whether you are disabled. Remember that the ALJ looks at the total person."

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Section 504
And The New
Civil Rights Mandates

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news

Reorganization In Office Of Human Development Will Create Administration For Handicapped Individuals

Arabella Martinez, Department of Health, Education, and Welfare (HEW) Assistant Secretary for the Office of Human Development, announced on July 26, that the office has been reorganized and renamed the Office of Human Development Services (OHDS).

The reorganization of the office is part of the general reorganization of HEW and other federal administrative departments announced by President Carter in a June 29 executive memorandum. The reorganization effort is aimed at eliminating inefficiency and confusion in administrative service programs.

Criticism Voiced

This reorganization of OHDS has been criticized for downgrading the existing programs for handicapped persons by adding an extra administrative layer between each administration and the assistant secretary for human development. A second complaint is that neither constituents nor consumer groups were consulted concerning this recent reorganization.

The OHDS has absorbed 18 former program administrations

into five new ones to include:

1) the Administration for Children, Youth and Families; 2) the Administration on Aging; 3) the Administration for Handicapped Individuals; 4) the Administration for Public Services; and 5) the Administration for Native Americans.

New Administration for Handicapped Individuals

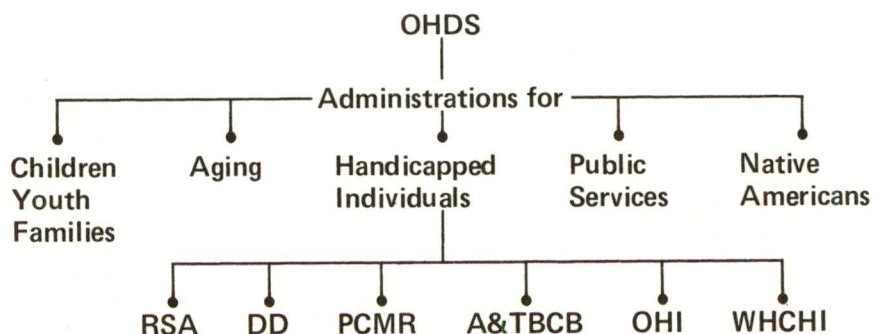
The newly created Administration for Handicapped Individuals (AHI) is composed of 13 former program administrations now consolidated into the 1) Rehabilitation Services Administration (RSA); 2) the Developmental Disabilities Office; 3) the President's Committee on Mental Retardation; 4) the Architectural and Transportation Barriers Compliance Board (A&TBCB); 5) the Office of Handicapped Individuals (OHI); and 6) the White House Conference on Handicapped Individuals. The AHI will also contain a technical assistance

staff which may focus on the implementation of Section 504.

The assistant secretary of the Office of Human Development Services will continue to serve as chairperson of the A&TBCB. The Office of Handicapped Individuals will report directly to the assistant secretary of OHDS rather than being channelled through the Administration for Handicapped Individuals.

One person will serve the dual function of Commissioner of the Rehabilitation Services Administration and Administrator for AHI. This change fulfills the statutory requirements that the RSA Commissioner report directly to the OHDS Assistant Secretary. However, the change has drawn criticism from a number of sources which contend that both positions require full-time attention to adequately meet the demands of both programs.

A task force chaired by OHDS Deputy Assistant Secretary Frank Newgent will implement the transition to the new OHDS administrative



structure by working with Congress, employee unions, and constituent organizations. Although the reorganization is immediately effective, the transition is not expected to be completed until January 1, 1978.

Citation Filed Against Social Security Administration

A second citation enforcing the provisions of the Architectural Barriers Act of 1968 was filed against the Social Security Administration's Southeastern Program Center in Birmingham, Alabama — the largest office building in the state.

The citation, filed on June 8 by the Architectural and Transportation Barriers Compliance Board (A&TBCB), followed unsuccessful attempts at informal resolution.

Eleven violations of the law are specified in the citation including an inaccessible primary entrance, inaccessible elevators, water fountains, parking, telephones, and toilet facilities, as well as carpeting that hinders mobility.

A status hearing has been held in the case, with a hearing anticipated sometime in the fall. The defendants have already made some changes to correct the violations by installing tactile

aids for the visually impaired and by making arrangements to provide accessible parking.

The first citation was issued by the A&TBCB against the Washington Union Train Station on March 23. (Reported in *Amicus*, April, 1977.)

Accessible Buses In Washington And Connecticut

Handicapped persons may soon have better access to public bus service in Tacoma, Washington, and in parts of Connecticut due to recent actions promoting the purchase of buses equipped with lifts for wheelchair users.

The Tacoma City Council recently approved the purchase of 33 new transit buses equipped with hydraulic lifts. A \$2.1 million grant application from the federal Urban Mass Transportation Administration (UMTA) must be approved, however, before buses can be ordered. Other recommendations accepted by the council include the purchase of seven van-type vehicles for handicapped persons, and the use of a share of federal funds to finance the gradual installation of lifts in the existing bus fleet over a period of four years.

In Connecticut, the 280 new buses which will be purchased by the Connecticut Department of Transportation will be equipped with lifts for wheelchair users.

The July announcement of the purchase followed a class action suit filed by the Connecticut Legal Aid Society against the Connecticut Department of Transportation to prevent the purchase of inaccessible new buses, (*Young v. Coleman*, Reported in *Amicus*, February 1977, and April 1977).

UMTA will finance 80 percent of the cost of the new Connecticut buses, replacing more than three-fourths of the existing Connecticut transit fleet.

New Programs and Services

HUD Acts For The Handicapped

The Department of Housing and Urban Development (HUD) has initiated several new programs for handicapped individuals, including the creation of the Office of Independent Living for the Disabled (OILD).

AMICUS SPECIAL REPORT

Copies of the *Amicus Special Report* on the educational rights of handicapped persons are available to interested groups or individuals free of charge.

HUD Secretary Patricia Roberts Harris announced that the OILD will be responsible for informing HUD of the needs of disabled Americans and will join with consumer and advocacy groups to draft HUD regulations to insure the rights of handicapped persons.

Another HUD program is the allocation of five percent of all new family units built under Section 8 of the Housing Assistance Payments Program and other public housing programs which will be designed for handicapped persons.

Local communities will be encouraged to use more of their Community Development Block Funds for the removal of architectural barriers and the construction of rehabilitation facilities. In addition, HUD itself will explore new housing alternatives for mentally disabled persons.

For further information, contact the HUD Coordinator for the Elderly and Handicapped in your area, or write to U.S. Department of Housing and Urban Development, Washington, D.C. 20410.

*Left to right:
NCLH
Executive Director
Thomas P. Carroll,
Representative
James M. Jeffords,
and
Representative
John Brademas*

NCLH News

NCLH Offers Testimony on 504 Compliance

NCLH Executive Director Thomas P. Carroll and staff attorney Lesly Bowers represented the Center in testimony on September 9 before the House Subcommittee on Select Education. The subcommittee, chaired by Representative John Brademas of Indiana, is concerned with the full implementation of Section 504, which prohibits discrimination against handicapped persons in federally financed programs.

Carroll stated that projections of enormous compliance costs for Section 504 of the Rehabilitation Act of 1973 are "unrealistically exaggerated, and the financial objections . . . are specious."

His remarks were in response to a bill introduced by Representative James Jeffords of Vermont which would appropriate \$6 billion to implement Section 504.

Carroll stated that there are widespread misunderstandings concerning 504, particularly with regard to the requirement for architectural changes. He emphasized that the regulations require classrooms and programs used by the handicapped to be accessible, but that huge sums of money will not be required to make every building accessible.



Moreover, the regulations allow three years to complete structural changes.

Carroll concluded that "we cannot afford to permit these financial complaints. . . as premature and undocumented as they are, to interfere with the guarantees of the civil rights of [the] handicapped. . . ."

NCLH Representative At Bar Association Meeting

Kent Hull, NCLH Director of Legal Services, was a participant in the American Bar Association (ABA) annual meeting held in Chicago, Illinois, August 8 and 9.

As a member of the panel in the Section on Individual Rights and Responsibilities, Mr. Hull presented a paper entitled: "The Civil Rights of Physically Handicapped People: Four Issues for Lawyers."

Other participants on the panel were Charles Goldman, General Counsel for the Architectural and Transportation Barriers Compliance Board; James Raggio, attorney for the Philadelphia Public Interest Law Center; Kenneth Mines, Regional Director for the Office for Civil Rights in Chicago; Harold Unterberg, attorney in New York

City; and Marcia Burgdorf, Director of the University of Maryland Law School Developmental Disabilities Law Project.

Bowers Joins NCLH Staff

Lesly Bowers is a recent addition to the NCLH legal staff. A graduate of the Indiana University Indianapolis Law School, Ms. Bowers was recently employed by the Indiana Employment Security Division as an assistant hearing officer in the appellate section, and previously held the position of deputy attorney general of Indiana (appellate section).

Ms. Bowers will concentrate primarily in the area of architectural barriers, and will also assist in the area of post-secondary education.

Employment Issue Of DePaul Law Review And Employment Symposium

NCLH will assist the *Law Review* of DePaul University School of Law in Chicago to publish the Summer 1978 edition dealing exclusively with legal issues pertinent to the employment of handicapped persons. The center will provide

articles for the review as well as technical assistance to the editorial staff.

Articles will examine the scope of rights for handicapped individuals in employment and the procedural methods for implementing those rights. Although primarily designed for lawyers and judges, the issue will also be useful to other individuals who are concerned with the employment rights of handicapped people.

The review will provide an in-depth examination of state and federal laws governing employment, reasonable accommodation, pre-employment inquiries, occupational qualifications, the role of unions, etc.

Employment Symposium

Discussions are also currently underway between NCLH and DePaul University for the co-sponsorship of a major symposium on employment law and the handicapped to be held in Chicago during the winter or spring of 1978. The symposium will provide lawyers with working knowledge and skills in the litigation of employment discrimination cases.

To insure maximum benefits for each participant, enrollment for the symposium will be limited. Persons interested in attending the symposium may write to NCLH staff attorney Brian Linn for further information.

legislation

Education For All Handicapped Children Act Becomes Effective

Final regulations implementing Part B of the Education for All Handicapped Children Act (Public Law 94-142) became effective October 1, 1977. The majority of the changes from the proposed regulations were of a technical nature, consisting of more detailed explanations and clarifications.

IEP Change

One major change, however, concerned the Individualized Education Program (IEP). The proposed regulations required that the IEP must be a statement of "specific educational services needed by the child (determined without regard to the availability of those services)," (Published in the *Federal Register*, December 30, 1976). The final regulations return to the phrasing of the statute itself, defining the IEP as a "Statement of the specific special education and related services to be provided to the child. . .," without reference to the availability of services, (Section 121a.346(c)).

The final IEP provisions require that "each public agency must provide special education and related services" according

to the IEP. However, if the child does not achieve the growth projected in the IEP, no agency, teacher or other person may be held accountable under the regulations, (Section 121a.349).

Furthermore, an IEP must be in effect by "October 1, 1977 and at the beginning of each school year thereafter" for each handicapped child receiving special education from a public agency, (Section 121a.342(a)).

HEW explains the lessening of requirements for the IEP in Appendix A: "given the controversy over this section and whether it is appropriate to add items not specifically covered in the statute, the Office of Education has decided that some experience operating under the statute would be useful before considering whether further regulations on this point would be appropriate."

The regulations were published August 23, 1977, in the Federal Register. A complete analysis of the final regulations for PL 94-142 will appear in the next issue of Amicus.

Education of The Handicapped Act Extended For Five Years

Resources provided to local school districts for educating handicapped children will be extended through fiscal year 1982 with the passage of Public Law 95-49.

The law, signed by President Carter on June 17, will continue the program of education grants made available under all portions of the Education of the Handicapped Act, except Part B (P.L. 94-142).

The Act provides resources for the development of regional resource centers, centers and services for deaf-blind children, early education for handicapped children, and regional post-secondary education projects.

Grants are also extended for personnel training, research and demonstration projects, and instructional media for the handicapped.

The National Advisory Committee on Education of Handicapped Children has not been refunded.

P.L. 95-49 authorizes appropriations of: \$197 million for fiscal year 1978, \$209 million for 1979, \$224.5 million for 1980, \$236.5 million for 1981, and \$247.5 million for 1982.

HEW Issues Proposed Rules For Enforcement Of 504

On June 17, the Department of Health, Education, and Welfare (HEW) issued a proposed rule for the enforcement of Section 504 of the Rehabilitation Act of 1973 by all federal departments and agencies other than HEW.

Section 504 prohibits discrimination against handicapped individuals in programs receiving federal financial assistance.

Executive Order 11914

The proposed rule was issued in compliance with Executive Order 11914 (April 28, 1976) which mandated HEW to "coordinate the implementation of Section 504. . . by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity. . ." HEW's first compliance with the order was the creation of Section 504 regulations for HEW programs, effective June 3, 1977. (These regulations are examined in the Special Report section of this issue of *Amicus*.)

The currently proposed rule employs much of the same terminology comprising the HEW regulations now in effect.

Subpart A of the proposed regulation outlines general procedures for the enforcement of Section 504 which are to be followed by each agency when promulgating its own regulations. Also included are provisions concerning interagency cooperation, and the coordinated implementation of Section 501, 503, and 504 of the Rehabilitation Act.

Each agency would be required to issue a notice of

proposed rulemaking within 60 days after the effective date of the proposed rule. Each agency would then be required to issue its final regulation no later than 135 days after the public comment period ends. However, the agency must first submit its proposed final regulation to HEW for review to provide for consistent government-wide implementation of Section 504.

Definitions

Subpart B contains the standards for defining "handicapped persons" and "qualified handicapped persons." The definition of handicapped person is basically the same as in the HEW regulations. Although the definition of "qualified handicapped person" has been adopted from the HEW regulation, agencies have been given the freedom to incorporate additional qualifications for their specific program.

Subpart C establishes guidelines for defining discriminatory practices. This section is divided into guidelines for general discrimination, discrimination in employment, and for program accessibility. Concerning accessibility, the agencies are urged to specifically illustrate the actions which will be permitted as alternatives to structural change in the recipients' existing facilities.

ICC Includes Handicapped In Intercity Regs

By its order issued on May 20, 1977, the Interstate Commerce Commission (ICC) amended regulations governing intercity bus service, and added specific requirements to ensure adequate service for handicapped persons.

The regulations state that no person shall be denied transportation on the basis of handicap or because that person cannot board a bus without assistance. Changes in the regulations which benefit handicapped persons include: 1) free passage for trained guide dogs accompanying blind passengers, 2) the provision of boarding assistance, including advance boarding and seating, and 3) the posting of notices indicating where and from whom assistance may be obtained.

They further require that terminals which are newly built or "substantially renovated" after January 1, 1978 are to conform to the standards approved by the American National Standards Institute.

The Commission noted that bus transportation is the "most affordable means of intercity for-hire transportation currently available for many persons," and stated that the regulations "should significantly improve intercity motor bus service at little or no additional expense to the consumer."

The regulations were issued two years after the announce-

ment of proposed regulations to the Interstate Commerce Act, and were published in the June 8, 1977 *Federal Register*.

Proposed Amendments to Rail Regulations

In a related action, the ICC granted a petition to reopen the rulemaking proceeding for inter-city rail passenger service in order to achieve compliance with the "necessary assistance" provision in Section 504 of the Rehabilitation Act of 1973.

The proposed amendments to the regulation specify that handicapped persons traveling without an attendant must be able to occupy a seat, feed themselves and take care of most of their personal needs, and have a physician's written approval for independent travel dated within one year of ticket purchase.

If handicapped persons traveling with an attendant cannot meet the above requirements, they are still acceptable for rail travel, provided they make the needed special arrangements 96 hours prior to departure.

Upon 30 minutes advance notice, assistance must be given to handicapped persons traveling with or without an attendant.

An on-board representative must be designated to provide the required assistance, with a notice permanently posted stating where and from whom this assistance can be obtained.

The proposed amendments were published in the June 9, 1977 *Federal Register*.

Justice Department Seeks Intervention In Right To Treatment Suits

Two bills recently introduced into Congress would authorize the Justice Department to initiate or intervene in suits on behalf of institutionalized persons, including the elderly, the mentally handicapped, children and prisoners.

Representative Robert Kastenmeier of Wisconsin introduced HR 2439, and S 1393 was introduced by Senator Birch Bayh of Indiana.

The Justice Department was becoming increasingly involved in "right to treatment" litigation against institutions until recently, when a court ruling found no legal basis for the department's action.

First Intervention

Such intervention first occurred when the Justice Department was ordered to enter the landmark case, *Wyatt v. Stickney*, in Alabama.

Following this suit, the Justice Department became involved in approximately 20 cases filed by private plaintiffs against institutions, and began initiating its own suits in 1974.

In 1976, however, a federal district court in Maryland dismissed *U.S. v. Solomon* on the

grounds that the Justice Department had no statutory authority to engage in such suits. Later, *U.S. v. Mattson* in Montana was dismissed for similar reasons.

Opposition to the Bills

Strong opposition to the bill has been expressed by a number of state attorneys general. A representative of the National Association of Attorneys General claimed that the Justice Department already has the power of intervention (Federal Rule of Civil Procedure 24), and that institutionalized persons now have sufficient recourse to state and federal courts. The fear was also voiced that the Justice Department would use its investigative powers arbitrarily.

However, remarks supporting the proposal were made by Assistant Attorney General Drew S. Days, III, before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

Coordinated Litigation

Days argued that the Justice Department requires this legislation to "embark on a coordinated program of litigation. . .where they are most needed across the country." Although he agreed on the importance of private suits, Days claimed that "resources sufficient to address

the complex problems cannot always be mustered by private organizations."

Comments by NCLH

NCLH submitted comments in support of both the Kastenmeier and Bayh bills. The comments illustrated the positive value of intervention by the Justice Department based on the Center's experience as *amicus curiae* in the Nebraska suit, *Horacek v. Exon*. Other organizations supporting the Kastenmeier bill include the American Bar Association, the American Civil Liberties Union, and the Mental Health Law Project.

Tax Credit For Employers Of Individuals With Handicaps

The Tax Reduction and Simplification Act, signed May 23, 1977, contains a new incentive to the business community to hire handicapped individuals.

Public Law 95-30 will allow employers to take an extra tax credit when they hire new handicapped employees who have been referred from state vocational rehabilitation agencies.

The law allows a standard tax credit for 1977 and 1978 of

50 percent of the first \$4,200 of wages paid to each new employee, with a limitation of \$100,000 per year.

With the hiring of new handicapped employees, an additional 10 percent of the first \$4,200 of annual wages may be taken. The new employee must have a mental or physical disability which results in a substantial handicap to employment and must be referred to the employer while receiving vocational rehabilitation or upon completion of rehabilitation services.

This additional credit may be taken during a one-year period only, beginning with the employee's first paycheck after December 31, 1976.

For further details, see Section 51 of the Internal Revenue Code.

state laws

DD Rights Law Signed In New Jersey

The New Jersey Developmentally Disabled Rights Act, signed May 5, 1977, guarantees that developmentally disabled individuals cannot be denied fundamental rights after admission to a facility or when receiving services.

The law states that no developmentally disabled person shall "be presumed to be incompetent or shall be

discriminated against or shall be deprived of any constitutional, civil or legal right. . ."

Among the rights guaranteed are the right to register and vote, to exercise religious freedom, to send and receive unopened correspondence, to conduct private visitations and telephone conversations, to interact with members of the opposite sex, and to be assured confidentiality of personal and medical records.

Retarded persons are protected from corporal punishment of any kind and are protected by severe restrictions governing medication or chemical restraint, physical restriction or isolation, shock treatment, psychosurgery, sterilization, or any type of research in their treatment.

Other Rights

The law requires that a written individualized habilitation plan be prepared for each resident within 30 days of admission, and that every developmentally disabled person in residential care receive a nutritionally adequate diet and proper medical care.

The law further requires that every person between the ages of five and 21 receive a suitable education, and that all services must be offered in a humane manner to maximize development in the least restrictive environment.

in the courts

architectural barriers

Graven v. Prindle, Patrick and Partners, et al., No. 77-607 (N.D. Ohio, E. Div., 1977)

The architects of the Cuyahoga County Justice Center, the Cuyahoga County Auditor, and the County of Cuyahoga are defendants in an action to halt further payments for the design and construction of the inaccessible Justice Center.

The class action was initiated by Robert J. Graven, a physically handicapped resident of Cuyahoga county. Mr. Graven is also the chairman of the Commissioners' Committee on Employment of the Handicapped and toured the Center in that capacity.

Violations Charged

Graven has declared that the Center will not be accessible, and its design violates the state and local building codes as well as Section 504 of the Rehabilitation Act of 1973, all in effect prior to the construction of the Center. Plaintiffs also charge violations of due process and equal protection under the 14th Amendment.

Among the defects noted by Mr. Graven in his affidavit are inaccessible judges' benches, judges' chambers, restrooms, and jury deliberation rooms, as well as an inaccessible atrium level. Mr. Graven also expressed concern that other substantial barriers to access exist in the facility which were not discovered prior to the filing of his complaint.

The district court has been asked to issue a temporary restraining order to prevent further payment of funds to the architects until the case is settled, and to require the architects to make the necessary structural changes at their own expense.

Jayne, et al. v. University of Nevada-Reno, No. R-76-183-BRT (D. Nev., 1977)

Although further court action in *Jayne v. University of Nevada-Reno*, was stayed by a recent district court order on June 10, 1977, the outcome for the plaintiffs is perhaps as beneficial as a lengthy trial.

The plaintiffs in the case, William Jayne and Dorothy Mosey allege in the amended complaint that they are unable to attend the University of Nevada at Reno (UNR), because the university buildings, programs and services are inaccessible to them due to their handicaps. The plaintiffs seek declaratory and injunctive

relief to enforce their right of access to UNR which is guaranteed by Section 504 of the Rehabilitation Act of 1973.

On December 15, 1976, the court held that the Rehabilitation Act of 1973, and the Architectural Barriers Act of 1968, failed to afford a private cause of action. However, a later decision, in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), concluded that these laws do indeed provide a private cause of action, at least when considered with the regulations which now implement them. (Reported in *Amicus*, February 1977.)

Lloyd Decision Utilized

In its June order, the court concurred with the arguments presented in the *Lloyd* case, and ordered the plaintiffs to file a supplemental complaint detailing the university's non-compliance with Section 504.

The Section 504 regulations state that institutions have 60 days to complete non-structural changes and up to three years to complete structural changes after June 3, 1977, the effective date of the regulations.

The effect of the court's order to stay proceedings has evoked positive reactions from the plaintiffs' counsel. The

court has retained jurisdiction over the case, thereby giving the plaintiffs the official right and duty to monitor UNR's compliance with the law. If it should be determined that UNR is not in compliance with either the 60 day or three year rule, the plaintiffs retain the right to seek court review of UNR's actions.

education

Barnes v. Converse College No. 77-1116 (D.S.C., 1977)

On July 13, 1977, in the first case to reach a decision based on the new Section 504 HEW regulations to protect the civil rights of individuals with handicaps, Converse College in Spartanburg, South Carolina, was ordered to provide the services of an interpreter at no extra cost to a deaf student.

Nelda K. Barnes, an English teacher at the Cedar Springs School for the Deaf and the Blind in Spartanburg, is periodically required by the State Department of Education to earn additional college credits to maintain her permit to teach in public schools. To participate in college classroom activities, Ms. Barnes requires an interpreter. When Converse College refused to provide an interpreter at no

extra cost, Ms. Barnes brought action in federal court asking for preliminary and permanent injunctive relief to order the college to do so.

Her claim was based on Section 504 of the Rehabilitation Act of 1973 and its regulations, specifically those which provide that postsecondary educational institutions which receive federal funds may not discriminate against handicapped students by denying auxiliary aids such as interpreters.

Irreparable Harm

In his order, U.S. District Judge Robert W. Hemphill stressed that the standard for a preliminary injunction is the "balance-of-hardship" test. After determining that the plaintiff has a "probable" right, the test requires balancing the likelihood of irreparable harm to the plaintiff and to the defendant. If the balance of hardship should appear in the plaintiff's favor, then the injunction must be issued.

The judge found Ms. Barnes did have a probable right and that she would suffer the greatest hardship, namely the loss of employment, while the school's hardship would consist of a payment of approximately \$1000.

Update :

Crawford v. University of North Carolina, et al., No. 77-173D (M.D. No. Car., 1977)

On September 1, 1977, a United States Magistrate for the Middle District of North Carolina recommended that a preliminary injunction be issued requiring the defendants to provide an interpreter or other auxiliary aids to the plaintiff.

However, as a condition to the recommended preliminary injunction, the Magistrate would order the plaintiff to file a complaint with HEW under the recently promulgated regulations for Section 504 of the Rehabilitation Act of 1973. As a further condition to the injunction, the Magistrate would require the plaintiff to post a \$3,000 security bond (Crawford's estimated interpreter fees for one year). Moreover, concerning the request for a permanent injunction, the Magistrate recommended that the action be stayed, pending the outcome of the complaint filed with HEW.

Crawford is a deaf graduate student at Western Carolina University, a constituent institution of the University of North Carolina. In December 1976, he requested and was denied interpreter services at university expense.

As a result of that action, Crawford filed suit alleging the denial of his right to equal protection under the 14th

Amendment and discrimination under Section 504 of the Rehabilitation Act. Crawford also charges violation of the Civil Rights Act of 1971. (Reported in *Amicus*, June 1977.)

Objections to the Magistrate's findings and recommendations have been filed by the defendants and by Crawford, who is represented by the National Center for Law and the Deaf Legal Defense Fund.

Crawford's objections center on the requirement that he initiate a complaint with HEW. The National Center for Law and the Deaf point to HEW's proposed Annual Operating Plan, which states that HEW will not be able to act on more than 10 percent of its new complaints.

The plaintiff also objects to the finding that compliance with the Section 504 mandate could be accomplished by providing deaf students with auxiliary aids other than interpreter services.

The Magistrate's recommendations have not yet been approved by the district court.

Update:
Kruse v. Campbell,
No. 75-0622R, (E.D.
Va., 1977)

A three judge court ruled for the plaintiffs in *Kruse v. Campbell*, finding that Virginia's statute providing only partial education tuition grants to

handicapped children is unconstitutional when the children are forced to resort to private schools because of the unavailability of an appropriate public educational placement.

The court ordered the defendants, on March 23, 1977, to provide an "appropriate private education" to the plaintiffs, equal to the education available to the more affluent handicapped children under the Virginia statute, until an appropriate public education is available.

Private Tuition Policy

The policy established under the Virginia statute (Va. Code, Section 22-10.8(a)), allowed partial tuition reimbursement for the private education of handicapped children whose parents could afford to pay the balance of the costs, often equaling "\$2,000 to \$3,000 in excess of the state's tuition grant." For parents of handicapped children who require such a private education for their children, yet could not afford to pay the balance of the tuition costs, the only recourse under the statute was to relinquish custody of the child to the state.

Plaintiffs in the suit, filed December 1, 1975, are disabled children and their parents who

are unable to pay the proportional costs of a private education. (Reported in *Amicus*, December 1976.)

In its March order, the court ruled that the Virginia statute violates the equal protection clause of the 14th Amendment, and further ruled that the practice of placing handicapped children in the legal custody of the state in order to provide private special education violates the right to family integrity guaranteed by the Ninth and the 14th Amendments.

The court refrained from ruling as to whether Virginia's system of tuition grants violates any due process rights or whether the defendants must provide an appropriate public education to all handicapped children as a matter of equal protection, noting that both issues were similarly left undecided by the Supreme Court in *San Antonio Independent School District v. Rodriguez*, (411 U.S. 1, 1973).

In his decision, U.S. district court Judge Robert M. Merhige, Jr., ruled that Section 504 provides a basis for the complaint despite the defendant's claim that Section 504 applies only to employment and vocational training, not education. The defendants argued that Congress intended PL 94-142, not Section 504, to provide for educational services.

Judge Merhige stated that "PL 94-142. . . in no way impairs or diminishes the present right of handicapped children to an appropriate education under [Section] 504. . . ."

Update:

***Mattie T. v. Holladay*,
C.A. No. D.C. 75-31-S
(N.D. Miss., 1977)**

In a significant ruling in this right-to-education case, a Mississippi federal court granted the plaintiffs' motion for summary judgment in the first case to be decided under the Education of the Handicapped Act (20 U.S.C. 1401, *et. seq.*). The ruling is also significant for establishing that an individual has a federal cause of action under the Act.

Summary judgment was also granted under Section 504 of the Rehabilitation Act of 1973. According to Daniel Yohalem, attorney for the plaintiffs, "the Section 504 rulings establish that handicapped children have a right to appropriate educational services *immediately . . .*" now that the regulations to Section 504 are in effect.

In the July 28 decision, Judge Orma Smith ruled that two Mississippi school districts are required to "thoroughly and individually test and evaluate" 26 handicapped children and provide each with "education services appropriate to his needs" within 30 days of the evaluation.

The suit, filed April 25, 1975, charged that the Pearl and Rankin school districts did not provide "necessary educational services" to 26 handicapped children, and that the children were discriminated against

"solely because of their . . . handicaps." (Reported in *Amicus*, Special Report, April 1977.)

In reaching the latest decision, Judge Smith ruled that the Section 504 regulations require schools to provide an appropriate "public elementary or secondary education" to all handicapped children beginning June 3, 1977 when the regulations took effect. The defendants had argued that schools were not required to provide the services until after September 1, 1978, when Public Law 94-142 funding begins.

Another ruling in the case found the defendants in violation of the plaintiffs' rights through the non-enforcement of provisions of the Education of the Handicapped Act, covering child identification, procedural safeguards, non-discriminatory testing, and least restrictive environment.

The court has not yet ruled whether *Mattie T. v. Holladay* qualified as a class action by all handicapped children in Mississippi.

A final ruling in the case will be given subsequent to the finalization and approval of Mississippi's fiscal 1978 annual program plan by the Bureau of Education for the Handicapped, and a 30 day period for the plaintiffs to comment to the court on the defendant's plan.

employment

***Coleman v. Darden*,
et al., C.A. No. 76 M
686 (D. Col., 1977)**

On January 19, 1977, a Colorado district court dismissed an action alleging employment discrimination brought by Michael Coleman, a blind law school graduate, against the Equal Employment Opportunity Commission (EEOC).

Coleman was employed as a case analyst and law clerk by the EEOC from January 1, 1974, to March 1, 1976. While employed as a law clerk, he was provided with a reader.

In November 1975, after his employment was terminated for failure to pass the bar exam, he applied to EEOC for a position as legal research assistant. The EEOC alleged that the job description for that position was similar to that of a paralegal specialist; therefore, Mr. Coleman must possess the qualifications of that position, including the ability to read printed material the size of typewritten characters.

Violation of Federal Laws

The suit claimed that Coleman was rejected for employment solely on the basis of his physical handicap, thereby violating Section 501 of the Rehabilitation Act of 1973 and

the Civil Rights Act of 1964, as well as Coleman's rights of due process under the Fifth Amendment. Coleman claimed that the EEOC had falsely presumed that his blindness rendered him unable to perform the job of legal research assistant.

In an earlier order on November 16, 1976, the district court held that the Rehabilitation Act of 1973 does not provide a private cause of action for individuals who have been discriminated against by employers covered by the Act and that the Civil Rights Act of 1964 is not a basis for relief in the case. In the January decision, the court held that Coleman's due process rights had not been violated, since the reading requirement was reasonably related to the duties of a research assistant.

The case is currently on appeal before the U.S. Court of Appeals for the Tenth Circuit. NCLH has submitted an *Amicus Curiae* brief in this case.

***McNutt v. Hills, et al.,*
C.A. No. 75-1422
(D.D.C., 1977)**

The United States District Court in the District of Columbia has ruled in favor of the plaintiff in a suit charging employment discrimination by the Department of Housing and Urban Development (HUD), under Section 501 of the Rehabilitation Act of 1973. However, the court found that the doctrine of

sovereign immunity prevented the award of back pay to the defendant.

Section 501 directs federal agencies to establish an affirmative action plan for the hiring, placement, and advancement of handicapped individuals.

McNutt filed suit on August 28, 1975, seeking: 1) a declaratory judgment that he was discriminated against by the defendant; 2) an injunction prohibiting future discrimination; 3) retroactive promotion; 4) back pay, and 5) an order requiring the defendant to prepare an affirmative action program for the physically handicapped.

Informal Transfer

McNutt, legally blind, was initially hired as an urban intern at a GS-7 level with HUD, then was promoted to GS-9 and transferred to another office. However, McNutt was not formally transferred, thus preventing any formal evaluation for promotion.

After attempting to obtain a promotion for two years, McNutt filed a formal grievance on March 4, 1974, alleging that the "mechanisms, strategies and commitments to make equal opportunities for the physically handicapped a reality" had been abandoned at HUD.

The grievance examiner found that McNutt had been

discriminated against by HUD's failure to meet its obligations under the statutes, policies, statements, and documents which determine the responsibility of federal agencies toward handicapped employees. The examiner recommended the "establishment of an honest affirmative action program, which amounts to more than rhetoric," and advised that McNutt be retroactively promoted to GS-13. It was further recommended that HUD provide the plaintiff with readers and special equipment for visually handicapped employees.

However, McNutt was not awarded retroactive pay, nor was an affirmative action plan for the physically handicapped provided.

On January 31, 1977, Judge Charles R. Richey held that the plaintiff had been a victim of discrimination and remanded the case to the administrative agency for the purpose of determining to what extent the plaintiff was entitled to promotion. The court further ordered HUD to prepare a report detailing how it intends to comply with affirmative action requirements for handicapped persons.

***Rogers v. Frito-Lay, Inc.,*
C.A. No. 3-76-1481-C, (N.D. Tex., 1977)**

A district court judge, citing the standards of *Cort v. Ash*, (422 U.S. 66, 78 (1975)), has held that Section 503 of the

Rehabilitation Act of 1973 does not allow employees of federal contractors to enforce Section 503 by means of private lawsuits.

Section 503 requires all federal contractors with government contracts over \$2500 to take affirmative action to hire qualified handicapped individuals.

Mildred Lee Rogers, a handicapped individual formerly employed by Frito-Lay, filed suit against the company, charging employment discrimination in violation of Section 503.

In his memorandum order of June 8, 1977, Chief Judge W. M. Taylor ruled that there was strong evidence that Congress did not intend Section 503 to provide a private cause of action. He also stated that the Act provides explicit procedures for administrative complaints, with the responsibility of investigation and enforcement specifically delegated to the Department of Labor.

While the court noted that *Lloyd v. Illinois Regional Transportation Authority*, (reported in *Amicus*, February 1977), established an implied cause of action to seek judicial review of an administrative proceeding under Section 504, the court held that this was distinct from an independent cause of action in federal court.

Furthermore, Judge Taylor held that a private cause of action under Section 504 appears to be limited to "entities which receive federal grants in the

nature of gifts to support activities deemed to be in the public interest or for the public welfare" rather than those holding "government procurement contracts" such as Frito-Lay.

housing

LaMarche v. Gatewood Associates, et al., C.A. No. 77-0332 (D. R.I., 1977)

Pauline LaMarche, who is permanently disabled, has filed suit against the owners and managers of an apartment complex in North Smithfield, Rhode Island, alleging unlawful discrimination in admittance policies and failure to provide her with a hearing.

Admission Denied

In the fall of 1976, the plaintiff applied for admission to the Gatewood Apartments, a housing project for elderly and disabled persons. The project is subsidized and extensively regulated by the Department of Housing and Urban Development (HUD). Ms. LaMarche was shown an apartment and asked to pay a "security deposit" of \$25.00. Subsequently, she

received a letter from the defendants rejecting her application because of her "restricted limitations of mobility with regard to (her) condition."

Ms. LaMarche contends that she is eligible for admittance to Gatewood and is being denied admission solely because of her physical handicap.

Violation of Section 504

The plaintiff alleges in her complaint that the denial of her admission violates Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against "otherwise qualified" handicapped individuals. She also contends that the defendants have violated her rights to a hearing under the due process clauses of the Fifth and 14th Amendments to the U.S. Constitution.

institutionalization

Doe, et al. v. Hudspeth, et al., No. J75-36 (C) (S.D. Miss., 1975)

Doe, et al. v. Hudspeth, et al., is a class action suit brought in 1975 which challenges the State of Mississippi's failure to provide adequate care and

treatment to residents of Hudspeth, the Central Mississippi Retardation Center in Whitfield.

Agreement Reached

After a year's delay due to a reassignment of judges hearing the case, trial was set for February 22, 1977. However, prior to the trial date, the defendants agreed to improve conditions at the center as detailed in a Memorandum of Understanding signed by both parties.

Five basic areas of concern are covered in the memorandum — food and nutrition services, physical therapy services, medication, developmental programming, and deinstitutionalization. Also included is a section on information exchange which ensures that the plaintiffs be provided with reports on new admissions, releases, and transfers; budget requests for fiscal years 1978 and 1979; copies of documents submitted to and by the State Medicaid Commission; and all reports on the center's services and personnel.

Included in the agreed-upon improvements are the provision of full-day developmental programming to each resident no later than July 1, 1978, implementation of the Rules and Regulations for Psychotropic Drug Use adopted by the Michigan Department of Mental Health, and individualized physical therapy services. The defendants had previously

adopted a policy of providing services in the least restrictive environment.

The memorandum also calls for three separate reviews and reports of recommendations on the center's programs and conditions. These reviews are to be conducted before July 1, 1978, by mental retardation experts chosen jointly by the parties.

In light of the memorandum, the plaintiffs agreed to a continuance of the trial until either the completion of certain construction at the center, or July 1, 1978, whichever comes first.

Doe, et al. v. Klein, et al., No. L. 12088-74 P.W. (Superior Ct. Trenton, N.J., 1974)

In June 1977, the parties in this suit entered into a settlement which establishes a comprehensive set of standards, rights, and services for all current and future patients in the Greystone Park Psychiatric Hospital.

This class action was brought in 1974 by patients of the residential psychiatric facility located in Trenton, New Jersey.

The plaintiffs cited numerous violations at the

facility, including lack of privacy, lack of social contact with the opposite sex, grossly inadequate furnishings and clothing, filthy toilet facilities, unqualified and insufficient staffing, and tying patients to beds or locking them in solitary confinement.

Consent Decree

Under the consent decree, state and hospital officials must use current and future appropriations and seek additional federal and private funds in order to achieve normal living conditions as efficiently as possible for the hospital residents. Personnel are to be revamped and upgraded, and a more humane physical environment is to be fostered.

The consent decree additionally requires that a 1975 statutory Patient's Bill of Rights is to be enforced, and that individualized treatment programs are to be instituted.

The order also stipulates that treatment be provided in the least restrictive setting necessary, that patients at Greystone be free from physical harm, and that the facility be utilized to "afford patients' safety, promote dignity and ensure privacy."

According to New Jersey Public Advocate Stanley C. Van Ness, the consent order is "the broadest decision ever on behalf of psychiatric patients in the state and most likely the furthest reaching of any such case in the country."

***Griswold v. Riley*, No. 77-144 PHX-CAM (D.C. Ariz., 1977)**

The federal district court has issued a well-reasoned opinion in this class action suit on behalf of all residents of the Arizona Training Program at Coolidge, denying the state's motion to dismiss the complaint.

The complaint alleges that the residents of the institution suffer a lack of care, habilitation and treatment in violation of their 14th Amendment rights of due process and equal protection, resulting in harm and deterioration in violation of the cruel and unusual punishment provision of the Eighth Amendment.

Violations of the Developmentally Disabled Assistance and Bill of Rights Act (D.D. Act, P.L. 94-103) and Section 504 of the Rehabilitation Act of 1973 are also alleged.

The state's key argument lay in the fact that all residents of the program are on "voluntary" legal status and that prior right to treatment or habilitation decisions based upon the 14th Amendment apply only to involuntarily committed residents.

The plaintiffs' attorney, Robert Beckett, of the Legal Services Project for the Developmentally Disabled, Arizona Association for Retarded Citizens, received suggestions and advice from the National Center for Law and the Handicapped on this legal issue. They argued that this

voluntary/involuntary distinction was meaningless as applied to the residents of a state institution for the retarded, and that all the residents were in one way or another involuntary residents.

The court agreed with the plaintiffs' argument and ruled that the residents "can not be characterized as voluntary, both because Plaintiffs themselves lack the capacity to decide upon an alternative course of action or treatment, and because if they or a next friend or guardian were able to make a decision. . .there is little, if any, choice of alternative programs or services for these Plaintiffs." In other words, since the state has not established community alternatives, the right to voluntarily leave the institution is meaningless. This reasoning is noteworthy, as many states have automatically relied on these distinctions to try to avoid responsibilities.

In addition, the court ruled that, based upon *New York State ARC and Parisi v. Rockefeller* (Willowbrook) and the Eighth Amendment prohibition against cruel and unusual punishment, even if the plaintiffs were in fact voluntary residents, "the facts allege physical harm and deterioration which taken as true. . .state a constitutional claim."

The court further instructed the parties to make appropriate demands on agencies which have jurisdiction to examine the complaints under Section 504 and the D.D. Act.

***New York State ARC and Parisi v. Carey* (Willowbrook), Nos. 72-C-356, 72-C-357 (E.D. N.Y., 1977)**

In the process of implementing the consent decree in this case, involving Willowbrook State School for the Retarded, a major decision was issued by the federal district court on June 10, 1977. The court ruled that the transfer of a resident of a large institution to a smaller institution would only delay and postpone the ultimate goal of the consent decree, which is placement in the community.

Massive Changes Required

The consent decree, entered April 30, 1975, ordered massive changes at Willowbrook, detailing reforms with regard to physical environment, staffing, programs, and therapy of various kinds, based upon the residents' constitutional rights, under the Eighth and 14th Amendments, to protection from harm (regression).

The decree also establishes a review panel to oversee the state's actions, and to create alternative community programs and facilities which will eventually decrease the population of Willowbrook to no more than 250 from a total of 5,700 when the suit was first filed.

The New York Department of Mental Hygiene recommended

that the consent decree be implemented by placing members of the Willowbrook class in the newly-built Bronx Developmental Center. The state argued that this smaller, community-based institution would help train and acclimate residents back to the community into which they were returning.

The Willowbrook Review Panel, however, disagreed, arguing that such a transfer would only delay and postpone the ultimate placement in the community, since each resident would need to first orient himself to the new institution, then later also adapt to placement in the community.

Testimony Given By Experts

One expert, Dr. James Clements, Director of the Georgia Retardation Center, testified to the importance of community placement, without which there would be no "real improvement in the mentally retarded." This view was backed by Linda Glenn, whose testimony was based upon her experiences with the Eastern Nebraska Community Office of Rehabilitation (ENCOR). Ms. Glenn testified that transitional institutional placements delayed community placement and created more problems in trying to achieve normalization.

The court relied upon the panel's experts, deciding that a

concentration on the establishment of community placement facilities, not institutions, "offers the principal hope in the elimination of the indifference and negligence which have characterized the institutional care of the retarded and handicapped for many years."

rights as jurors

***Gureckas v. Goodwin,* No. 77-1721-F, (C.D. Cal., 1977)**

The Los Angeles County Superior Court has changed its former policy of excluding disabled individuals from the rosters of potential jurors after two lawsuits were filed challenging the policy.

In a class-action suit filed in May, Michael Gureckas, who uses a wheelchair, alleged that the court's policy of exclusion was denial of his civil and constitutional rights to serve as a juror in his county. In Los Angeles, wheelchair-bound persons are categorized as "not competent" to serve as jurors solely because they are wheelchair users and are thus denied rights traditionally considered fundamental to American civil and political institutions.

The plaintiffs contend that the defendants, the Los Angeles County Jury Commissioner and Assistant Commissioner, have violated state and federal law by

denying them the opportunity to serve as jurors. The plaintiffs also argue that the former jury selection process conflicts with the policy mandated by Congress to integrate disabled individuals into all aspects of our society.

The plaintiffs seek to enjoin the defendants from branding them as "not competent" since such automatic categorization only serves to perpetuate the stereotype that disabled persons are in fact incompetent, and thus restrict the plaintiffs from participating in society to their fullest extent.

The plaintiffs also seek a declaration by the court that the exclusion of the plaintiff class from the jury selection process is in violation of California state law, U.S. congressional policy and the U.S. Constitution.

In an affidavit filed in this suit, the Los Angeles Superior Court Assistant Jury Commissioner said the practice of excluding disabled individuals as jurors was terminated after a trial last year challenging the policy. However, although the policy change became effective January 1, it had never been publicly announced and was never fully implemented.

U.S. District Judge Warren J. Ferguson has denied the plaintiffs' request for an injunction because of the already changed policy.

transportation

Update :

Lloyd, et al. v. Illinois Regional Transit Authority, et al., No. 75-C-1834 (N.D. Ill. E. Div., 1977)

An amended complaint was filed in *Lloyd* on July 1, 1977, pursuant to leave granted by the court on May 25, 1977.

The complaint seeks declaratory, injunctive, and monetary relief on behalf of the class of all mobility disabled persons residing within the region served by the Regional Transportation Authority (RTA), the Chicago Transportation Authority (CTA), and the Chicago Urban Transportation District (CUTD).

The case originated when two handicapped individuals brought suit to enjoin the expenditure of federal funds in Chicago for the purchase of inaccessible public transit buses, and to compel the transit authorities to provide accessible transportation services for disabled individuals, (Reported in *Amicus*, May 1976 and February 1977).

The U.S. Court of Appeals for the Seventh Circuit reversed the lower court decision, January 18, 1977, which had dismissed the original complaint. The court ruled that Section 504 of the Rehabilitation Act of 1973 establishes "affirmative rights"

on behalf of disabled people and provides a private cause of action. On that basis, the action was then remanded to the lower court for further consideration.

The complaint charges violations of the Urban Mass Transportation Act, Section 504 of the Rehabilitation Act, the Architectural Barriers Act of 1968, Section 165 of the Federal Aid Highway Act of 1973, and the Fifth and 14th Amendments to the Constitution.

The plaintiffs are asking damages of \$20,000 for violation of their rights, and punitive damages of \$100,000 for violation of the plaintiffs' statutory and constitutional rights, as well as costs and attorneys' fees.

An injunction is sought to prevent the defendants from owning or operating any mass transportation vehicles or facilities in addition to those already owned or operated which are not designed for accessibility and effective utilization by mobility handicapped individuals.

Additionally, the complaint seeks an injunction to prevent the approval of any projects, proposals or requests and to prevent release of any federal funds for any additional mass transportation vehicles not accessible to handicapped persons.

Declaratory judgments are sought to: 1) declare the defendants in violation of the Transbus mandate of defendant Brock Adams, issued May 19, 1977; 2) affirm the plaintiffs' rights to use transportation services funded with federal money and

not to be subjected to discrimination in such services; 3) affirm the plaintiffs' rights to participate in the process of obtaining federal funds for mass transportation.

Update :

United Handicapped Federation, et al. v. Andre, C.A. No. 76-1369 (D. Minn., 1977)

The June 21, 1977 order of the Eighth Circuit Court of Appeals in *UHF v. Andre* is significant, in the view of the plaintiffs' attorney, for its retroactive application of regulations and guidelines to determine whether the defendants have met their obligations under the Rehabilitation Act of 1973, and the Urban Mass Transportation Act (UMTA).

The suit was filed by the United Handicapped Federation, the National Paraplegia Foundation, and six mobility handicapped individuals against officials of the Minnesota Metropolitan Transit Commission (MTC), the U.S. Department of Transportation, UMTA, and the AM General Corporation.

The complaint charged violations of the 14th Amendment and Section 504 of the Rehabilitation Act as well as the Urban Mass Transportation Act of 1964, the Federal Highway Amendments of 1974, and the Department of Transportation and Related Agencies

Appropriations Act of 1975. (Reported in *Amicus*, September 1976).

The plaintiffs sought to prevent the purchase by MTC and UMTA of 338 standard buses not equipped for wheelchair users.

When the district court denied a preliminary injunction, the buses were purchased and delivered. Judge Donald D. Alsop ruled for the defendants on March 11, 1976, finding no violation of the statutes or the Constitution.

The June 21, 1977 reversal by the appeals court in *UHF v. Andre* was based on the appeals court reversal in *Lloyd v. Illinois Regional Transportation Authority*. (Reported in *Amicus*, February 1977). The appeals court in *Andre* found that Section 504 "does create an affirmative duty on the part of these defendants," and that a private cause of action does exist for the plaintiffs.

The court remanded *UHF v. Andre* to the district court "for reconsideration of defendants' duties under the statutes and administrative regulations and guidelines."

Update :

***Vanko v. Finley, et al.*,
No. 76-1305 (N.D.
Ohio, E. Div., 1977)**

The June 14, 1977 memorandum and order in *Vanko v. Finley* has held that the plaintiff has interpreted the "special efforts" provision in the

Mass Transportation Act of 1964 too broadly. In addition, the court has requested both parties to submit supplemental briefs in the case.

Vanko v. Finley is a class action filed on behalf of mobility handicapped persons who have been denied access to transportation services provided by the Regional Transit Authority (RTA) of Cuyahoga County, Ohio. (Reported in *Amicus*, February 1977).

The plaintiffs seek to prevent the purchase of non-accessible vehicles by the RTA, as well as the release of federal funds to the RTA, until handicapped persons can effectively utilize its services. The complaint charges that the RTA is operating in violation of the Fifth and 14th Amendments as well as several federal statutes, including the Rehabilitation Act of 1973.

The main argument rested on the "special efforts" provision of the Urban Mass Transportation Act of 1964, the plaintiffs contending that the provision required all vehicles and facilities to be accessible to every person with a mobility handicap.

The district court held that the plaintiffs' interpretation was too broad. The court then identified two issues which remained unsolved by both parties' arguments.

The first issue is whether the RTA is required to provide service for elderly handicapped individuals "that is reasonable by comparison with the service provided to the general public." Secondly, if the RTA is required to provide comparable service, is

it in fact meeting the requirement?

In response to the court order, both parties have submitted supplemental briefs addressing these legal questions.

Update :

***Young v. Adams, No.
77-6056 (2nd Cir., 1977)***

The second circuit recently reversed the district court decision of January 1977 and returned the case to the lower court to carry out the new stipulations. (Reported in *Amicus* as *Young v. Coleman*, February 1977).

The suit was brought to block federal payments to the inaccessible transportation systems of Hartford, New Haven, and Stamford, Connecticut. The second circuit order nullifies the district court's grant of summary judgment and/or dismissal in favor of the federal defendants in that case.

The new order is based on a stipulation filed in the second circuit which states that the state defendants will purchase, and the federal defendants will approve the purchase of 280 passenger buses, all of which will be equipped with lift devices so as to be fully accessible to mobility handicapped and wheelchair confined persons.

The remand also provides that the district court shall retain jurisdiction of the case to make any further orders necessary to carry into effect the terms of the stipulation as filed by the parties.

Section 504 And The New Civil Rights Mandates

NONDISCRIMINATION UNDER FEDERAL GRANTS

"Sec. 504. No otherwise qualified handicapped individual in the United States, as defined in Section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

After four years of living with a law that had no real force but had the potential for greatly affecting the everyday lives of millions of individuals and the functioning of schools, businesses and public facilities, the implementation of that law can now, finally, begin.

The law — the Rehabilitation Act of 1973, Section 504 — was originally enacted to protect the civil rights of all handicapped Americans. Now with the implementing regulations and enforcement provisions, the law can provide greater opportunity for the physically and mentally handicapped to have access to, and participate in, those activities that are summarily accepted by the majority of American citizens as unquestionable rights, e.g., to be able to enter buildings to vote, to observe cultural and artistic events, to attend public schools, and to hold jobs.

The regulations to the Rehabilitation Act were signed April 28, 1977, by Joseph Califano, Secretary of the Department of Health, Education, and Welfare (HEW), and became effective June 3, 1977. Although they bar acts of discrimination in programs receiving assistance from HEW only, further regulations will be forthcoming from other federal departments.

Section 504 was designed to reach in a pervasive way those situations where equal opportunity is not afforded handicapped individuals, and to alter the discriminating conditions. The regula-

tions now stipulate, however, that the termination of discriminatory treatment is not always an adequate means of redressing the resulting damage that occurs. Coinciding with the cessation of discrimination, must be the additional requirement of positive action that will take into consideration the handicap itself, in order to ensure equal opportunity. For instance, simply admitting a blind child into the public school system is only the first step in assuring equal educational opportunity. It logically follows that the child must also either receive verbal instruction or be provided with materials written in braille. Similarly, a government employee using a wheelchair must have access to appropriate offices, restrooms, cafeterias, etc., in order to receive true equal employment opportunity.

The Section 504 regulations address issues of primary importance to the well-being of handicapped individuals — issues of education, employment, access and use of facilities, and social services. With effective implementation, the federal regulations as a whole will provide the assurance that the benefits of these areas will be equitably offered to all individuals by a responsible public. It is therefore essential that the law is clearly understood, particularly by those who are most directly affected by the regulations — handicapped individuals and recipients of federal funds.

"The 504 Regulation attacks the discrimination, the demeaning practices and the injustices that have afflicted the nation's handicapped citizens. . . . It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law."

***— Joseph A. Califano,
April 28, 1977***

STRUCTURE OF THE REGULATIONS

The regulations are divided into seven subparts: 1) General Provisions, 2) Employment Practices, 3) Program Accessibility, 4) Preschool, Elementary, and Secondary Education, 5) Postsecondary Education, 6) Health, Welfare, and Social Services, and 7) Procedures.

A preamble to the regulations provides supplementary information regarding the background to Section 504 rulemaking and the history, as well as a brief overview of the various subparts.

Appendix A offers an analysis of the final regulations and comments upon changes made from the proposed regulations published in July 1976.

For individuals to thoroughly understand how the regulations will affect their own particular circumstances, it is essential that every subpart is clearly understood. For instance, an employer who receives financial assistance from HEW must comply not only with Subpart B — Employment Practices, but with provisions of Subparts A — General Provisions and C — Program Accessibility, as well. Similarly, postsecondary educational institutions must be aware not only of the provisions in Subpart E — Postsecondary Education, but also the requirements of Subparts A, B, and C. Therefore, each subpart does not exist independently from the others; they must all be considered as a whole.

"To have the regulations signed doesn't mean the world will miraculously change. This is just the first step."

***— Dusty Irvine,
a protest leader,
April 1977***

Nondiscrimination Provisions Of The HEW Section 504 Regulations

Subpart A — General Provisions (Sections 84.1 - 84.10)

Definitions Section 84.3

The following terms used throughout the regulations could be subject to multiple interpretations and therefore require specific definitions.

Recipient

"any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient. . . ."

- This definition includes providers of Medicaid.
- Private elementary and secondary schools are not recipients just because their students may participate in other programs which receive federal funds.

Federal Financial Assistance

"any grant, loan, contract. . . or any other arrangement by which the Department [HEW] provides. . . in the form of: 1) funds, 2) services of federal personnel, 3) real and personal property or any interest in or use of such property. . . ."

- The definition excludes procurement contracts of insurance or guaranty. In addition, medical practitioners, hospitals, etc., reimbursed for services to patients receiving Medicare, are also exempted.

Qualified Handicapped Person

"1) With respect to employment — a handicapped person who, with reasonable accommodation, can perform the essential functions of the job. . .

2) With respect to public preschool, elementary, secondary, or adult educational services — a handicapped person of an age during which non-handicapped persons are provided such services, or of an age during which it is mandatory under state law to provide such services to handicapped persons, or to whom a state is required. . . under Section 612 of the Education of the Handicapped Act, and

3) With respect to postsecondary and vocational education services — a handicapped person who meets the academic and technical standards requisite to admission. . . ."

- With regard to employment, the term "essential functions" is used in order to emphasize that handicapped persons should not be disqualified simply because they have difficulty performing tasks that are only marginally related to a particular job.
- The term "technical standards" of postsecondary education refers to all nonacademic admissions criteria.

General Prohibitions Against Discrimination Section 84.4

Any program or activity which receives federal financial assistance 1) may not exclude qualified handicapped persons from aids, benefits or services; 2) must provide equal opportunity to participate or benefit; 3) must provide services as effective as those provided to the nonhandicapped, and 4) may not provide different or separate services except when necessary to provide equally effective benefits.

- Services need not be identical to those provided to the nonhandicapped, but must be the equivalent to them and must afford an equal opportunity to achieve equal results in the most integrated setting appropriate to the persons "needs."
- Although separate programs may be permissible, qualified handicapped persons must be given the option of participating in regular programs.
- Recipients are prohibited from supporting another entity or person that discriminates against handicapped persons.
- Finally, recipients may not make site selections that would prevent handicapped persons from receiving the benefits of a program or activity receiving federal assistance.

"Four years is a little too long to wait for the government to start enforcing the law."

***— Elliot Lichtman
attorney for
the NAACP***

Assurances of Compliance Section 84.5

Applicants for federal financial assistance must submit an assurance on a form specified by the Director of the Office for Civil Rights (OCR) that its programs will be conducted in compliance with the regulations.

- Medicaid providers may meet this requirement through certification on Medicaid vouchers.
- Assurances obligate the recipients for the period during which federal funding is extended or during the period of time in which real or personal property are used which were purchased with federal funds.
- Covenants to assure nondiscrimination are required when federal assistance is given in the form of real property or interest in the property or is used to purchase or improve property. Moreover, with the provision of real property or interest, a breach of covenant allows HEW to revert the title to the property.

Remedial Action, Voluntary Action, and Self-Evaluation Section 84.6

If the Director of OCR finds that a recipient of federal funds has violated Section 504 or the regulations, action is required to remedy the effects of the discrimination.

- Remedial action may be required of a recipient that exercises control over another recipient that has violated the law.
- Remedial action may also be required if handicapped persons no longer participate in the program but were subject to discriminatory treatment or were denied participation.

- Voluntary action may be taken by a recipient to overcome conditions that led to limited participation of handicapped persons.

- Recipients of federal funds are required to conduct a self-evaluation of current policies and practices by June 2, 1978, and to take action to modify any discriminatory effects.

- Consultation with handicapped persons or organizations representing the handicapped is required in the evaluation process and prior to modifications or remedial action.

- Recipients with 15 or more employees must maintain records for three years of persons consulted, descriptions of areas examined, problems identified, and corrective steps taken. Furthermore, the records must be available for public inspection.

Grievance Procedures *Section 84.7*

Recipients that employ 15 or more persons must adopt a grievance procedure and must designate an individual to be responsible for coordinating compliance efforts.

- Appropriate due process procedures must be followed.

- Grievance procedures do not apply to applicants for employment or for admission to postsecondary educational institutions.

- It is not necessary to exhaust grievance procedures before seeking recourse with HEW.

Notice *Sections 84.8, 84.9*

Recipients with 15 or more employees must take appropriate steps to notify beneficiaries and employees of its nondiscrimination policies.

- Notice is required by September 1, 1977.

- Notice must include identification of the individual responsible for coordinating non-discrimination procedures.

- Methods of meeting the requirement are flexible, but notice must appear in recruitment or general information materials that are distributed to beneficiaries and employees.

Inconsistent State Laws *Section 84.10*

Compliance with Section 504 is required, despite state or local laws, or practices by particular professions, that limit the eligibility of qualified handicapped persons to receive services or to practice an occupation.

"We will not have the resources for FY 1978 to do everything we should under Section 504." (Tatel Dep. at 58.)

***— David S. Tatel
Director,
Office for Civil Rights***

Subpart B — Employment Practices (Sections 84.11 - 84.14)

Discriminatory Practices *Section 84.11*

"No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies."

Discrimination is prohibited in:

- 1) recruitment, advertising, and the processing of applications
- 2) hiring, alterations in job status, rehiring
- 3) rates of pay and other forms of compensation
- 4) job assignments and classifications, lines of progression and seniority
- 5) leaves of absence and sick leave
- 6) fringe benefits
- 7) selection and financial support for training, conferences, and other job-related activities, and
- 8) employer sponsored activities, including social or recreational programs.

- Many recipients who are subject to these regulations receive federal contracts in excess of \$2500 and are therefore subject to Section 503 as well.

- Recipients that also receive assistance under the Education of the Handicapped Act must take *positive steps* to employ and advance in employment qualified handicapped persons.

Reasonable Accommodation *Section 84.12*

A recipient is required to make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee" unless the accommodation imposes an undue hardship on the operation of its program.

- Examples of reasonable accommodation may include:

- 1) modification of work schedules or job restructuring,
- 2) physical modifications or office relocation so that facilities are accessible to, and usable by, handicapped persons, or
- 3) the provision of readers or interpreters.

- The determination of what constitutes undue hardship is based upon the facts of each specific situation. Factors to be considered in such a determination are number of employees, type of facility, size of budget, etc.

Tests and Employment Selection Criteria *Section 84.13*

Recipients of federal funds may not use tests or other selection criteria that screen out handicapped persons unless the test score is shown to be related to the particular job in question and alternative tests that do not screen out handicapped persons are not shown by the Director of OCR to be available.

- Tests must measure job performance rather than the individual's ability to see, hear, speak, or perform manual tasks, unless such skills are essential to the job. (For example, an applicant for a research job who has substantial loss of hearing would be severely disadvantaged if given an oral examination but may otherwise be perfectly qualified for the position. The test results, however, would measure the hearing loss rather than ability in job performance.)

Pre-employment Inquiries *Section 84.14*

Recipients may not conduct pre-employment medical examinations or make pre-employment inquiries concerning the existence or the nature of, a handicap. Inquiries must only concern an applicant's ability to perform job-related functions.

- For example, an employer may not ask if an applicant is visually impaired but may inquire if the person has a current driver's license (provided that the license is necessary to the job).

- Pre-employment inquiries regarding an applicant's handicap may be made only when remedial action is required or in the event of voluntary or affirmative action efforts. In such cases, the intention of the recipient must be stated in writing or orally, and the recipient must explain that an applicant's response is voluntary and will remain confidential.

- Offers of employment to handicapped persons may be conditioned on the results of medical examinations if they are administered to all entering employees in a nondiscriminatory manner and results are treated confidentially.

Subpart C — Program Accessibility **(Sections 84.21 - 84.23)**

No qualified handicapped person may be excluded from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

Existing Facilities *Section 84.22*

Recipients shall operate programs and activities so that, when viewed as a whole, they are readily accessible to handicapped persons.

- It is not required that each or every part of an existing facility is accessible or that structural changes be made where other methods are effective in achieving program accessibility. Compliance with this requirement may be achieved in a number of ways; however, priority must be given to methods that will assure the provision of services in the most appropriate integrated setting.

- Suggested methods of compliance:
 - 1) redesign of equipment
 - 2) reassignment of classes or other services to accessible buildings
 - 3) assignment of aides
 - 4) home visits

- A consortium which establishes the post-secondary education of handicapped students into one accessible institution in a geographical area and allows other colleges and universities to participate in that program, restricts the choice of qualified handicapped persons in the selection of schools, and is therefore discriminatory. Consortia, however, may be formed for the benefit of all students.

- Although a public school district need not make each of its buildings completely accessible, it may not make only one building accessible if it results in the segregation of handicapped students.

- Providers of health, welfare, or other social services with fewer than 15 employees may refer handicapped persons to accessible facilities providing the desired service elsewhere, if the only alternative is a significant alteration in existing facilities.

- Time Periods: 1) Compliance with program accessibility is required by August 2, 1977. 2) Where structural changes are necessary, program accessibility must be completed by June 2, 1980. Outside ramps and similar structural additions that can be constructed quickly and economically must be added as expeditiously as possible.

- When structural changes are necessary, recipients must develop, by December 2, 1977, a transition plan with the assistance of handicapped persons or organizations representing the handicapped. The plan, to be available to the public, must include identification of the problem areas, methods to be used for making facilities accessible, a year by year schedule, and identification of the person responsible for implementing the plan.

- Procedures must be adopted and implemented for giving notice to interested persons of the existence and location of accessible facilities.

New Construction

Section 84.23

Construction of new facilities, as well as alterations that could affect access to, and use of, existing facilities, must be designed and constructed so that the facility is accessible to, and usable by, handicapped persons.

- The above requirement is applicable only if construction commenced after June 3, 1977.

- Alterations to facilities should provide physical accessibility "to the maximum extent feasible."

- Recipients must comply with the American National Standards Institute, Inc. (ANSI) accessibility standards, entitled "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped."

- The ANSI standards provide waivers to allow for the use of other methods that are equally effective in providing accessibility; therefore, departures from the ANSI standards are permitted.

(The Section 504 regulations) "are fine in theory, but they mean very little until an administration in full accord with their spirit stands behind the law. No administration that really cared about disabled citizens would spend three years trying to avoid enforcing Section 504. No compassionate administration would force disabled consumers to take it to court before it would enforce the law."

***— Presidential Candidate Jimmy Carter
in his speech on September 6, 1976,
in Warm Springs, GA.***

Subpart D — Preschool, Elementary, and Secondary Education (Sections 84.31 - 84.39)

No preschool, elementary, secondary, or adult education program receiving or benefiting from federal funds may exclude a child from school on the basis of handicap.

If placement in a regular educational setting cannot be achieved satisfactorily, adequate alternative services must be provided at no additional cost to the child's parents or guardian.

Location and Notification *Section 84.32*

Public schools must annually identify and locate handicapped children who are not receiving an education and must notify handicapped children and their parents of the recipient's duty in regard to identification.

Free Appropriate Public Education *Section 84.33*

A free appropriate public education must be provided to qualified handicapped persons in each recipient's jurisdiction no later than September 1, 1978.

Appropriate Educational Services — Regular or special education services that will meet the individual needs of each handicapped person as adequately as the needs of nonhandicapped persons are met. Teachers must be trained to instruct students in light of each particular handicap, and appropriate materials and equipment must be available. Implementation of an individualized education program in accordance with PL 94-142 satisfies this requirement.

Jurisdiction — Includes both domicile and actual residence.

Free Education — Recipients that do not provide the requisite services or do not provide adequate services must pay for alternate placement which includes tuition expense, transportation, psychological and medical services, and residential care (because of the handicap).

Educational Setting *Section 84.34*

Qualified handicapped students must be educated with nonhandicapped persons to the maximum extent appropriate to the students' needs. Nonacademic services (i.e., meals, recess, etc.) must also be provided in as integrated a setting as possible.

- Educational placements should be made as close to the person's home as possible.
- Children in residential settings are to be provided opportunities for participation with nonhandicapped children.
- Separate facilities and services that are necessary for certain handicapped students must be comparable in quality to other facilities and services.

Evaluation and Placement *Section 84.35*

Recipients operating public elementary or secondary programs must evaluate each handicapped person believed to need special education services before an educational placement is made and must establish procedures for periodic re-evaluation.

- In order to avoid misclassification or incorrect placement, procedures must ensure that tests and other evaluation materials are valid for specific areas of educational need and results are not distorted by a student's physical impairment.

- Placement decisions are to be made by several persons, including persons who know the child, and must be based upon information from a variety of documented sources which include tests, teacher recommendations, physical condition, background, and adaptive behavior, in order to ensure the most appropriate placement.

Procedural Safeguards *Section 84.36*

Due process procedures for parents or guardians with respect to the identification, evaluation, and placement of a handicapped child who may need special services must include: notice, a right to inspect records, an impartial hearing and representation by counsel, and a review procedure.

Nonacademic Services *Section 84.37*

Handicapped persons must have an equal opportunity to participate in nonacademic and extracurricular services, including counseling and athletic services, in the most integrated setting appropriate.

- Handicapped students should not receive counseling which restricts their career objectives.

- Separate athletic activities for handicapped persons may be offered only if qualified handicapped students are allowed to compete for teams or participate in regular activities.

Private Education *Section 84.39*

Private elementary or secondary education programs receiving federal funds may not exclude qualified persons from their programs on the basis of handicap if an appropriate education can be provided with minor adjustments.

- Private schools are subject to evaluation and due process requirements only if they operate special education programs.

- Handicapped persons may be charged more than nonhandicapped only if the recipient must bear a substantial increase in program costs.

Subpart E — Postsecondary Education **(Sections 84.41 - 84.47)**

Admissions and Recruitment *Section 84.42*

Qualified handicapped persons may not be denied admission or be subjected to discrimination in admission or recruitment to postsecondary education and vocational education programs and activities.

- Quotas of handicapped persons are disallowed.

- Tests may not be used that have a disproportionate, adverse effect on handicapped persons unless the test successfully predicts academic success and other tests with less adverse effects are unavailable.

- Admissions tests must measure aptitude or achievement without distorted results that might occur due to a specific handicapping condition. Predictions of educational success may be based upon first-year grades, with periodic validity studies.

- Admissions tests are to be given in facilities that on the whole are accessible. They must be given as often and in as timely a manner as other tests.

- Inquiries concerning an applicant's handicap may not be made prior to admission unless the recipient is attempting to correct past discrimination or is trying to increase the participation of handicapped persons. Responses are to be given voluntarily and must be kept confidential.

- Inquiries may be made after admission as to handicaps that may require accommodation.

Treatment of Students *Section 84.43*

Following admission, qualified handicapped students shall not be excluded from, or subjected to discrimination under, any post-secondary education or extracurricular program or activity or in any specific course of study.

- This requirement includes programs for research, occupational training, counseling, health, financial aid, housing, and insurance, as well as academic programs.

- Equal participation in education programs that are not operated by the recipient must be assured.

- Services must be provided in the most integrated setting appropriate.

Academic Adjustments *Section 84.44*

Adjustments must be made in practices or rules that tend to discriminate against students with handicaps; i.e., course substitutions, longer exam times, etc.

- Recipients must ensure that auxiliary aides are provided to handicapped students as necessary for equal participation in programs. Auxiliary aides may include taped texts, interpreters, readers, etc.

Housing *Section 84.45*

Accessible housing must be provided to handicapped students at the same cost and comparable in quality to housing provided other students. By the end of the transition period as discussed in Subpart C, the choice of housing is to be comparable to that of nonhandicapped students.

- A recipient that assists another entity in providing housing to students must ensure that the housing is available to handicapped students in a manner that does not result in discrimination.

Financial Assistance *Section 84.46*

Recipients may not provide less assistance to handicapped persons or limit their eligibility for assistance, even when the assistance is provided through another entity with the recipient's sponsorship.

- Recipients who assist in providing employment opportunities to handicapped students must ensure that the employment that would be provided would not violate Subpart B (Employment Practices) of these regulations.

Nonacademic Services *Section 84.47*

Discrimination is prohibited in physical education and athletics, counseling and placement services and social organizations as discussed in Subpart D, Section 84.37.

Subpart F — Health, Welfare, and Social Services (Sections 84.51 - 84.54)

Social Services Section 84.52

In providing health, welfare, or other social services, recipients of federal funds may not deny qualified handicapped persons these services or limit their participation in the services.

- Services must be equal to, and as effective as, those provided to others.
- Separate services are allowed only where necessary to assure that they are as effective as services provided to others.
- Notice of services and written material concerning waivers of rights or consent to treatment must be available in a form that can be understood by handicapped persons; i.e., brailled messages, radio-spots, etc.
- Hospitals must have procedures for communicating with hearing impaired persons.

- Auxiliary aides (brailled and taped material, interpreters, etc.) must be provided to persons with impaired sensory, manual, or speaking skills by recipients with 15 or more employees or by other recipients specified by the director of OCR.

Drug and Alcohol Addicts Section 84.53

Discrimination is prohibited in the admission and treatment of drug and alcohol addicts by hospitals or outpatient facilities.

Education of Institutionalized Persons Section 84.54

Recipients providing social services for institutionalized persons shall ensure an appropriate education to qualified handicapped persons.

"In the late 1960's it was Title VI; in the early 1970's it was Title IX. The issue was civil rights; the battle was long and bitter. Today it is Section 504."

***— Letter to President
Carter from Frank Bowe,
Director of the American
Coalition of Citizens
With Disabilities.***

Who Is "Handicapped"?

A handicapped person, as defined in the Section 504 regulations, is any person who "1) has a physical or mental impairment which substantially limits one or more major life activities, 2) has a record of such an impairment, or 3) is regarded as having such an impairment." This definition of "handicapped person" is comprehensive, including persons who traditionally have not been regarded as handicapped.

Physical or Mental Impairment

The first part of the definition refers to any physical or mental impairment which affects one or more of the body systems. It includes any person who has a physical impairment, whether it is a "physiological disorder or condition," a "cosmetic disfigurement" or an "anatomical loss." Such handicapping conditions as cancer, heart disease, diabetes, cerebral palsy, epilepsy, and muscular dystrophy are included in these categories.

Also included in the first part of the definition are persons with any "mental or psychological disorder" such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities.

However, in order for a person to qualify as "handicapped," in the first part of the definition, any physical or mental impairment present must also substantially limit one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, breathing, learning or working.

Although not specifically listed in the regulations, alcoholics and drug addicts are clearly to be included, according to a lengthy discussion in Appendix A — Analysis of Final Regulations.

The applicant, however, must meet the basic eligibility requirements for programs, and the applicant's behavior must not cause a substantial interference with the program's operation.

In regard to services, alcoholics and drug addicts have been frequently denied hospital

treatment (including emergency treatment) for conditions unrelated to their alcoholism or addiction. Such persons may no longer be refused these vital services under Section 504.

Record of Impairment

The second major part of the definition includes persons who have a "record of such an impairment," whether this record consists of a history of an impairment or a misclassification as having an impairment.

Persons with a history of mental illness, cancer in remission, or epilepsy under medical control would be included in this category. These persons frequently face the same bias and barriers as persons with limiting disabilities, mentioned in the first part of the definition.

Regarded as Having an Impairment

The third major part of the definition includes persons who do not have a physical or mental impairment that substantially limits major life activities, but are "regarded as having such an impairment," (by a recipient of federal funds). This also includes persons who have a physical or mental impairment which does not substantially limit any major life activity, but which is treated by recipients as constituting such a limitation. Moreover, persons who have a physical or mental impairment that substantially limits major life activities, *only* because of the attitudes of others toward such an impairment would also be included.

This category could include an individual with a disfiguring scar, a limp, or any person who would be treated as being handicapped. Any such individual who is perceived as having a mental or physical disability that would prevent him from performing his job would therefore be included with this part of the regulations, despite the fact that the person would not be considered handicapped under the first part of the regulations.

Note: Information in this article refers to Section 84.3(j) of the regulations, except where otherwise indicated.

Legislative History

The following history of Section 504 capsulizes its legislative development and outlines the significant events which had some bearing on the enactment of this "bill of rights" for handicapped persons and the ultimate promulgation of its regulations.

December 9, 1971

January 20, 1972

Representative Charles Vanik of Ohio introduces H.R. 12154, (117 Congressional Record 45945 (1971)), and Senators Hubert Humphrey of Minnesota and Charles Percy of Illinois introduce S3044, (118 Congressional Record 525-526 (1972)). These bills, intended to amend Title VI of the Civil Rights Act of 1964, contain the language which later becomes Section 504.

September, 1972

The Senate Committee on Labor and Welfare includes Section 504 in the Rehabilitation Act of 1973.

October 27, 1972

President Richard M. Nixon announces his pocket veto of the Rehabilitation Act.

March 27, 1973

President Nixon vetoes the Rehabilitation Act a second time.

September 26, 1973

The Rehabilitation Act, (Public Law 92-112), becomes law after Congress passes the Rehabilitation Act over the President's veto.

June, 1974

The Senate Subcommittee on the Handicapped, (a subcommittee of the Senate Labor and Welfare Committee), holds hearings on proposed amendments to the Rehabilitation Act, and requests HEW to state when regulations will be issued for Section 504.

July 11, 1974

HEW states that final regulations will be published and in effect by the end of fiscal year 1975.

September 6, 1974

The Senate Committee on Labor and Public Welfare, (the committee which developed the Rehabilitation Act of 1973, including Section 504), states in its report on the 1974 Amendments to the Rehabilitation Act: "The Committee understands that HEW's section 504 regulations should be completed by the close of this year."

October, 1974

The Conference Committee on the 1974 Amendments states: "The conferees fully expect that HEW's section 504 regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act was enacted over one year ago — September 26, 1973."

December 7, 1974

The 1974 Amendments to the Rehabilitation Act pass both houses of Congress.

of Section 504

June 3, 1975

A petition for rulemaking is filed by James L. Cherry and the Action League for Physically Handicapped Adults, (ALPHA), requesting that HEW promptly issue regulations for Section 504.

February 13, 1976

Cherry and ALPHA file suit to compel HEW to promulgate regulations for Section 504. (*Cherry et al. v. Mathews et al.* No. 76-0255 (D.D.C.)). (Reported in *Amicus*, July, 1976).

April 28, 1976

President Gerald R. Ford issues Executive Order 11914, requiring HEW to "coordinate the implementation of Section 504. . .by all Federal departments and agencies. . .so that consistent policies, practices, and procedures are adopted with respect to the enforcement of Section 504. . ." (Published April 29, 1976, *Federal Register*).

July 16, 1976

Proposed regulations for Section 504 are published by HEW.

July 19, 1976

District court Judge John Lewis Smith, ruling in *Cherry v. Mathews*, orders HEW to promulgate the regulations without undue delay.

January 18, 1977

HEW Secretary David Mathews states he will not sign the final regulations until Congress has reviewed them to provide additional guidance. Judge Smith considers holding Mathews in contempt, but appeals court action (U.S. Court of Appeals, D.D.C.) gives Mathews enough time to avoid signing the regulations before the Carter administration takes over on January 20.

March, 1977

Advocate organizations set a deadline of April 4, 1977, for HEW Secretary Califano to sign the Section 504 regulations, and plan nation-wide demonstrations for April 5 if the regulations are not signed.

April 5 - 27, 1977

Handicapped demonstrators and persons from advocate organizations protest the delay in signing the regulations by occupying HEW offices in Washington and San Francisco.

April 28, 1977

Califano signs the HEW final regulations for Section 504. (Published May 4, 1977, *Federal Register*).

June 3, 1977

Regulations for Section 504 become effective.

June 17, 1977

In compliance with Executive Order 11914, HEW issues the proposed rule for implementation of Section 504 by all federal departments and agencies (other than HEW) which extend federal financial assistance to any program or activity. (Published June 24, 1977, *Federal Register*.)

August 1, 1977

The Office for Civil Rights in HEW publishes its Proposed Annual Operating Plan, outlining the allocation of OCR resources for investigating discrimination complaints under Section 504 and other statutes. (Published August 5, 1977, *Federal Register*.)

NCLH

Point Of View

By Thomas P. Carroll
Executive Director, NCLH

Now that the HEW 504 regulations are signed and in effect, few will question that they will serve as a positive force in the ongoing struggle of handicapped citizens for equal rights. NCLH feels that the regulations could be improved; our position was outlined in the comments we filed prior to the promulgation of the final regulations. Nevertheless, NCLH feels that, after a long struggle, the finalized regulations contain some powerful and far-reaching provisions that can bring great progress in the civil rights movement.

One might question, however, whether the regulations "will work fundamental changes in many facets of American life," as HEW Secretary Joseph Califano has claimed. The reason for our skepticism lies in the fact that the HEW Office for Civil Rights (OCR), which presently has the responsibility for enforcing nondiscrimination laws, has been given the responsibility for the enforcement of the 504 regulations. Given the track record of OCR in other areas of civil rights, NCLH has grave concerns about its ability to enforce the 504 regulations.

A report on the OCR, issued March 30, 1977, to Senator Birch Bayh, (D-Ind.) from the federal General Accounting Office reveals some startling facts. The report states that OCR does not have reliable production statistics over the past several years due to an inferior management information system. Consequently, data that is needed for decision-making and improvements in agency efficiency are unavailable.

OCR claims that it has not been able to keep up with its workload because of a lack of staff due to a federal hiring freeze and because of requirements placed on OCR by the courts. The GAO report, however, reveals that other factors also undoubtedly contribute to OCR's low productivity, namely: 1) There is no coordination among the four divisions of OCR for uniform policies and guidelines; 2) OCR staff lack the necessary job skills required for effective investigative work; 3) The Office has no uniform system for allocating staff resources among its various units, e.g., the number of staff allocated to a regional office may

have no correlation to the size of complaint backlogs or staff workload; 4) With one exception, OCR has no system for coordinating its enforcement activities with HEW's activities; 5) There is no system for keeping field offices informed in a timely manner of OCR decisions; and 6) OCR has no procedures for monitoring the costs incurred or benefits derived from large model programs or unique compliance reviews.

In short, OCR cannot account for funds and staff resources expended or effectiveness of compliance efforts since its establishment in 1967!

Adams v. Califano

In ongoing litigation involving three lawsuits — *Adams v. Califano*, *WEAL v. Califano*, and *Brown v. Califano* — plaintiffs are seeking redress of OCR's failure to enforce other areas of civil rights legislation which fall under its responsibility. Given the present ineffectiveness of OCR, it is only a matter of time before they are sued by plaintiffs seeking the enforcement of the 504 regulations.

OCR Director David Tatel submitted an affidavit June 6 in *Adams v. Califano* supporting a motion to consolidate the three cases. Tatel admitted in the affidavit that, "in the past OCR has failed to enforce the civil rights laws in accordance with congressional mandates and that lawsuits were necessary to mobilize this Department's enforcement energies." He stated that "a balanced enforcement program" for OCR must be designed and implemented, and then explained such a plan as, "a program which rationally allocates OCR's resources . . . in a manner which takes account of our limited resources and which addresses civil rights problems in an orderly and logical manner."

Considering the obvious inefficiency of the office and the substantial reorganization needed to establish its credibility as an effective agent in monitoring and enforcing civil rights compliance, Tatel's statement seems far from reassuring.

One might, for instance, legitimately ask the

following questions:

1) How does OCR propose to handle its responsibility for enforcing the 504 regulations when it is under three court orders to fulfill its responsibility in other areas of civil rights?

2) What does OCR propose to do about the backlog of approximately 3025 civil rights complaints on file July 1, 1977?

3) What management proposals are being made to deal with the admitted fact that OCR doesn't know how many complaints it has received of discrimination against the handicapped?

4) Since OCR admits to not knowing how much staff time is spent on the average complaint or how much money it spends on complaint investigations, compliance reviews, etc., what measures are being undertaken to remedy this situation?

5) How much longer will the field offices of OCR continue to develop their own policy guidelines and compliance standards without the knowledge of the central office?

6) What chance is there for OCR to be effective in enforcing 504 legislation when it proposes to investigate only 10 percent of the new complaints coming in during 1978 and conducting only 185 compliance reviews?

7) When will the other government agencies that extend financial assistance develop their own implementing regulations to 504?

Notices of proposed rulemaking are due no later than 60 days after the effective date of HEW's implementation plan which is to set out procedures, standards, and guidelines for agency-wide enforcement of 504 (Executive Order 11914). HEW proposed rules for enforcement appeared in the June 24 *Federal Register* — when will final rules appear, allowing other agencies to begin drawing up their own plans?

OCR's Proposed Annual Operating Plan, released August 1, is its first attempt toward "balanced enforcement." Under the plan, complaints will be divided by type (race, sex, handicap), and a proportionate number of each type will be processed on a first come, first served basis. Such efforts toward reorganization are welcomed.

However, the actual figures cause some concern; that is, only ten percent of its new complaints and 42 percent of its backlogged complaints will be investigated in 1978. These efforts hardly qualify as "programs which vigorously enforce the laws," which Tatel stated in his affidavit he would "put into motion."

Tatel also notes in his affidavit plans for reorganizing OCR by establishing a new Office of Program Review and Assistance, which would work with HEW agencies granting federal assistance, and a separate policy office in OCR headquarters. The Office of Compliance and Enforcement has also been restructured, according to Tatel. Other positive signs include the hiring of new employees, the mailing of Section 504 assurance forms to 37,000 institutions, the development of a training program for investigators, and the technical assistance and public awareness campaign for Section 504.

Such plans sound encouraging; certainly, Tatel's managerial skills will be put to the test if the programs are to be successful. But in order for Section 504 to be truly effective, there should be no hesitancy by handicapped individuals or persons representing the handicapped to complain to OCR of discriminatory practices. Recipients of federal funds as well as the government agencies expending and monitoring those funds must be held accountable to the American public for the lawful use of its resources.

Tatel inherited the muddled OCR bureaucracy. We hope he will respond quickly and effectively to pull the Office out of the bureaucratic quagmire. In the meanwhile, handicapped citizens and their advocates must not be lulled into a sense of complacency because the 504 regulations have finally been promulgated by HEW and their enforcement has been assigned to OCR. On the contrary, the obvious ineffectiveness of OCR raises some concern that the promulgation of the 504 regulations may not be followed by vigorous enforcement. Enforcement is not a matter of rhetoric; it demands enforcement mechanisms, and until OCR puts some enforcement mechanisms in place, NCLH will continue to be concerned.

Sections 503 and 504: New Employment Rights For Individuals With Handicaps

by Vincent Ochoa

Title VI¹ of the Rehabilitation Act of 1973, which is designed to be a civil rights act for handicapped individuals, is the most recent development in the use of federal legislation to protect individuals from employment discrimination.

Sections 503 and 504 of the Act are particularly significant. Section 503 requires all federal contractors with government contracts over \$2500 to take affirmative action to hire and advance in employment qualified handicapped individuals. Section 504 prohibits discrimination against handicapped persons in any federally funded program or activity.

This article examines the regulations to Section 504, recently issued by the Department of Health, Education, and Welfare (HEW), and the Department of Labor's Section 503 Regulations, analyzing the major differences and similarities between the two regulatory schemes. Hopefully, this analysis will benefit handicapped individuals who are eager to utilize the protections afforded by these two laws.

It is important to understand that the 504 regulations are applicable only to employers who receive federal financial assistance from HEW (other federal agencies have yet to issue their own 504 regulations to govern employers which they fund).² Therefore, this discussion is relevant only to the HEW 504 regulations.

Another initial consideration with regard to understanding these laws lies within their scope. The ambit of Section 504 is more extensive than

that of 503. Section 504 prohibits discrimination against handicapped individuals not only in employment, but also in the provision of services and benefits such as education, housing, and health care; whereas Section 503 deals only with issues related to employment. This article is limited to a discussion of the scope, effect, and operation of HEW's 504 regulations on recipients of federal assistance in the area of employment only.

Defining The Qualified Handicapped Individual

The protection offered by Sections 503 and 504 is limited to individuals who are within the parameters of the protected class, i.e., those persons who meet the specific definition of a "qualified handicapped individual."

The definition of a handicapped individual with respect to employment is identical for both Sections:

A handicapped individual is any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such impairment.³

Both sets of regulations also protect only "qualified" handicapped individuals. "Qualified" means that the individual be able to perform the essential functions of a particular job.⁴

Determining The Applicable Law

Having determined that one falls within the definition of "handicapped individual" one must then consider which set of regulations govern the activities of the particular employer in question. A primary difference between Sections 503 and 504 is that of coverage.

Section 503 applies to all government procurement contracts and sub-contracts for \$2,500 or more. Included under this section would be any employer who has an agreement with any department or agency of the United States for the furnishing of supplies or services such as utility, construction, research, or transportation; or for the use of real or personal property, including lease arrangements.⁵

Section 504, by contrast, applies to all recipients of federal financial assistance. The term "federal financial assistance" includes government grant loans, contracts (procurement contracts regulated by Section 503 are excluded), or any other assistance in the form of funds, services of federal personnel, or real and personal property.⁶

Examples of employers that are frequently covered by 504 are universities, school districts, hospitals, nursing homes, daycare centers, and public welfare offices. The many state and local government offices that receive funding from HEW are also covered. Section 503 typically includes employers that provide the government with goods and services such as defense contractors, space program contractors, construction companies, and firms which sell equipment and supplies. Most 503 employers will be private, profit-making companies.

Extent of Coverage

The coverage of both sections is also designed to regulate the operations of certain employers who do not receive their federal contracts or assistance directly from the federal government. Not only are federal contractors required to maintain affirmative action policies, but they must also include an affirmative action clause in every sub-

contract or purchase order in excess of \$2,500.⁷ The subcontractors must also comply with the Section 503 regulations.⁸

Section 504 contains similar provisions which reach beyond the employer who initially receives the federal assistance; however, the Section 504 regulations are not as far-reaching as Section 503. Under 504, a "recipient" is defined as any employer who receives federal financial assistance either directly or through another recipient.⁹ Under this definition, employers may be required to adhere to the Section 504 requirements even though they do not receive their federal assistance directly from the government; thus, those employers who receive assistance from agencies and organizations contracting directly with the federal government are also covered.

Affirmative Action v. Non-Discrimination Action

Sections 503 and 504 also differ in their general regulatory approach. Employers covered by Section 503 are obligated to take "affirmative action" while employers covered by 504 must insure "nondiscriminatory action."

Traditionally, "affirmative action" has meant a more active and extensive effort than that required by a nondiscriminatory order. Section 503 employers face a greater responsibility than 504 employers, but they are given flexibility to use their own initiative and resources in meeting their affirmative action obligations.

While not being obligated to implement specific steps in the affirmative action program or to establish specific goals and timetables for hiring handicapped persons, contractors are nevertheless expected to undertake appropriate outreach and positive recruitment activities. These include enlisting the support of recruiting sources, such as state vocational rehabilitation agencies; organizations for handicapped individuals; and educational institutions which participate in training handicapped individuals, such as schools for the blind, deaf or mentally retarded.

Requirement of Good Faith

Although an employer is given substantial latitude in the methodology chosen for his specific affirmative action program, there is a definite requirement that good faith efforts be made to establish a program that insures that when a job vacancy exists, handicapped individuals are notified and given a fair opportunity to fill the vacancy.¹⁰

This "affirmative action" concept includes informing employees and prospective employees of the employer's commitment to increase employment opportunities for qualified handicapped individuals.¹¹ The development of internal support from supervisory and management personnel and the cooperation of union officials in meeting the contractor's obligations are also required.¹²

Employers are obligated to review their employment practices to determine whether their personnel program provides the required affirmative action for the employment and advancement of qualified handicapped individuals.¹³

In contrast to Section 503, Section 504 does not require the same affirmative efforts on the part of employers. However, 504 permits recipients to take "voluntary action" beyond the specific requirements of the regulation to overcome conditions that have led to limited participation by handicapped persons in the past.¹⁴ Moreover, recipients are required to conduct a self-evaluation in consultation with interested persons, including handicapped persons or organizations representing the handicapped,¹⁵ in order to determine whether their present policies or practices may have discriminated against handicapped persons in the past.¹⁶

The recipients are then required to take appropriate steps to eliminate the effects of any discrimination.¹⁷ Recipients that employ 15 or more persons must maintain on file for three years after the evaluation and must make available for public inspection, a list of the interested persons consulted, the problems identified, and a description of any modifications made and of any remedial steps taken.¹⁸

Additionally, if HEW finds that an employer has discriminated against handicapped individuals,

it may order that "remedial action" be taken.¹⁹ Thus, an employer could potentially be required to initiate affirmative action through this process.

Written Affirmative Action Plan And Notices Of Nondiscrimination

For the handicapped applicant or employee who seeks to be well advised of his rights, the regulations which detail the employer's responsibilities for notifying the public may be especially important.

Under Section 503, notices which state the employer's obligations to take affirmative action in the employment of qualified handicapped employees must be posted in conspicuous places at the work site.²⁰

Although all employers must have an affirmative action program plan,²¹ larger employers, with 50 or more employees and a contract of \$50,000 or more, are required to prepare and maintain a *written affirmative action program plan*,²² which must be made available to any employee or job applicant upon request.²³

Every employer under 503 is also obligated to invite all applicants and employees who have handicaps and who wish to benefit from the affirmative action program to identify themselves. The invitation must advise the employees and applicants that any responses are to be voluntary on their part, that refusal to provide this information will not subject the applicant or employee to any adverse treatment,²⁴ and that any information given will be afforded confidentiality.²⁵

This important requirement of informing persons of their rights and the public at large of the employer's obligations, is also imposed on recipients of federal assistance by Section 504. A recipient that employs 15 or more persons must take *appropriate steps* to notify applicants and employees, including those with impaired vision or hearing, that it does not discriminate.²⁶ Methods of notification may include posting of notices, notification in application forms, publication in newspapers, or other written communication.²⁷

Pre-employment Inquiries and Medical Examinations

Traditionally, employers have not asked prospective employees questions concerning their physical or mental disabilities for such benevolent purposes as affirmative action. Rather, their perspective has been to screen out applicants who they perceive as being incapable of performing in the particular job. Questions asked by an employer which are purportedly related to the person's ability to do the job are thus an important focus of the regulations.

... too often employers erroneously assume that when an individual has a certain handicap he is automatically disqualified for a particular job.

Recognizing that information which is useful in the personnel process can be obtained in a non-discriminating manner, pre-employment inquiries of an applicant as to whether he is handicapped or concerning the nature and severity of his handicap are not permitted by Section 504.²⁸ The reasoning behind the proscription against pre-employment inquiries is that too often employers erroneously assume that when an individual has a certain handicap he is automatically disqualified for a particular job. Under the 504 regulations, the employer may only inquire as to one's talents and abilities.

Thus, an applicant can be asked on an employment form if he has a current driver's license (if the ability to operate a motor vehicle is an essential qualification for the position in question), but may not be asked if he is blind or visually impaired. An employer may also ask the applicant whether he can perform safely on a particular job, but may not ask the applicant if he has epilepsy.²⁹

Questions Must Pertain To Job

The 503 regulations do not present the same broad prohibition against pre-employment inquiries. Instead, Section 503 requires employers to first review all physical and mental job requirements to ensure that they do not tend to screen out qualified handicapped individuals.³⁰ If the job requirements do tend to screen out such individuals, they must be "job-related" and they must be consistent with "business necessity and the safe performance of the job."³¹ (See discussion of Job Requirements, Testing and Individualized Determinations.)

Although geared to insure a thorough and careful consideration of the job qualifications of handicapped individuals, the regulations do not directly forbid pre-employment inquiries. However, it is clear that inquiries which go beyond the scope of being "job related" are contrary to the regulations. The employer has the burden to show that all such inquiries are narrowly drawn and specifically relevant to the particular job in question.³² For example, where the ability to operate a motor vehicle is essential to the job, the applicant may be asked whether he is blind; but where the inquiry would serve no legitimate interest and would only provide a hindrance to a thorough consideration of an individual's qualifications to perform on the job, the inquiry would be contrary to the regulations.

Sections 503 and 504 also take different approaches with regard to pre-employment medical examinations. Both regulations permit employers to require medical examinations prior to beginning a job;³³ Section 504 however, contains a specific requirement that, if medical examinations are given, they must be given to all applicants or employees, regardless of handicap.

Confidential Treatment Of Medical Information

Employees or applicants who have provided their employer with medical information during an

interview process or through a medical examination, as well as those who have identified themselves for the purpose of the employer's affirmative action program, should be aware of the extent of the confidentiality provisions in the regulations.

Both regulations treat all such medical information in the same manner, regardless of the method by which the information was obtained. They provide that the information is to be kept confidential, except that: (1) supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals and regarding necessary accommodations; (2) first aid and safety personnel may be informed, if the condition might require emergency treatment; and (3) government officials investigating compliance with Sections 503 or 504 must be informed of relevant information upon request.³⁴

Job Requirements, Testing, And Individualized Determinations

A major concern of many job applicants is that they be given the opportunity to be seriously considered for positions which are available. Too frequently employers have made hiring decisions based upon their preconceived notions of the capabilities of applicants. These biases can usually be attributed to lack of knowledge and stereotyped images.

Both Sections 503 and 504 seek to insure that the abilities, rather than the disabilities, of each applicant or employee are considered. The personnel process must assure a thorough consideration of the job qualifications of known handicapped applicants and employees;³⁵ they can no longer systematically exclude disabled applicants. For example, an employer may not require that radio dispatchers have two arms when an individual with one arm is able to adequately perform the essential functions of the job. The selection of an employee must depend upon ability, not the bias and misconceptions of the employer.

Job Requirements

In establishing job requirements which define the basic qualifications of individuals the employer will consider, both Sections 503 and 504 prohibit the establishment of criteria which tend to screen out handicapped individuals unless it can be shown that a "business necessity" exists.³⁶ However, 503 and 504 differ in their approaches to placing the burden of proving business necessity.

Under Section 503, the employer must prove that the job requirements which tend to screen out qualified handicapped applicants are related to business necessity or the safe performance of the job.³⁷ Under Section 504, HEW must show that alternative tests which are job-related and which do not tend to screen out qualified handicapped applicants are available.³⁸

Testing

Closely aligned with the treatment of job requirements, are the approaches taken with regard to testing. Although the language of Sections 503 and 504 again differ slightly, the basic thrust of both regulations is the same.

Under 503, employers are required to use a personnel process which assures a careful and systematic consideration of the job qualifications of each known handicapped applicant and employee. This provision requires the employer to utilize only those tests that accurately reflect a person's ability.³⁹

Section 504, using more specific terminology, requires the same obligation from recipients of federal assistance. Employers are required to select and administer employment tests so as to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual or speaking skills, the test results accurately measure the person's ability to perform on a job rather than the person's ability to see, hear, speak or perform manual tasks, except where such skills are the factors that the test purports to measure.⁴⁰

For example, a person with a speech impairment may be perfectly qualified for employment. Yet, if given an oral test, the person may be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance, but instead will reflect impaired speech.⁴¹

In the final analysis, both Sections 503 and 504 strive to insure that employers who must comply with these laws evaluate each applicant and employee on an individual basis. To this end, overly broad physical and mental requirements and tests which do not accurately reflect the ability to perform the essential job requirements are prohibited.

Reasonable Accommodations

To many disabled individuals, the concept of reasonable accommodations is one of the most significant aspects of the regulations implementing the Rehabilitation Act. Inherent in the prohibition against discrimination is the concept that reasonable accommodations must be made in order to ensure equal employment opportunities. Both regulations recognize that work sites and equipment have historically been designed by and for an able bodied population. Employers are now, therefore, required to provide the necessary access to all jobs for which a disabled person is otherwise qualified — this is the underlying philosophy behind "accommodations."

"Undue Hardship" Provision

The only limitation which would release the employer from his responsibility to provide an accommodation is whether it is unreasonable. Thus, "reasonable accommodations" are to be made to the known physical or mental limitations of a handicapped applicant or employee unless the employer, under Section 503, can demonstrate that the accommodation will impose an undue hardship on the operation of the business.⁴² The 503 regulations set forth two factors which

"among others" may be considered in determining the extent of the 503 employer's obligation; these are (1) business necessity, and (2) financial cost and expenses.⁴³

Similarly, the 504 regulations permit the employer to forgo making accommodations when the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.⁴⁴ The factors which are to be considered in determining the extent of the 504 employer's obligation are: (1) the overall size of the recipient's program, with respect to number of employees, number and type of facilities, and size of budget; (2) the type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) the nature and cost of the accommodation needed.⁴⁵

Although the two regulations do not include identical provisions, both recognize that the amount of the cost involved will be a primary consideration, and the 504 regulations specifically find that the extent of the employer's obligation is directly related to size of budget. Thus, HEW hypothesizes that while a large school district might be required to hire a teacher's aide for a blind teacher, it might constitute an undue hardship to require any more financial expense of a small daycare center than that necessary to equip a telephone for use by a secretary with impaired hearing.⁴⁶

Wide Variety of Reasonable Accommodations

The specific nature of the reasonable accommodations that employers must make will be determined on an individual basis and will vary depending on the facts of each particular situation. The reasonable accommodations needed by a blind employee will be different from those that an employee who uses a wheelchair will need. A reasonable accommodation encompasses any arrangement which can be beneficial to a handicapped individual and which enables him to perform the job for which he is otherwise qualified

when it does not place an excessive financial burden on the employer.

Although only Section 504 expands upon the specifics of what is meant by an accommodation, the substance of its provisions are equally applicable to 503.⁴⁷ Section 504 indicates that reasonable accommodations include making facilities accessible to, and usable by, handicapped persons, job rescheduling, part-time or modified work schedules, acquisition or modification of equipment or devices, and the provision of readers or interpreters.⁴⁸

For example, where a deaf individual has the qualifications to be a social worker, a large state welfare agency might be required to hire an interpreter for him.⁴⁹ In this context, the regulations require employers to focus on the person's ability and not to highlight his disability.

An example may also be useful in explaining what is meant by the term "job restructuring." Assume a job situation in which the essential requirements involve the ability to assemble and package electrical components, and assume that the employees must also occasionally load heavy boxes of the assembled products on pallets. If a particular applicant or employee has the requisite skills to perform the essential job tasks but does not have the physical ability to move the boxes, the regulations might require the employer to restructure the job so as to not require him to move the boxes.

Although neither of the regulations provides an indepth analysis of the nature of accommoda-

tions which can be made, the regulatory language requires a firm commitment on the part of federal contractors and federally assisted programs.

Labor Unions

Personnel decisions are many times the result of negotiation between the employer and union representatives. The union's seniority rules and hiring hall practices may actually dictate to the employer who is to be hired or advanced in employment. Job definitions, also, are the product of negotiations between the union and employer. It was because of these interrelations that Title VII of the Civil Rights Act of 1964 applied to employers and labor unions. However, Title VII did not forbid discrimination based on a physical or mental condition.

The regulations to Section 503 require employers to notify labor unions of the contractor's obligation to take affirmative action towards the handicapped⁵⁰ and to make reasonable accommodation, which includes job restructuring and time schedule modifications. Although labor unions are not directly required to take affirmative action, union-management agreements will not be justifiable barriers to restructuring a job to accommodate a handicapped person.⁵¹

Since the duty to make reasonable accommodation is also imposed on 504 employers, they, too, will be obligated to insure that labor

Footnotes:

1. 29 U.S.C. Section 790-794, P.L. 93-112, 87 Stat. 357 (1973)

2. Executive Order 11914, 41 FR 17871 (April 28, 1976), directs all federal departments and agencies empowered to extend federal financial assistance to issues rules, regulations and directives consistent with the standards established by HEW. HEW on June 24, 1977 issued proposed rules specifying procedures for the promulgation and enforcement of Section 504. (42 Federal Register (F.R.) 32264)

3. 41 Code of Federal Regulations (C.F.R.) Section 60-741.2 45 C.F.R. Section 84.3(j)

4. 41 C.F.R. Section 60-741.2
45 C.F.R. Section 84.3 (k)(i)

5. 41 C.F.R. Section 60-741.3

6. 45 C.F.R. Section 84.3 (h)

7. 41 C.F.R. Section 60-741.4(f)

8. 41 C.F.R. Section 60-741.2

9. 45 C.F.R. Section 84.3(f)

10. 41 C.F.R. Section 60-741.6(f)

11. 41 C.F.R. Section 60-741.6(f)(3)

12. 41 C.F.R. Section 60-741.6(g)

13. 41 C.F.R. Section 60-741.6(b)

14. 45 C.F.R. Section 84.6(b)

15. 45 C.F.R. Section 84.6(c)(1)

16. *Id.*

17. *Id.*

18. 45 C.F.R. Section 84.6(c)(2)

19. 45 C.F.R. Section 84.6(a)

20. 41 C.F.R. Section 60-741.4(d)

21. 41 C.F.R. Section 60-741.4

22. 41 C.F.R. Section 60-741.5(a)

23. 41 C.F.R. Section 60-741.5(d)

24. *Id.*

25. 41 C.F.R. Section 60-741.5(c)(1)

26. 45 C.F.R. Section 84.8

unions do not hinder the hiring or advancement of handicapped persons. Moreover, the 504 regulations require that employers not "participate in a contractual or other relationship that has the effect" of subjecting qualified handicapped applicants or employees to discrimination.⁵² Section 504 specifically provides that the employer's obligations are not obviated by any inconsistent term of any collective bargaining agreement to which the employer is a party.⁵³

If a revision of the collective bargaining agreement is necessitated by the 503 regulation, the labor unions are to be notified of such change and given an opportunity to present their view to the employer and to the Director of the Office of Federal Contract Compliance. The Director is required by the regulations to use his or her "best effort" directly or through the employer to assure that labor unions cooperate with and assist the employer to meet affirmative action obligations.⁵⁴

Prohibited Practices

Although the proscriptions against discrimination by employers are generally thought of in terms of decisions made in the hiring of an applicant or in the promotion of an employee, the regulations apply to the total ambit of employment-related issues. The Sections 503 and 504 regulations both impose a broad obligation of assurance that the same rights, benefits and privileges are granted to all employees.

More specifically, leaves of absence, sick leave, or any other leave and fringe benefit available by virtue of employment are to be provided equally to handicapped employees.⁵⁵ Discrimination in rates of pay or any other form of compensation is prohibited. Additionally, compensation is not to be reduced because of any disability income or pension or other benefit the employees receive from other sources.⁵⁶

Handicapped employees are also to be given an equal opportunity to receive financial support for training, including apprenticeship, and professional meetings and to be selected for leaves of absence to pursue training.⁵⁷

These new laws are a serious effort to assure that the handicapped are provided an equal opportunity to secure employment. There will be those who will say that the laws place too much of a burden on employers and that the regulations were unnecessary. The fact is, that the regulations were made necessary by years of gross exclusions of the handicapped from the labor force. The time for hollow statements of good intention in providing employment for the handicapped has passed. "Hire the Handicapped" is no longer just a slogan, it's the law.

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27. *Id.*
28. 45 C.F.R. Section 84.14(a)
29. In conjunction with the Rules and Regulation, HEW promulgated "Appendix A - Analysis of Final Regulations" 42 F.R. 22685 (1977)
30. 41 C.F.R. Section 60-741.6(c)(1)
31. 41 C.F.R. Section 60-741.6(c)(2)
32. 41 C.F.R. Section 60-741.6(b)
33. 41 C.F.R. Section 60-741.6(c)(3), 45 C.F.R. Section 84.14(c)
34. 41 C.F.R. Section 60-741.6(c)(3)(i) 45 C.F.R. Section 84.14(d)(1)
35. 41 C.F.R. Section 60-741.6(b)

36. 41 C.F.R. Section 60-741.6(c)(2) 45 C.F.R. Section 84.13(a)
37. 41 C.F.R. Section 60-741.6(c)(2)
38. 45 C.F.R. Section 84.13(a)
39. 41 C.F.R. Section 60-741.6(b)and(c)(2)
40. 45 C.F.R. Section 84.13(b)
41. *Id.*
42. 41 C.F.R. Section 60-741.6(d)
43. *Id.*
44. 45 C.F.R. Section 84.14(a)
45. 45 C.F.R. Section 84.12(c)
46. 42 F.R. 22688 (1977)
47. 45 C.F.R. Section 84.12(b)

48. *Id.*
49. 42 F.R. 22688
50. 41 C.F.R. Section 60-741.4(e)
51. 41 C.F.R. Section 60-741.9(a)
52. 45 C.F.R. Section 84.11(a)(4)
53. 45 C.F.R. Section 84.11(c)
54. 41 C.F.R. Section 60-741.9(a)and(b)
55. 41 C.F.R. Section 60-741.6(a) 45 C.F.R. Section 84.11(b)
56. 45 C.F.R. Section 60-741.6(e)
57. 45 C.F.R. Section 84.11(6)(7)

Complaint Procedures

If one has been discriminated against because of a handicap, one has 180 days from the date of the alleged discriminatory act to file a written complaint. The written complaint must contain the following information: (1) name and address of the complainant; (2) name and address of the employer who committed the alleged violation; (3) a description of the act or acts considered to be a violation; (4) a signed statement that the individual is handicapped, or has a history of a handicapping condition, or was regarded by the contractor as having an impairment; and (5) other pertinent information available which will assist in the investigation.

Section 503 Complaint Procedures

The Department of Labor is required by the Section 503 regulations to institute a prompt investigation of each complaint. If the investigation shows no violation of the regulation, or if the Director of the Office of Contract Compliance decides not to initiate administrative or legal proceedings where there has been a finding of discrimination, the complainant is notified and is given the opportunity (30 days) to request review by the Director.

If the investigation indicates that the contractor has not complied with his obligations under 503, an attempt will be made to resolve the matter by informal means including conciliation or persuasion. Where the apparent violation is not resolved informally, the OFCCP may seek judicial enforcement.

The OFCCP may also withhold so much of the accrued payment due on the contract or any other contract between the prime contractor and the federal government to correct any violation of the provisions of the affirmative action clause. In addition, a contract may be cancelled or terminated in whole or in part for violation of the regulations. Finally, a prime contractor or subcontractor may be debarred from receiving future contracts for failure to comply with the provisions of Section 503.

Section 503 complaints should be addressed to:

The Equal Standards Administration Office of
Federal Contract Compliance Program (OFCCP)
Third and Constitution Avenue, N.W.
Washington, D.C. 20210

or to the OFCCP regional office, which is listed in most telephone directories under U.S. Government, Department of Labor.

Under Sections 503 And 504

Section 504 Procedures

Procedures for noncompliance are similar under Section 504. If the complaint cannot be resolved by informal means, HEW may terminate or suspend the financial assistance or may refer the case to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce the law.

Section 504 employers are required to adopt a grievance procedure which will provide a prompt and equitable resolution of a complaint alleging a violation of Section 504. However, this grievance procedure is limited to use by employees, and may not be used by job applicants.

Although the ultimate remedies available to the compliance agencies involve withdrawing the federal contracts or financial assistance, both regulatory schemes are designed to effect a remedy for the individual who has been discriminated against. Thus, where discrimination has occurred, OFCCP and HEW will pursue promotion, reinstatement, backpay or whatever is appropriate to rectify the unlawful acts of the employer.

Complaint procedures for Section 503 are found in 41 Code of Federal Regulations, Sections 60-741.26 and 60-741.28. Procedures for Section 504 can be located in 45 C.F.R., Sections 84.61 and 84.7.

Section 504 complaints should be addressed to:

Mr. John Wodatch
Office of New Programs
Office for Civil Rights, HEW
Washington, D.C. 20201

Copies Of Regulations

Individuals who would like to obtain copies of the Sections 503 and 504 regulations may write to the following addresses:

For 503 Regs: Employment Standards Administration
Office of Federal Contract Compliance
3rd St. and Constitution Ave., N.W.
Washington, D.C. 20210

For 504 Regs: Department of Health,
Education, and Welfare
Office for Civil Rights
Main HEW Building
Washington, D.C. 20201

Deadlines For Section 504 Compliance

June 3, 1977

The Section 504 regulations became effective.

July 5, 1977

Assurance of Compliance forms (HEW form 641) must be returned from all institutions receiving financial assistance from HEW.

August 2, 1977

Programs or activities in existing facilities must be made accessible (where structural changes are not required). (Section 84.22(d)).

September 2, 1977

Recipients of HEW funds employing 15 or more persons must make an initial notification that they do not discriminate on the basis of handicap. (Section 84.8(a)).

December 2, 1977

Where structural changes in existing facilities are necessary to make programs accessible, recipients of HEW funds must have completed a transition plan outlining the steps needed to complete these changes. A copy of the transition plan must be available for public inspection. (Section 84.22(e)).

June 2, 1978

HEW recipients must have completed a self evaluation process in consultation with handicapped individuals and organizations. (Section 84.6(c)).

September 1, 1978

Public elementary and secondary schools must provide each qualified handicapped student a free appropriate education. (Section 84.33(d)).

June 2, 1980

Structural changes must be made in existing facilities where this is necessary to achieve program accessibility.

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



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