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NATIONAL CENTER FOR LAW & THE HANDICAPPED
VOL. 3 NO. 1 • JAN./FEB. 1978

Legal Resources for the Handicapped

- Who Are The Advocates?
- Choosing Your Attorney-
Proceed with Caution

Amicus

VOL. 3 NO. 1 • JAN./FEB. 1978

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news

OCR Charges New York City School Board With Race, Sex, and Handicap Bias

The Office of Civil Rights (OCR) has charged that New York City's board of education does not provide equal educational opportunities for all students.

On October 5, OCR gave the board 45 days to devise a plan to bring the district into compliance with Civil Rights Act Title VI and provisions of Section 504 of the Rehabilitation Act of 1973.

OCR has cited several instructional barriers to handicapped children, including inaccessibility to classrooms, shorter school days for handicapped students, and undiagnosed needs of children with special needs.

An in-depth investigation of the school system was conducted by OCR in response to requests it received from HEW and in accordance with the timetable established by Judge John Sirica's order of September 20, 1976, in *Brown v. Mathews* (No. 75-1068, July 20, 1976).

In that case, Judge Sirica ordered HEW to complete certain investigations, including

negotiations, and, where necessary, initiation of enforcement proceedings, according to a strict timetable. This order was modified on September 20, 1976, to allow sufficient time for the completion of the New York City investigation which had a deadline of January 18, 1977.

The investigation alleged to have revealed a number of inequities perpetrated by the board, including: 1) denial of equal educational resources, 2) misallocation of special federal funds, and 3) denial of meaningful educational services to both under-privileged and special needs children.

HEW Offers Technical Assistance for Compliance with Section 504

A series of technical assistance programs to help federally funded institutions comply with the Section 504 regulations prohibiting discrimination against handicapped persons has been initiated by the Department of Health, Education, and Welfare (HEW).

The programs will include the development of resource materials such as a national survey of technical assistance needs, grievance procedures and model self-evaluation, guides for

child identification and training resources, a training program for HEW personnel, and a national "hotline" providing prompt response to inquiries on compliance with Section 504. A national speakers bureau is currently being maintained by HEW.

Additional information is available from *Mr. Jim Bennett, U.S. Department of Health, Education, and Welfare, Washington, D.C. 20201. Telephone: (202) 245-9180.*

A&TBCB Adopts Resolution Extending Use of ANSI

The Architectural and Transportation Barriers Compliance Board (A&TBCB), has adopted a resolution calling for all federal agencies to use the *American National Standard Specifications (ANSI) for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped*. The action establishes an A&TBCB policy recommending that at a minimum ANSI should be used for all federally funded construction.

NCLH news

NCLH Architectural Barrier Survey : First Step Toward Developing Better State Legislation

The National Center for Law and the Handicapped, in compliance with a request made by the President's Committee on Employment of the Handicapped, has undertaken a long-term project to develop improved state architectural barrier legislation. As part of the project, a survey was distributed at a conference sponsored by the Committee and to other interested individuals.

The purpose of the survey was to gain insight into what people would like to see included in model legislation to eliminate architectural barriers. The survey also sought to determine what factors cause problems with accessibility and usability in their state.

A total of 95 responses were received by NCLH (from either the conference participants or people who contacted NCLH to express interest in the survey). A majority, over 70 percent, indicated they had some form of handicap.

In general, the respondents expressed discontent with their state's accessibility of facilities,

even those recently constructed under architectural barrier regulations. The lack of effective enforcement of the regulations was cited as another problem, especially among handicapped persons (84.10 percent of all the respondents felt that it is vitally important to effect enforcement mechanisms by written law).

In the final section, the questionnaire provided an opportunity for respondents to list items they believe are imperative to include in an architectural barrier law. The recommendations ranged from general items such as strict enforcement, a well funded administrative agency, and stiff penalties, to specific items such as ramps, wide doorways, accessible restrooms, etc.

The survey indicates that a great deal must be accomplished before a barrier free environment is achieved. A sense of improvement was reflected in the survey, however, attributable mainly to recent architectural barrier legislation. For example, facilities constructed prior to the enactment of new architectural barrier regulations received very poor marks. Eighty percent of the facilities were said to be either bad, or very bad, with regard to accessibility. This compares with only 28.42 percent who felt that accessibility was very bad (in the same facilities) after passage of the new regulations.

Survey respondents expressed a need for laws to include

a clear and all-encompassing definition of what an architectural barrier is. The responses also reflected a growing concern over the many loopholes in regulations which seriously hinder efforts made to increase accessibility. A call for removal of such loopholes permeated the surveys, coupled with a demand for stiff penalties and fines to ensure compliance.

In the final assessment, one common chord resounded throughout all six sections of the survey: the need for broad application of architectural barrier regulations combined with strict enforcement of compliance.

publications

Publications Available on Legislation and Regulations Affecting the Handicapped

Synopses of legislation enacted during the 94th Congress affecting handicapped persons is available in *A Summary of Selected Legislation Relating to the Handicapped: 1975-76*. The 42-page booklet is the sixth in a series first published in 1967. The booklet includes tables tracing the development of each law through the legislative process, and cross references to laws described in earlier editions.

Also, *Key Federal Regulations Affecting the Handicapped: 1975-76* is a 74-page booklet reviewing selected federal regulations with implications for children and adults with handicapping conditions.

These publications may be obtained by writing to: *Clearinghouse on the Handicapped, Office for Handicapped Individuals, DHEW 338D Humphrey Building, 200 Independence Avenue, S.W., Washington, D.C. 20201.*

Beyond the Best Interests of the Child

Beyond the Best Interests of the Child, by John Goldstein, Anna Freud, and Albert J. Solnit (New York: Free Press, 1973) emphasizes the psychological needs (in addition to bodily necessities) of a child who is inappropriately placed or is in some way deprived of an environment which adequately serves his needs.

The authors critique "the existing laws governing the disposal of children and attempts to formulate a revised code." They represent three institutions, the Yale Law School, the Hampstead Child-Therapy Clinic, London, and the Child Study Center, Yale University.

The ostensible purpose for state intervention into traditional parent-child relationships, state the authors, is the desire to serve

"the best interests of the child." The state's benevolent objectives are frequently not met, however. Judicial, legislative, and executive decisions have, according to the authors, been appallingly slow to recognize the necessity of safeguarding a child's psychological well being.

The authors present definitive guidelines for the establishment of continuous and affectionate relationships for every child with an adult. The failure to develop such a relationship invariably has detrimental effects on the child's psychological well being. (The authors express dismay over how this basic, indispensable need is at times totally overlooked in the placement of a child.)

The tenuous and frequently tentative nature of commonly used child placement procedures tend to subvert a child's inherent psychological need for permanence and security. As presently instituted, the child has no firm assurances that adopting adults will become "psychological" parents, or that foster parents can retain him on a permanent basis, or that custody will not be transferred from one divorced parent to the other. The authors suggest improvements in all such proceedings, with the child's psychological needs being taken under consideration to the same degree as his physical needs.

The authors perhaps espoused their beliefs best in stating: *A child's mental reliance on the adult word is at least as long-lived as his physical dependency. Each child's development*

unfolds in response to the environmental influences to which he is exposed. His emotional, intellectual, and moral capacities prosper, not in a void, and not without conflict, within his family relationships, and these determine his social reactions. (P. 10)

FAA Publishes Access Guide for Handicapped Travelers

The Federal Aviation Administration of the U.S. Department of Transportation has published, "Access Travel: Airports," a 20-page expanded edition of the Federal Architectural and Transportation Barriers Compliance (A&TBCB) Board's airport access guide for handicapped travelers.

The guide is being distributed free by the Consumer Information Center of the U.S. General Services Administration. Sixty-nine accessibility features, e.g., ramps, lowered telephones, accessible restrooms, etc., are listed for 220 airport terminals around the world.

The booklet also includes information on how travelers with special needs can make advance arrangements.

Copies of the guide can be obtained by writing: *Consumer Information Center, Dept. 619-F, Pueblo, Colorado 81009.*

legislation

NCLH Urges Civil Service Commission to Substantially Change its Proposed Rules for Assuring Nondiscrimination

The National Center for Law and the Handicapped (NCLH) has submitted comments to the Office of Selective Placement Program, U.S. Civil Service Commission, in regard to the Commission's proposal to establish a review system for discrimination based on handicap for federal employees and applicants. The proposed regulations were published in the *Federal Register*, September 16, 1977. (45 C.F.R., Section 713.701 — 713.706).

NCLH states in its comments that the proposed rules do not satisfy the congressional mandate set forth under Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. Section 791). Section 501 imposes upon executive agencies the obligation to file affirmative action plans with the U.S. Civil Service Commission and the Interagency Committee on Employment of the Handicapped.

Based upon an extensive investigation of the legislative history, NCLH contends that Section 501 was intended to be a working mechanism for combating discrimination through affirmative action; and furthermore, that Congress intended the federal government to become a "model employer" of the handicapped, and mandated that the Civil Service Commission be a focal point for the implementation of Section 501.

NCLH asserts that the proposed regulations are insufficient to ensure the full implementation of these congressional goals. The regulations provide that:

Agencies shall give full consideration to the living, placement, and advancement of qualified mentally and physically handicapped persons. An agency shall not discriminate against a qualified mentally or physically handicapped person on the basis of the handicap. An agency shall make reasonable accommodation for the known limitations of a qualified mentally or physically handicapped employee or applicant to enable that individual to perform the duties of a position efficiently and without endangering the health or safety of the individual or others.

When the Rehabilitation Act was first introduced, Senator Hubert Humphrey indicated that the bill would "make every effort to enable a handicapped person to lead a productive and financially independent life." He also stated that "the Federal Government can and should assume the leadership in hiring, placement, and advancement practices with respect to handicapped persons."

During hearings before the Subcommittee on the Handicapped, May 5, 1976, Senator Williams stated:

To require that the Federal Government itself act as a model employer of the handicapped and take affirmative action to hire and promote the disabled, we enacted Section 501 of the act. . . .

Legislative Intent Not Reality

To date, however, according to NCLH, "blatant, unmitigated discrimination runs rampant in many federal agencies." For example, the Immigration and Naturalization Service of the U.S. Department of Justice recently circulated a sheet entitled "Information about Requirements for the Position of General Attorney (Nationality)." That job description sets the following as "physical requirements":

Applicants must be physically able to perform efficiently the duties of the position. Good distance vision and ability to read without strain printed materials. . . . ability to hear the conversational voice. . . possess emotional and mental stability and unimpaired speech. . . able to drive an automobile. . . . Any physical condition which would cause the applicant to be a hazard to himself or others is disqualifying.

Indiscretions such as these obviously counteract the congressional intent of Section 501, which, according to NCLH, expressly calls for "affirmative

action" in the hiring of handicapped individuals, as opposed to mere "nondiscriminatory" practices.

The NCLH comments note the absurdity of many federal government practices, such as the job description in question in the case of *Coleman v. Darden* (Reported in *Amicus*, September 1977). In that case, the plaintiff, who had obtained a Juris Doctor degree, was automatically disqualified for the position of an Equal Employment Opportunity Commission research assistant as a result of a Civil Service Commission bulletin which required "the ability to read printed matter the size of typewritten characters."

NCLH observes that according to the Commission's annual report for 1977, as of December 31, 1976, only 2.8 percent of all employees of the federal government are handicapped.

More Substantive Regulations Needed

In order to redress the present disparity in the federal government's hiring practices, NCLH urges the Civil Service Commission to issue more substantial regulations outlining the necessary development of effective affirmative action plans, similar to the provisions of Section 503, which include outreach, positive recruitment, external and internal dissemination of policy, responsibility for implementation, and development and execution of affirmative action plans.

According to the National Center, the inadequacies of the proposed regulations under Section 501 not only fail to implement congressional intent, but its deficiencies become even more evident when compared to the strong regulatory schemes devised under Sections 503 and 504 for prohibiting employment discrimination by federal contractors and subcontractors and in federally assisted programs. NCLH finds a note of irony in the failure of the federal government to effectively implement Section 501, vis-a-vis the substantive protections provided by the regulations implementing Sections 503 and 504.

House Bills Introduced Designed to Promote 504 Compliance

Representatives James Jeffords from Vermont and Christopher Dodd from Connecticut have introduced bills in the House of Representatives to help states assess and pay the costs of removing architectural and communications barriers that limit access of handicapped persons to education programs.

Dodd's bill (H.R. 10071), introduced on November 11, 1977, is identical to Senate bill

2302 proposed earlier in November by Senator Jennings Randolph, of West Virginia. Both bills authorize \$15 million for grants to help states conduct "independent studies" of costs incurred in bringing their educational programs into compliance with Section 504 of the Rehabilitation Act of 1973. They would also authorize funds to assist educational institutions in the removal of architectural barriers.

Jefford's bill (H.R. 10100) provides only \$5 million for independent studies, but makes grants available to any institution or agency receiving federal assistance.

Jefford's bill also stresses the importance of changing attitudinal barriers to the handicapped and calls for studies assessing attitudes toward the handicapped, and for grants reimbursing costs of removing those attitudes.

New Housing Law and Proposed Regulations Benefit Disabled Persons

The Housing and Community Development Act of 1977 (Public Law 95-128), enacted on October 12, and proposed regulations issued October 21 and 25 by the Department of Housing and Urban Development (HUD)

include a number of provisions of interest to handicapped persons.

PL 95-128 extends funding for the Housing Act of 1974 (PL 93-383) through fiscal year 1980. Amendments were also added which list handicapped persons as eligible for rural housing assistance and specify funding eligibility for congregate housing for elderly and handicapped persons.

A handicapped person is defined in the Act as one who is determined by the regulations to have an impairment of indefinite duration which inhibits his capacity for independent living, and whose ability to live independently could be improved by more suitable housing conditions. A developmentally disabled individual as defined under Section 102(7) of the Developmental Disabilities Services and Facilities Construction Act also qualifies as a handicapped individual under the Act.

Congregate Housing

Section 508 of the Act covers congregate housing facilities for elderly or handicapped persons who require some supervision and central services but are otherwise able to care for themselves. Such housing may include a central dining facility or may be utilized in conjunction with educational and training facilities. This section also

guarantees that specifically designed equipment required by elderly or handicapped persons will not be considered as "elaborate or extravagant."

Section 8

On October 21, HUD issued proposed regulations for the Section 8 Housing Assistance Payment Program for Existing Housing which was created under the Housing and Community Development Act of 1974. The proposed regulations are partially in response to criticism that current regulations are "excessively restrictive" for eligible mentally and physically handicapped individuals and families with special needs that are best met in group homes and independent group residences.

An independent group residence is defined as privately owned housing for up to 16 eligible elderly, handicapped, or disabled persons, including resident assistants, who require continuous support services. Persons requiring continuous nursing or medical care are excluded from this definition.

Resident assistants providing support services may be counted as a family member when determining the unit size needed, but the resident assistant's income will not be counted when determining income assistance eligibility unless the income is contributed to the family. The housing agency also has the choice of considering each household member as an individual or as part of the family unit for the purposes of income eligibility.

Block Grant Funds

On October 25, 1977, HUD issued proposed regulations to implement the Community Development Program Block Grant funds.

Centers for the handicapped are specifically identified in the proposed regulations as being eligible for block grant funds, providing that the center is not primarily a residential facility. Funds may also now be used for the removal of architectural barriers which restrict the mobility of elderly or handicapped persons in public or private facilities, buildings or improvements.

Any application for block grant funds to improve public and community facilities must outline a strategy to insure the "full opportunity for participation by and benefits to, the handicapped."

Each funding application must contain a Housing Assistance Plan summarizing the special housing needs of any subgroup in the Act, such as handicapped persons, whose needs have not been met through previous grant funds. All applications must further certify compliance with federal civil rights laws, though Sections 503 and 504 of the Rehabilitation Act of 1973 are not specifically mentioned.

The regulations also require that 75 percent of each community's funding allotment must be aimed at "projects principally benefiting low and moderate income persons."

Clarification of Final Regulations to Public Law 94-142

Editor's Note: *The changes in the final regulations to PL 94-142 which are discussed in this article will affect previous Amicus articles relating to the regulations, particularly those in the April and June 1977 issues.*

The Bureau of Education for the Handicapped has issued a statement clarifying its position on the individualized education program (IEP) in the final regulations to Public Law 94-142, the Education for All Handicapped Children Act.

The final regulations require that the IEP include a statement of the "specific special education and related services provided to the child and the extent to which the child will be able to participate in regular educational programs." This differs from the requirement in the proposed regulations for "special educational services needed by the child (determined without regard to the availability of those services)." Because of this change, some individuals have concluded that schools need not provide services to handicapped children beyond those currently available.

However, this interpretation is not correct according to Edwin Martin, Deputy Commissioner of the Bureau of Education for the Handicapped (BEH). In a November 17 letter to the chief state school officers, Martin emphasized that BEH's position on the "critical issues of need and required services" has not changed, but that the "exact nature and extent of services to be provided to individual handicapped children are educational judgment questions which must be determined through the IEP process and, where necessary, through the due process procedures set out in the regulations. . . ." Furthermore, Martin believes that under the statute, and in light of the extensive legislative history of IEPs, BEH does not have the authority to change the IEP provisions. Under PL 94-142 and Section 504, each public agency must provide a free appropriate public education to handicapped children no later than September 1, 1978.

Other Changes in IEP's

A number of other changes and additions have been made to the final regulations for PL 94-142 concerning the IEP, procedural safeguards, and a number of state and local education agency responsibilities.

When an IEP meeting is held for a child who has been evaluated for the first time, a member of the evaluation team must be present, or a teacher (or other person) who is familiar with the child, the evaluation procedures, and the results of the evaluation. Adequate advance notice of the IEP meeting must be given to parents and a copy of the final IEP must be provided on request. The IEP must be in effect before any services are provided, and must be implemented as soon after the IEP meeting as possible.

Another new section is intended to relieve fears that an agency or teacher would be held accountable should a child "not achieve the level of growth projected." However, the comment to this part emphasizes that "good faith efforts to assist the child in achieving the objectives and goals listed" are still required. Moreover, this section does not cancel the parent's right to initiate a complaint, or request an IEP revision if the child's needs are not being met.

Procedural Safeguards

Several requirements have been added to strengthen the existing provisions under procedural safeguards for due process, evaluations, least restrictive environment, and confidentiality of information.

When parental consent is sought for a preplacement evaluation and initial placement, the parent must be "fully informed of all [relevant] information. . . in his or her native language or other mode of communication unless it is clearly not feasible to do so." Upon request, the public agency must also inform parents as to where an independent evaluation can be obtained.

Parental consent for educational and related services (other than the preplacement evaluation and the initial educational placement) may not be "required as a condition of any benefit to the parent or child."

Where state law also requires parental consent prior to the provision of services, the public agency must first seek a court order or other legal means, and then follow the due process procedures outlined in the regulations for PL 94-142. Where no state law requires such parental consent, the public agency may seek authority to proceed through the PL 94-142 due process procedures. The parent, however, still retains the right to be notified of the hearing, to participate and to appeal the decision.

New provisions included in the final regulations state that when a due process hearing is initiated, or upon re-

quest, the public agency must give the parent information on free or low cost legal services and related services. A list of hearing officers and their qualifications also must be maintained by the public agency. New evidence at a hearing must be revealed to the other party at least five days prior to the hearing, and parents have the right to open the hearing to the public and/or have their child present.

New requirements for an impartial review state that the review official may allow either oral or written arguments or both, and may seek additional evidence if necessary. After a request for a hearing is received, the hearing must be held and a final decision reached, within 45 days (within 30 days for the impartial review) although the period may be extended upon request. A written copy of the hearing and review decisions must be mailed to each party.

State and Local Education Agency Responsibilities

The final regulations add a requirement that at least one teacher or specialist knowledgeable in the area of the suspected disability must be included in the multi-disciplinary evaluation team.

Two important additions to the regulations have been made to the least restrictive environment provisions: each child must be placed as close as possible to his home, and must be able to participate in nonacademic and extra-curricular activities with non-handicapped children as much as possible. Also, an error in the proposed regulations is corrected in Section 121a.361 of the final regulations by specifying that the least restrictive alternative provisions *do* apply whenever the State Education Agency (SEA) provides direct services.

The final regulations define "education records" as those records protected by the Family and Educational Rights and Privacy Act of 1974. Parents have the right of access to records prior to any meeting (in addition to any hearing as stated in the proposed regulations) and may extend the right of access to a representative. Personally identifiable information no longer needed by a public agency must be destroyed at the parent's request, although a comment to this part suggests that there is a possible need for some records for social security benefits, etc. in the future.

Evaluations and Least Restrictive Environment

Additions have also been made to the final regulations concerning the responsibilities of the State and Local Education Agencies (SEA and LEA).

Taken nearly verbatim from the statute, a new section clearly identifies the SEA as the single, final authority re-

sponsible for the implementation of the Act. The SEA must insure that the provisions of the Act are carried out in each education program for handicapped children in the state, even when the program is administered by another agency, i.e., state schools for the deaf or blind, departments of mental health, and welfare departments. All such agencies are included with SEAs and LEAs in the new term "public agency" which is used whenever a provision applies to every political subdivision in the state that educates handicapped children.

Each agency's education program must meet the SEA standards and generally be supervised by SEA personnel. Moreover, the state government itself must comply with this provision through state law, regulation, signed agreements between proper agency officials, or other documents.

The comment to Section 121a.360 points out that any state receiving funds under PL 94-142 must insure that all public agencies comply with the Act even if an agency chooses not to receive the funds. In that case, the SEA must use the LEA funding allotment and other funds to provide direct services. Moreover, if the LEA receives *any federal funds*, it must still comply with the free appropriate public education requirements under Section 504 of the Rehabilitation Act of 1973.

The analysis in Appendix A of the final regulations compares the relationship between the requirements of PL 94-142 and Section 504, Subpart D (Preschool, Elementary and Secondary Education). Both regulations mandate:

- *that a free appropriate public education be provided for handicapped persons,*
- *that handicapped children be educated with non-handicapped children as much as possible,*
- *that all handicapped children who are not receiving a free appropriate public education be identified and located,*
- *that evaluation procedures be adopted for educational classification and services, and*
- *that procedural safeguards be established.*

However, the term "free appropriate public education" in PL 94-142 is defined in relation to compliance with the IEP provisions, while the same term in Section 504 refers to educational and related services which are designed to meet the educational needs of handicapped children as adequately as those of non-handicapped children, (and which are in compliance with the Section 504 provisions for educational setting, evaluation and placement, and procedural safeguards).

Other new SEA responsibilities in the final regulations include the development of procedures for monitoring and evaluating public agencies that educate handicapped children by collecting data and reports, conducting on-site visits, auditing the use of federal funds, and examining a number of programs to compare the program proposal with

the existing program. The comment to this part suggests that parents and organization representatives could be included in some of these monitoring activities.

Accidentally omitted from the proposed regulations was a provision for the SEA to effectively review, investigate, and/or act on any substantive allegations of non-compliance by a public agency. Specific SEA personnel must be designated as responsible for implementation, and provision must be made for negotiations, technical assistance activities, and other remedial action, as well as sanctions for non-compliance.

Services for Children 3 to 5 and 18 to 21

While a free appropriate public education must be provided to children ages three to five and 18 to 21 within the state no later than September 1, 1980, changes have been made in the final regulations to encourage earlier compliance on a selective basis and according to services currently provided in each disability category and age group. However, the provision of these educational services is not mandated if a state law specifically bars the use of state funds for the education of non-handicapped children in the same age groups, or if it is inconsistent with a court order governing the provision of free public education to handicapped children in that state.

Hearing Aids

In an addition to the final regulations, the public agency is required to insure that hearing aids worn in school are functioning. A study by BEH indicates that up to one-third of the hearing aids worn by public school children are malfunctioning.

Placement in Private Schools

Should the public or private residential placement of a child be required in order to provide special education and related services, an addition to the final regulations provides that the program cost, including non-medical care, room and board, must be borne by the public agency.

Before a private school referral or placement is made, a meeting must be held to develop an IEP for the child. An IEP must also be developed for handicapped children who were placed in a private facility prior to the effective date of the regulations. While the private school or facility may conduct meetings to implement, review or revise the IEP, the SEA retains responsibility for compliance with the regulations.

Even when a child is placed in a private school by his parent, the LEA must provide "genuine opportunities to participate in special education and related services [not available at the private school] which are consistent with the number of those children and their needs." In this case, the public agency is not required to insure that the private facility is in compliance with the Act, nor is the agency required to pay the cost of the placement. Should the parent decide to take advantage of the opportunities offered, the LEA must provide services comparable to those provided to handicapped children in public schools and supervise their administration.

Preservice and Inservice Training

The regulations include a new provision specifically prohibiting the use of PL 94-142 funds to provide preservice training, except when a major part of the child's proposed education plan is missing, such as a qualified teacher. The SEA and LEA is then permitted to provide the lesser interim services. However, only after all first priority children are at least given interim services, may the public agency use PL 94-142 funds for preservice training and other support services in the 1977-78 school year.

Under a new provision in the final regulations, personnel providing related services now qualify for inservice training as well as the general education, special education, and support personnel included in the proposed regulations. Furthermore, representatives of handicapped, parent or other advocacy organizations must be given an opportunity to participate in the development, review, and updating of the system of personnel development, as well as the higher education institutions named in the proposed regulations.

State Advisory Panel

The state advisory panel is required to comment on the state annual program plan; panel members must be reimbursed by the SEA for appropriate expenses; and panel members or participants must be provided with interpreters and necessary services at panel meetings.

Definitions

Some definitions have been altered in the final regulations. The definition of handicapped children has been expanded to include separate categories for deaf-blind and other multi-handicapped children. Surrogate parents are now included within the definition of "parent" and for a

child who is the ward of the state, the state may not be considered the parent.

Under the category of "related services" the definitions of counseling, social work services, and recreation are more detailed and "school health services" has been added. The comment to this part emphasizes that not all possible "related services" have been included in the final regulations. Other developmental, corrective, and supportive services (such as artistic and cultural programs, art, music, and dance therapy) may fall within the definition if they are

necessary in order for a child to benefit from special education.

Newly included under the definition of "special education" are vocational education and physical education skills in aquatics, dance and individual and group games and sports (including intramural and lifetime sports). The final regulations state that physical education must be provided for every child who receives a free appropriate public education, even if specially designed equipment is required.

Office of Education Ensures Funding for Learning Disability Centers

On November 11, 1977, the Office of Education published deadlines for continuation research and learning disabilities centers grant applications. This will ensure funding for learning disability centers even though Congress eliminated a separate provision for the centers in Part G of the Education of the Handicapped Act.

Part G was eliminated under the Handicapped Amendments of 1977 (Public Law 95-49), which extended the Education of the Handicapped Act for five years. In 1975, Congress had amended the definition of handicapped to include learning disabilities. This meant that learning disability centers could be funded under a general research and demonstration

authority (Part E) of the Education of the Handicapped Act.

The Office of Education has set aside \$6.5 million for approximately 50 research projects and 44 learning disabilities centers.

According to a notice in the November 11 *Federal Register*, applicants have until February 2 to apply for the continuation grants.

Court Interpreter Bill Passes Senate

A bill, introduced by Senator DeConcini of Arizona, ensuring qualified interpreters for the deaf in all federal court proceedings, passed the U.S. Senate on November 4, 1977. This bill, the Bi-Lingual, Hearing and Speech Impaired Court

Interpreter Act (S 1315) also includes interpreters within the safeguard of attorney-client privilege. Thus, under the bill, an interpreter could not be compelled to testify concerning any attorney-client communications made through the interpreter.

Under the Act, the Director of the Administrative Office of U.S. Courts would be required to prepare lists of, and standards for, qualified interpreters in consultation with the National Registry of Interpreters for the Deaf, state registries of interpreters for the deaf, and state associations of the deaf and would be responsible for keeping the lists updated.

Many of the provisions of an earlier bill, S 819, introduced by Senator Mathias of Maryland, were incorporated into S 1315. Presently, the Act is being considered by the Judiciary Committee of the U.S. House of Representatives.

in the courts

The Case of *Stump v. Sparkman* Before the U. S. Supreme Court

No. 76-1750 (U. S. Supreme Court 1977)

This case presents a challenge to the traditional veil of immunity protecting judges in the United States. On January 10, 1978, the U.S. Supreme Court heard arguments on whether a circuit court judge acted beyond the limits of his authority when he ordered the sterilization of a 15-year-old girl.

Judge Harold D. Stump of DeKalb County, Indiana, signed a petition for the sterilization of Linda Sparkman in 1971. The petition contained an affidavit by the mother, Ora McFarlin, that her daughter was "somewhat retarded," and that she wished to "prevent unfortunate circumstances."

Linda Sparkman was never informed of the order and only learned the true purpose of her hospitalization in 1975 when she and her husband were encountering difficulties in their attempts to conceive a child. They subsequently brought suit against Judge Stump, the doctors, the hospital, her mother, and her mother's attorney.

The National Center for Law and the Handicapped (NCLH) has entered the case as a friend of the court on behalf of Linda Sparkman. In its *amicus* brief, the Center submits that throughout history, there has been a mistaken notion that

by sterilizing those who are "unfit," all "unfit" individuals will be totally eliminated. The Center maintains that this fallacy has led to the massive sterilization of the mentally impaired, sanctioned by law. The facts of this case are compared to the history of sterilization in Nazi Germany where sterilization laws initially passed in the early 1930's were eventually ignored, and judges began to exercise total unreviewable discretion to order sterilization for any person. The Center further asserts that judicial immunity should not shield a judge's actions when procedural protections, including the right of appeal, have been denied and where the fundamental right to procreate has been abridged.

History of the Eugenics Movement

According to the NCLH brief, the unfounded, pervasive fear that incompetent individuals would outnumber, and eventually control, the rest of the population resulted in an organizational structure for encouraging sterilization, culminating in the American Genetic Association

(originally American Breeders Association). The concern was even expressed by Supreme Court Justice Holmes in 1927 in the case of *Buck v. Bell* (274 U.S. 200). Holmes stated that: *We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who have already sapped the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetents. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the cutting of the Fallopian tubes. . . . Three generations of imbeciles are enough.*

By January 1, 1933, 30 states had enacted legislation to sterilize the mentally ill and mentally retarded, and 16,066 persons had been sterilized. By 1949, 49,027 individuals had been sterilized.

The history of the eugenics movement in Germany ran closely parallel to the movement in the United States. Due to the political thinking of the Third Reich, however, the classes of individuals to be sterilized were

expanded. Eventually hundreds of thousands of persons considered mentally impaired were either sterilized or put to death. Those considered "asocial" were spared sterilization, however, only to be placed into concentration camps.

During this period in Germany, the U.S. Supreme Court recognized the fundamental right to procreate in the case of *Skinner v. Oklahoma* (316 U.S. 535 (1942)), where Justice Douglas wrote:

The power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither or disappear.

Since the *Skinner* case, lower courts have repeatedly found that judges have no jurisdiction to order sterilization unless a statute specifically authorizes the procedure. Furthermore, even in the states which have legislation permitting sterilization, the courts have assured that strict procedures and standards were guaranteed.

The Label of Mental Retardation and The Rationale for Sterilization

Traditionally, according to the NCLH brief, the mentally retarded, the mentally ill, and persons with epilepsy have been subjected to involuntary sterilization in order to prevent them

from producing "defective" offspring, and because it was thought that they could not be satisfactory parents.

It is now accepted, however, that only a very small percentage of mental retardation is actually inherited. The overwhelming majority of mentally retarded children are born to "normal" parents; therefore, in order to prevent mental retardation through the process of sterilization, large numbers of "normal" people, and few mentally retarded people, would actually be chosen for sterilization. Furthermore, several studies have shown that mentally retarded persons can, in fact, function adequately as parents. Thus, NCLH submits that the rationale for sterilization of the mentally retarded is extremely weak. (See *Amicus*, February 1977.)

NCLH argues, in addition, that even if the Court holds that Judge Stump was authorized to order sterilization for certain special classes, Linda Sparkman would not be included in that jurisdiction. The petition alleged that she was "somewhat retarded," and attending public school and progressing at the same rate as her peers. According to the American Association on Mental Deficiency, *Mental retardation refers to significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.*

NCLH therefore asserts that the facts in the petition presented to Judge Stump were inadequate

to support a finding that she was mentally retarded. According to NCLH, a decision by the Supreme Court that Judge Stump had jurisdiction to order Linda Sparkman's sterilization would be tantamount to protecting any judge from civil liability for the sterilization of any individual.

Judicial Immunity

In cases dating back to 1608, the courts have heretofore uniformly held that judges, while acting within their jurisdiction, are absolutely immune from suits brought against them. However, NCLH argues that the *Sparkman* case differs substantially from the earlier cases because Judge Stump deprived Linda Sparkman of all procedural protections including the ability to appeal his order. The basis for applying a doctrine of absolute immunity to judges has traditionally rested upon the public's interest in assuring uncoerced and independent judicial decision-making. The individual, in turn, is protected by his right to correct errors, malice or judicial abuse by appealing a judge's action to a higher authority. NCLH asserts that Judge Stump should not be permitted to avail himself of the protections of immunity while Linda Sparkman was deprived of all her protections.

In its brief, NCLH illuminates some facts concerning the nature of mental retardation and

attempts to dispel certain stereotypes which persist even beyond the scientific demise of the eugenics movement. The Center requests the Court to recognize that "[t]he central importance of the family to our way of life transcends all cultural boundaries — ethnic, religious, social, and economic. Neither does the desire to have children diminish with handicapping conditions."

education

***Larry P., et al. v. Riles, et al.*, No. C-71-2270 RFP (N.D. Cal., filed Nov. 24, 1971)**

On October 11, 1977, the trial began on this test bias case which was initially filed in 1971. The plaintiffs allege that six black children were inaccurately labeled as mentally retarded following evaluations with intelligence tests which they claim are racially and culturally discriminatory.

The case was certified as a class action suit in 1972 and affects 5,700 black children placed in classes for the retarded in California. Defendants include the San Francisco Unified School District, the state board of education, the state education department and the state superintendent.

The first amended complaint, filed in January 1977, charges: 1) violations of the U.S. and California Constitutions; 2) violation of the right to an appropriate education under the Constitution and laws of California; and 3) violation of the right to an education free from discrimination as guaranteed by U.S. law including the Elementary and Secondary Education Act, the Civil Rights Act of 1964, the Emergency School Aid Act of 1972 and 1974, and all pursuant regulations.

The complaint seeks to prevent the defendants from using racially and culturally biased tests, and from placing members of the plaintiff class in classes for the retarded based on such tests. The complaint further seeks to remove from classes for the mentally retarded those plaintiffs falsely labeled as mentally retarded; to provide them with intensive, individual remedial training; to remove all school records indicating that they are or were retarded or were placed in classes for the retarded, and to require increased numbers of minority psychologists and psychometrists in schools.

Evidence presented by the plaintiffs prompted the court to issue a preliminary injunction in 1972 to prevent the placement of black children in classes for the retarded on the basis of the intelligence tests as currently used. (*Larry P. v. Riles*, 343 F. Supp. 1106 (N.D. Cal. 1972)).

This evidence showed that when the six plaintiffs were re-tested in 1970 and 1971 by black

psychologists, each scored above the ceiling for placement in classes for the retarded.

The case also brought to light the fact that in San Francisco in 1971, black students comprised 66 percent of the students in classes for the retarded, while they equaled only 28.5 percent of the city's total school population. The state statistics showed an even greater imbalance: black children comprised 27 percent of the children in classes for the retarded, but made up only 9.1 percent of the total California school population.

The 1972 order was expanded to the entire state in December 1974. (*Larry P. v. Riles*, 502 F.2d 693 (9th Cir. 1974)).

The U.S. Justice Department has been given permission to enter the case by filing a brief and presenting witnesses. One witness is geneticist Harvey Bender of the University of Notre Dame, former Executive Director of the National Center for Law and the Handicapped. Bender is expected to respond to the defense's charge that mental retardation in black persons is inherited genetically.

***Kenneth J., et al., v. Kline et al.*, No. 77-2257 (E.D. Pa. 1977)**

This class action charged the defendants with failure "to treat the proposed suspension or expulsion of a nonretarded

mentally handicapped child as a change in educational placement, while according such treatment to mentally retarded school-aged children." A change in placement would be subject to the protections of due process procedures established by Pennsylvania law.

However, all current motions in the case were suspended on December 8, 1977, when the parties entered into a stipulation agreement. The agreement states that the defendants will adopt the suspension/expulsion procedures sought by the suit, will enter into negotiations with the plaintiffs, and will promulgate official standards, guidelines, or regulations concerning suspension or expulsion of the plaintiff class by March 1, 1978.

Kenneth J. is a 15-year-old nonretarded emotionally disturbed student representing all non-retarded mentally handicapped children in Pennsylvania who are being, or will be suspended or expelled from their local schools. Kenneth has attended school in the Coatesville area school district, and since March 1974, has received special services for his disability. On June 9, 1977, Kenneth was involved in an incident which resulted in his expulsion by the school board.

The complaint charged violations of the right to equal protection and due process under the 14th Amendment, and violation of Section 504 of the Rehabilitation Act of 1973, and the Education for All Handicapped Children Act of 1975 (Public Law 94-142).

The state board of education is also charged with violating its statutory duty to promulgate regulations providing the plaintiff class with proper due process procedures.

Pleadings of the plaintiffs cite the case of *St. Ann v. Palisi* (495 F.2d 423 (5th Cir. 1974)), arguing that the suspension or expulsion of a mentally handicapped child may be punishing him for manifestations of his handicap rather than for voluntary misconduct.

The plaintiffs also argued that under Section 504, a due process hearing must be initiated for handicapped children when it becomes clear that they can no longer benefit from, or are not adapting to, their present placement.

Hoffman v. Board of Education of the City of New York, No. 12593 (Sup. Ct. N.Y. 1976)

A trial by jury resulted in the award of \$750,000 plus court costs to the plaintiff in *Hoffman* on October 21, 1976, for educational malpractice by the defendant.

The complaint charged that Daniel Hoffman was wrongly evaluated as mentally retarded when he entered school at age six. The defendant was charged with violating its statutory duty to provide educational services;

specifically, negligence in providing evaluations, re-evaluations, and educational support services, and failure to hire and supervise competent personnel, resulting in the plaintiff being deprived of his right to an education consistent with his true capacity.

Daniel Hoffman was placed in classes for the educable mentally retarded for all of his 12 school years, and did not learn that he had a normal level of intelligence until he was re-evaluated by the Queens Occupational Training Center in 1969. The complaint charges that throughout his school years Daniel Hoffman possessed a severe speech defect for which he was not given adequate therapy.

The 1969 re-evaluation found that Daniel "has above average intellectual potential and a good personality structure [but that] due to his being almost immobilized in the speech area, as well as considering his extremely defective academic background, he would find it difficult, if not impossible to function in a regular high school. . . ."

Daniel's mother was also named as plaintiff, charging that the defendant caused her to expend funds for unnecessary programs and services. She also claimed that she may be required to expend additional sums for the retraining and further treatment of her son, and that she has been caused severe financial loss due to the lost earning capacity of her son. While the complaint sought \$1,500,000 in

damages for Daniel and \$500,000 damages for Mrs. Hoffman, the jury awarded damages only to Daniel Hoffman.

The defendant has filed an appeal in the case.

Donohue v. Copiague Union Free School District, No. 77-1128 (Sup. Ct., N.Y. 1977)

This suit, charging educational negligence and malpractice and violation of state statute, was dismissed August 31, 1977. The court found that the facts alleged by the plaintiff "fail to state a claim on which relief can be granted" and that "no common law duty in New York" existed on which to base a complaint of both negligence and malpractice.

Judge Baisley noted, however, that the recent amendment to the Rules of the Board of Regents (8 NYCRR 3.45), effective June 1, 1979, requires that students pass basic competency tests prior to promotion and graduation. This fact, combined with the lack of a precedent for this kind of case in New York, led Judge Baisley to suggest that the case be considered by the appellate courts.

The plaintiff claimed that the defendant, as an agency funded with state taxes, violated its obligation to educate the plaintiff and did not properly assess the plaintiff's learning abilities by evaluation, grading

and testing, and failed to supply the necessary facilities, personnel and services.

Despite the fact that Donohue received failing grades in English and other subjects, he graduated from Copiague High School in June 1976. Donohue claimed that he was unaware of his mental incapacity and lack of comprehension until, having experienced an inability to understand or complete job application forms, he obtained a copy of his school records in December 1976.

The plaintiff's liability claim of \$5 million in damages is based on Article XI of the New York Constitution.

He argues that the guarantee of a free education given by the Constitution at least implicitly provides the right to an adequate education as well.

The decision is currently being appealed.

Sherer v. Maier, North Kansas City School District, et al., No. 77-0594-CV-W-4 (W.D. Mo. 1977)

This case, which involves the refusal to provide catheterization to an individual with spina bifida, was dismissed by the court without prejudice on November 2, 1977.

A complaint was filed August 9, 1977, by Cheryl and

Wayne Sherer on behalf of their eight-year-old daughter, Kimber.

They charged that the defendants refused to provide daily catheterization services to their daughter, who suffers from spina bifida, a physical handicap commonly known as "open spine." The defendants are alleged to have violated the Due Process and Equal Protection clauses of the 14th Amendment, and the Rehabilitation Act of 1973.

According to the complaint, Kimber was enrolled at Briarcliff Elementary School in a program for the orthopaedically handicapped in 1975. In 1976, Kimber's physician informed her parents that she would have to be catheterized at least once a day during school hours.

The plaintiffs then requested Mr. Johnson, the director of pupil services, to have the necessary services provided to Kimber. According to the complaint, Mr. Johnson refused, and the plaintiffs made the same request to the North Kansas City School Board, which also denied the request. The Board offered to provide homebound instruction which was unacceptable to the plaintiffs.

In dismissing the case, the court acknowledged that the plaintiffs have a right to initiate a private civil suit under Section 504 of the Rehabilitation Act, but only after the administrative machinery established by the Act has been exhausted.

The court ruled that administrative remedies were not fully sought by the plaintiffs. By dismissing the case without

prejudice, the court leaves open the future filing of the complaint by the plaintiffs if the issue is not resolved administratively.

employment

Ryan v. Federal Deposit Insurance Corporation, et al., No. 76-1634 (D.C. Cir. 1977)

The Appellate Court for the District of Columbia affirmed a portion of the lower court decision which found that the plaintiff-appellant had failed to exhaust her administrative remedies, and which directed the defendant to make available the relevant administrative procedures for the plaintiff to do so.

Mary Ryan, an attorney with the Federal Deposit Insurance Corporation (FDIC) charged that she was denied certain job assignments and a promotion because of her physical disability.

The plaintiff-appellant's complaint was based on Section 501 of the Rehabilitation Act of 1973 and 5 U.S.C. Section 7153 which requires regulations to prevent discrimination on the basis of physical handicap within executive agencies, including the FDIC and the Civil Service Commission.

In affirming the lower court decision, the appeals court stated that it was unclear whether or not the FDIC was in compliance with its statutory obligations to provide adequate administrative remedies for the discrimination alleged by the plaintiff-appellant.

Consequently, in addition to affirming the order to exhaust administrative remedies, the court also ordered the FDIC to amend its employee grievance procedures and affirmative action plan, if necessary, to provide a remedy for discrimination in promotion based on physical handicap.

Should the appellant be dissatisfied after administrative action is taken to remedy her complaint, she may again seek judicial review.

Goodwill Industries of Southern California and Local Freight Drivers 208, 231 N.L.R.B. No. 49 (1977)

A petition, filed by the Local Freight Drivers Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was dismissed August 23, 1977, in a split decision by a three-member panel of the National Labor Relations Board (NLRB).

The petitioner sought representation of all drivers, helpers, and mechanics at a

facility of Goodwill Industries of Southern California in Los Angeles.

Although the NLRB panel found the 650 to 670 handicapped "clients" of the employer to be "employees" under the National Labor Relations Act (thereby entitled to union representation), it ruled that union representation of these individuals in this particular instance is not necessary, since the employer's ostensible concern is for the welfare of its employees, which coincides with the union's purpose.

Considering the unusual employer-client relationship at the facility, the panel further expressed apprehension toward the possibility of collective bargaining. For example, if the union demanded higher wages, it could force the employer to reduce its client work force or hire more productive workers, thus compromising the charitable objectives of the employer.

The panel also noted that union representation may further interfere with benefits presently enjoyed by clients of the employer, including: efforts to match clients in positions suitable to their special needs; extremely lenient disciplinary procedures (very rarely is a client's employment terminated); rehabilitative programs; a full-time job specialist whose sole purpose is to find jobs for clients in the private market; and assurances of retaining jobs at Goodwill if, after a

one-month trial basis in private industry, the client's work is found to be unsatisfactory.

Moon v. Roadway Express, Inc.
No. C 77-908
(N.D. Ga. 1977)

In an October 6, 1977 decision, Howard L. Moon, a handicapped individual who alleges to have been the victim of employment discrimination, was found not to have a private cause of action under Section 503 of the Rehabilitation Act of 1973 by the U.S. district court.

The court upheld the defendant's (Roadway Express, Inc.) contention that the plaintiff never established a private cause of action under any of the four requirements set in *Cort v. Ash* (442 U.S. 66 (1975)).

Moon has been consolidated in appeal with *Rogers v. Frito Lay* (reported in *Amicus*, September 1977), and they will be heard together in the Fifth Circuit Court of Appeals. In *Rogers*, the court found the implication of a private cause to be inconsistent with the legislative intent behind the Rehabilitation Act.

Bisby v. City of Independence,
No. 770668-LV-W-4
(W.D. Mo., 1977)

A complaint was filed against the city of Independence, Missouri, by Roger R. Bisby, a handicapped person with spina bifida whose left leg is one-half inch shorter than his right leg.

Bisby charges that he was denied employment as a civilian dispatcher for the Independence police department communications unit, solely on the basis of his handicap. He claims to be fully qualified for the job, possessing a diploma as an electronic technician, and an amateur radio operator's license from the Federal Communications Commission.

Violations of Sections 503 and 504 of the Rehabilitation Act of 1973 and the Due Process and Equal Protection Clauses to the 14th Amendment were cited in the complaint. The City of Independence receives federal funds and is thereby obligated to utilize affirmative hiring practices of handicapped persons under the Rehabilitation Act.

According to the complaint, the plaintiff applied for employment with the defendants in 1973. In February 1974, the defendants notified Bisby that a vacancy existed in the police department communications department, and requested him to submit to a medical examination by a physician of his choice.

The plaintiff complied, and on the basis of the examination's findings, his application for employment was rejected.

Bisby obtained letters from other physicians in support of his application, including a letter from his regular physician claiming that Bisby was unconditionally qualified for the job.

The plaintiff seeks a permanent injunction against the defendants, directing that they offer him employment and back seniority pay, back pay and all other rights of employment as of February 1974. He also requests the court to award costs and attorney's fees.

Kunz v. Salt Lake County,
No. C77-0280
(C.D. Ut., 1977)

On August 25, 1977, a complaint was filed against the Salt Lake County Fire Department by Myron Kunz, who claims he was refused a job as a dispatcher because he has use of only one hand.

Kunz has had prior dispatching experience and types 40 words per minute. He therefore claims he was qualified to meet the job requirements.

The complaint cites violations of the Rehabilitation Act of 1973 and the Due Process and Equal Protection Clauses to the

14th Amendment. Salt Lake County is a recipient of federal grants and is thereby obligated to carry out affirmative hiring of handicapped individuals under the Rehabilitation Act.

According to the complaint, the chief and the assistant chief of the Salt Lake County Fire Department interviewed the plaintiff, but did not reasonably consider his qualifications (not allowing him to demonstrate his ability to handle the office and the dispatching equipment). The plaintiff contends that a person of lesser ability to perform the job was eventually hired.

Claiming economic and emotional damages, the plaintiff seeks compensation for attorney's fees, other costs incurred, and salary for the time between the interview and subsequent employment. The plaintiff also seeks punitive damages (to be assessed to the chief and the assistant chief in the amount of \$25,000 each) as a warning to others who may be inclined to display similar "reprehensible" and "unconscionable" conduct. Kunz further asks the court to issue an injunction against the defendants and retain jurisdiction until the defendants conclusively prove that they have ceased discriminatory practices against handicapped persons.

guardianship

Michigan Association for Retarded Citizens, et al. v. Wayne County Probate Judge **No. 77-535** **(D. Mich. 1977)**

On November 9, 1977, the Michigan Court of Appeals ordered Wayne County Circuit Court to determine whether over 400 guardianship hearings held by a Wayne County probate judge at various state operated institutions comply with provisions of the state Mental Health Code.

The order is in response to an appeal filed November 23, 1976, by residents of Oakdale Center for Developmental Disabilities on behalf of themselves and a class of similarly situated residents of state institutions.

The plaintiffs alleged in their original complaint that the probate judge held hearings for over 100 mentally retarded residents at the Oakdale Center in the span of 75 minutes.

The plaintiffs requested the circuit court to order the judge to rehear all guardianship petitions for persons affected and to hold all future hearings in compliance with the Mental Health Code which provides safeguards

designed to protect the substantive rights of the mentally retarded.

The circuit court refused to consider whether the hearings complied with the mental health law and dismissed the complaint. The appellate court reversed the decision and remanded the case to the circuit court for a ruling.

institutionalization

Halderman v. Pennhurst, No. 74-1345 **(E.D. Pa. 1977)**

On December 23, 1977, Justice Broderick, Federal Court Judge for the Eastern District of Pennsylvania, issued a far-reaching decision concerning Pennhurst State School for the retarded.

In a 72-page decision, Judge Broderick ruled that the plaintiff class of mentally retarded residents have a constitutional right to: 1) minimally adequate habilitation; 2) habilitation in the least restrictive conditions consistent with the purpose of commitment; 3) freedom from harm; and 4) non-discriminatory habilitation (equal protection of the laws).

In addition, the conditions at Pennhurst were found to violate Section 504 of the Rehabilitation Act of 1973 and a Pennsylvania statutory right to habilitation.

The Plaintiffs' Claims

The original complaint in this action was filed in May 1974. The class consisted of all mentally retarded persons who, as of May 30, 1974, were residents, had been residents or may have become residents of Pennhurst. Trial did not begin until April 18, 1977, and lasted until June 13, 1977.

The plaintiffs claimed violations of state and federal statutes as well as constitutional rights in connection with institutionalization at Pennhurst. They sought damages and broad equitable relief, including the closing of Pennhurst and the requirement that the defendants provide them with education, training and care in their respective communities.

After hearing extensive evidence in the case, including the testimony and depositions of numerous experts, Judge Broderick concluded:

It has become apparent that by and large the parties share the same goals: all desire to improve the education, training and care provided the retarded in Pennsylvania and believe that Pennhurst should be closed and that all the residents should be educated, trained and cared for in the community. . . . that institutions such as Pennhurst are inappropriate and inadequate for the habilitation of the retarded. . . . that the habilitation provided Pennhurst residents does not meet minimally acceptable professional standards. The Commonwealth in recent years has been attempting to upgrade Pennhurst and the education, training and care provided therein to its retarded residents. Moreover, the Pennsylvania Department of Public Welfare's current plans call for the transfer of all Pennhurst residents from the institution

into the community (though perhaps temporarily into other institutions) by the early 1980's. Defendants contend, however, that they are neither constitutionally nor statutorily mandated to make these transfers or to upgrade the care, education and training provided at Pennhurst. It is their position that no constitutional or statutory rights have been violated. We disagree.

The Ruling of the Court

The court began by holding that,
When a state involuntarily commits retarded persons, it must provide them with such habilitation as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit.

Then the court, in a key finding, held that:
minimally adequate habilitation cannot be provided in an institution such as Pennhurst.

This holding, the court emphasized, applies to voluntary as well as involuntary residents, based upon the court's belief that most residents, regardless of labels, have been provided no alternative placement; thus, in reality they are involuntary residents.

The court then recognized that if the state wishes to provide habilitation of a retarded person, it must do so in the least restrictive setting appropriate for that person. Since the court found that "isolation and confinement are counter-productive" to habilitation and that "habilitation other than in the least restrictive setting is a violation

of one's constitutional rights," Judge Broderick concluded that, *there is no question that Pennhurst, as an institution for the retarded, should be regarded as a monumental example of unconstitutionality with respect to the habilitation of the retarded.*

Considering the constitutional right to equal protection of the laws, the court further concluded that equal protection principles *prohibit the segregation of the retarded in an isolated institution such as Pennhurst where habilitation does not measure up to minimally adequate standards.*

Then, in a key interpretation, the court viewed Section 504 as a codification of these equal protection principles. The court thus held that the federal statute under Section 504 had been violated since "unnecessarily separate and minimally inadequate services are discriminatory and unlawful."

Finally, the court decided that the defendants were dedicated professionals who were given little with which to accomplish their responsibilities to provide habilitation and thus would not be held liable for damages.

A hearing has been scheduled for January 6, 1978, to determine appropriate relief. From the tenor of the opinion, that relief may well be an order for the closing of Pennhurst. And if Judge Broderick's legal analysis is upheld through the anticipated appeals of the order, this decision could sound the deathknell for isolated institutions for the mentally retarded.

***Institutionalized
Juveniles v. Secretary
of Public Welfare,
No. 72-2272 (E.D. Pa.)***

The National Center for Law and the Handicapped submitted an *amicus* brief in this case (formerly *Bartley v. Kremens*), on behalf of NCLH and the Pennsylvania Association for Retarded Citizens, Inc.

Filed on December 2, 1977, the brief focuses upon the needs and rights of mentally retarded children within a commitment process which permits parents or guardians to provide the substituted consent of minor children for "voluntary" admission into institutions. (The case is again before a three-judge federal court upon remand by the U.S. Supreme Court, reported in *Amicus*, Vol. I, Nos. 1, 2, 6; Vol. II, Nos. 2, 4, 6.)

NCLH is concerned that the Supreme Court might again ignore the subclass of mentally retarded children and provide them with fewer protections. Since the record in the case has limited evidence specifically related to mentally retarded children, the NCLH brief discusses the issues relevant to this subclass and attempts to convince the court to make specific findings to include in its opinion.

In Part I, of its five-part brief, NCLH divides the subclass of mentally retarded children into varying levels of age and of

functioning abilities. By analyzing the interests of these various groups, NCLH illustrates how each needs the protections of the court when faced with institutionalization. NCLH, however, argues that mildly retarded children, who constitute a large percentage of all mentally retarded children, should never be institutionalized.

Part II discusses the divergence of interests which may exist between parent and child, focusing especially upon the coercive influence which professionals have historically exerted upon parents in encouraging institutionalization.

Part III illustrates that despite parental interests, institutionalization will rarely be in the child's best interest. This section discusses the harm of institutionalization as illustrated by recent lawsuits and examines the unmet psychological needs of institutionalized children.

Part IV illustrates that through the use of the least restrictive alternative principle, institutionalization should rarely be ordered by courts. The brief describes the realities of community service systems, Pennsylvania's own plan for community alternatives, and the application of the principle nationally as well as within the Pennsylvania state courts. NCLH submits that parents should not be able to commit a child when a judge could not legally commit the child in the same situation.

Finally, in Part V, NCLH argues that a mentally retarded child should never be committed prior to a hearing. The brief

discusses educational and habilitation plans which would be upset by summary commitment, and illustrates the lack of a casual relationship between mental retardation and dangerousness, thus negating the necessity for summary commitment.

***U.S. v. Solomon,
et al., No. 76-2184
(4th Cir. 1977)***

On October 12, 1977, the Fourth Circuit Court of Appeals affirmed the lower court decision in *U.S. v. Solomon* which found that the Justice Department lacks authority to bring suit against state hospital officials for alleged failure to provide treatment to residents of Rosewood State Hospital.

The court found that no explicit or implicit statutory authority to sue existed for the Justice Department, despite *In re Debs* (158 U.S. 564 (1895)) which, in the broadest interpretation, would authorize the Executive to sue without statutory authorization whenever the alleged violations "affect the public at large."

The nonstatutory authority of the government to sue has been upheld in other civil rights cases which attempted to desegregate public facilities that, because of their segregation,

obstructed interstate commerce. However, the court found that the institutionalized persons affected in *U.S. v. Solomon* did not constitute the "public at large" nor did the case concern a national emergency or interstate commerce.

The original complaint in *Solomon* charged violation of the Eighth, 13th and 14th Amendments. Allegations cited in the complaint included insufficient recruiting and employment of trained personnel; failure to implement adequate treatment and habilitation plans and to provide residents with a humane physical and psychological environment; the placement of residents in seclusion for unjustifiably long periods of time; and failure to provide residents with clean, odor-free, sanitary, living conditions.

The *Solomon* decision coincides with congressional efforts to enact legislation which would authorize the Justice Department to initiate and intervene in lawsuits on behalf of institutionalized persons.

Hearings held by the Senate Subcommittee on the Constitution on S 1393, the Civil Rights of the Institutionalized Bill, produced 1,100 pages of testimony. The subcommittee recently recommended unanimously that the full Senate Judiciary Committee approve the bill.

According to Subcommittee Chairman Birch Bayh, the testimony revealed that while widespread abuse exists in state institutions throughout the country, neither institutionalized persons nor public interest legal services are capable of pursuing the long, complicated litigation which is required. The Justice Department, however, according to Senator Bayh, has the ability to conduct this litigation efficiently, if after consultation with state officials, litigation is seen as the only remedy.

transportation

***Atlantis Community, Inc. v. Adams,* No. 77-M-707 (D.C. Col. 1977)**

In this class action, the plaintiffs sued on behalf of all persons within the service area of the Regional Transportation District (RTD) who have mobility handicaps which deny them the ability to board RTD buses without assistance. They sought a preliminary injunction to prevent the use of new buses about to be delivered to RTD unless the buses are equipped with hydraulic lifts and related devices to provide wheelchair access.

The court stated, on November 9, that the plaintiffs seemed

to have a compelling case and that some form of relief will probably be indicated. It concluded, however, that it would not be appropriate to issue a preliminary injunction because of other considerations involving service of the transportation system for the general public.

In its opinion, the court stated that,

... this law suit raises some fundamental questions about the status of mobility handicapped persons in a democratic society with egalitarian values. The importance of the plaintiffs' efforts to obtain access to public transportation must be considered in terms of employment and educational opportunity, medical and mental health care, participation in the political process and the removal of the social barriers and stigmatic effects of physical impairments. These are questions of civil rights which are of no lesser importance than matters of discrimination by race, color, national origin, age, and sex.

The plaintiffs claim violations of Section 16a of the Urban Mass Transportation Act of 1964 and Section 504 of the Rehabilitation Act of 1973, which the court recognized as "very broad statements of national policy," that "can best be characterized as goals and directions for government action rather than legislative programs."

The court noted that in each act the Congress had given legislative function to executive agencies, and stated that,

... when the rules, regulations and actions of such agencies fall short of the expectancies generated by legislative platitudes, those whose interest are most directly affected come to the courts to create the law necessary for the fulfillment of the perceived entitlements.

The court stated that the legislative history of the two laws "show that individuals in the Congress have been unhappy with the Department of Transportation and its failure to achieve the prescribed goal of equal access." It viewed the primary legal issue as "whether the law compels equal access to public transit facilities or merely requires that special efforts be made to assist the mobility handicapped." The court recognized that the questions in the case "are of great importance to the parties and to the public and, accordingly, this proceeding must be expedited to reach a final decision on the merits at the earliest practicable time."

Michigan Paralyzed Veterans of America v. Coleman,
No. 5-71114
(E.D. Mich. 1977)

In this transportation accessibility case, the court has denied the defendants' motion for summary judgment and has allowed the plaintiffs to amend their complaint.

The suit was brought by elderly and handicapped persons to prevent the Southeastern Michigan Transportation Authority from actions which would have resulted in further inaccessibility of the public transportation system.

Prior to this action, the court had denied the plaintiffs' request for a temporary restraining order to halt the procurement of buses with funds derived from the Urban Mass Transportation Administration (UMTA). It had also denied a motion by the defendants to dismiss the complaint, and its November 3 opinion, reiterated that decision, citing the *Lloyd v. Regional Transportation Authority* case (*Amicus*, May 1976).

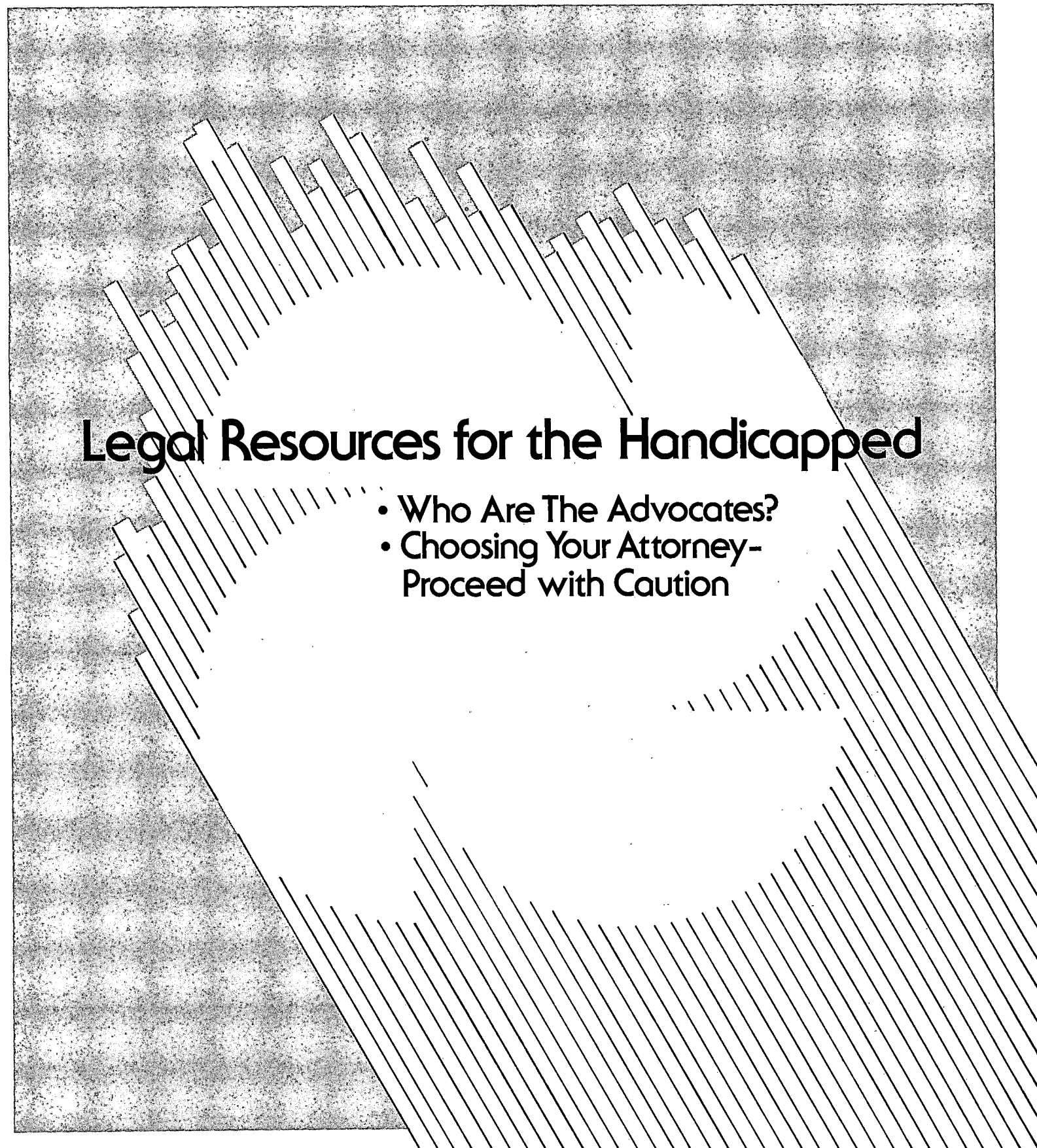
The court referred to earlier decisions by district courts in *United Handicapped Federation v. Andre* (*Amicus*, April and September 1977) and *Snowden v. Birmingham-Jefferson County Transit Authority* (*Amicus*, November 1975, April and June 1977), and concluded that the holdings in those cases were weakened by advances in the technology of bus systems. The court pointed to the action of the Southern California Rapid Transit District in receiving bids for buses which have wheelchair accessible options and the

Secretary of Transportation's announcement of the Transbus decision in May.

The court said several questions remain to be considered: whether the defendants are required by the Urban Mass Transportation Act or the regulations published by UMTA to order accessible buses immediately; also, the effect of the UMTA regulations pertaining to the requirement of a wheelchair accessible option and for utilization of the Transbus procurement requirements in specifications issued by UMTA after September 30, 1979.

The court will also consider the most recent UMTA regulations in light of the Urban Mass Transportation Act, taking into account the discretion conferred by that law upon the Secretary of Transportation to implement congressional policy. If the regulations were sustained as valid, the question would then be presented as to whether the local transit authority was in fact soliciting bids on buses which do permit the addition of the wheelchair accessibility option.

In a footnote, the court dismissed the action against the General Services Administrator, who was alleged by the plaintiffs to be in violation of the Architectural Barriers Act of 1968. Essentially, the court's holding on this point was that transit coaches or buses were not within the authority granted to the administrator by the Architectural Barriers Act.



Legal Resources for the Handicapped

- Who Are The Advocates?
- Choosing Your Attorney-
Proceed with Caution

NCLH:

In The Forefront Of Advocacy For The Disabled

By Jean Postlewaite
NCLH Director of Public Education

With this January issue, *Amicus* marks the beginning of its third year of publication.

The magazine has evolved over the past two years from a small newsletter (*Newsline*), to a substantial journal, reaching over 14,000 individuals. Its evolutionary pattern can be observed as a direct response to the changes in the area of civil rights for the handicapped. With each issue of *Amicus*, NCLH is increasingly challenged to provide in-depth analyses of laws, regulations and case developments, as these are generated in ever-growing numbers. Although significant laws, such as Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, are in effect and should offer protection against discriminatory treatment, *Amicus* and the National Center, as well as all legal advocacy centers and publications, are faced with the challenge of assuring that the laws function as they are intended. Acts of discrimination must be reported. Affected parties must comply with regulatory provisions and court orders. And the federal and state governments must set up effective enforcement mechanisms.

Previous efforts in the area of legal advocacy, although significant in light of the past void of legal protections for the handicapped, have, in fact, directly affected few people. The challenge is now to assure that the laws are effective; that circumstances will change for the thousands of persons who are unable to find a job or use public transportation, to vote, to be given a quality education, or to live among family and friends. Legal advocates can play an important role toward ensuring that the appropriate changes will be made.

For five years, NCLH — the National Center for Law and the Handicapped — has served as a center of technical excellence in its work to insure the rights of handicapped citizens.

The idea for a national center came about as the result of a local incident where a slightly retarded child was denied admission to the public school system and a simple phone call from an attorney resulted in the child's placement. The incident served to illustrate how an attorney could be of great value in dealing with such cases; for at that time, few attorneys, either in private practice or in the public sector, were adequately prepared to litigate cases or to provide legal counsel to mentally or physically handicapped individuals deprived of their civil rights. Moreover, since such deprivation was so pervasive, and not limited to a particular geographical area, the concept of a national center was supported.

Consequently, in 1972, the University of Notre Dame School of Law and the Council for the Retarded, St. Joseph County, began to formulate plans to establish a national legal advocacy organization, a unique and innovative concept. The two organizations, with support from the National Association for Retarded Citizens and the Family Law Section of the American Bar Association, applied for federal funding. Since its inception, joint funding of the Center has come

from HEW's Bureau of Education for the Handicapped and the Division of Developmental Disabilities.

Currently, NCLH has an interdisciplinary team of attorneys and social science professionals working together for the further establishment and implementation of the legal rights of disabled persons. The activities of the entire staff of approximately 15 professionals, whether through direct legal intervention, legal assistance, conferences, publications or general information, center around such key issues as the right to education, to treatment and community-based services, to equal employment opportunity, and of access to transportation and the built environment. The need for specialization in these areas has greatly increased over the years, particularly as a result of major federal legislation and an expanding number of test cases.

Although the Center has served in court cases in the capacity of counsel and co-counsel, it primarily becomes involved in the role of a friend of the court (*amicus curiae*). The staff consults regularly with attorneys, organizations and other individuals concerning potential litigation and changes which can be made in state and federal legislation. NCLH has interceded on behalf of hundreds of individuals discriminated against because of their handicaps, and has successfully resolved their complaints, often with a simple letter or phone call, using litigation in the courts as a last resort.

Special efforts are made by the Center to provide comments to federal agencies issuing regulations to implement laws affecting the handicapped and to assist legislators and professional and consumer organizations in drafting and reviewing model legislation. Representative Robert Kastenmeier, for example, requested NCLH comments regarding proposed legislation to authorize the U.S. Justice Department to bring suits on behalf of institutionalized persons. And NCLH comments were submitted to HEW regarding proposed regulations to implement Section 504 of the Rehabilitation Act of 1973 by the executive branch of the federal government, and regulations to implement Public Law 94-142, the Education for All Handicapped Children Act.

Training Programs

A legal internship program was established in the first year of NCLH operation as a curricular project with the Notre Dame Law School, for years in the forefront of civil rights advocacy. Second and third year students are given the opportunity to work in the area of civil rights for the handicapped and perform much of the research which goes into the work of the Center. The Law School also offers one of the few courses in the country on law and the handicapped, which is coordinated by the Center and open to all law students.

An intern "outreach" program was initiated last year to bring law students from other colleges and universities to the Center, as well as place current interns in off-site programs and legal advocacy offices across the country. An NCLH intern was placed with Project Impact, a regional advocacy office of the National Association for Retarded Citizens, located in Burlingame, California. The intern visited various minority groups, identifying their problems and assisting staff members in locating appropriate resources for dealing with those problems. A law student "extern" from Northeastern University in Boston spent a term with the Center. The individual is now working with the Metropolitan Human Rights Commission in Fort Wayne, Indiana, and has filed a class action suit against the Fort Wayne Community Schools special education program, charging inadequate placement of pupils. NCLH also began in 1977 a training program for new attorneys. Attorneys from Washington State, Washington D.C. and Vermont received training at the Center and are now actively involved with discrimination cases.

Public Education Programs

Heightening the awareness of professionals to the problems of the disabled, as well as providing information to disabled consumers about their legal rights, have also been major objectives of the NCLH program. The Center has been responsible for conducting a number of national workshops and con-

ferences focusing upon such key issues as education, medical care and treatment, accessible transportation and equal employment opportunities. Plans are now underway to hold a symposium on the employment rights of the handicapped in April sponsored jointly with the DePaul University School of Law. NCLH will also assist the Law School in the publication of their spring issue of the Law Review which will deal exclusively with rights to employment.

NCLH staff are frequently requested to address groups and hold seminars and training sessions for both professionals and non-professionals who are anxious to increase their knowledge of the rights of the handicapped.

Although *Amicus* is the Center's primary vehicle for public education regarding the rights of the disabled, legal monographs prepared by the NCLH staff, as well as materials prepared by other organizations or individuals, are disseminated in response to requests for general information. Hundreds of requests for more specific information receive individual attention every month.

A few of the major publications projects presently underway at NCLH include a book, under contract with the American Civil Liberties Union, on the rights of physically handicapped persons; a series of "how-to" manuals for use by judges in civil commitment hearings; and a directory of attorneys actively involved in litigation on behalf of handicapped persons.

The NCLH library contains invaluable resource material of great benefit to the NCLH staff, and to those requesting assistance. Particularly noteworthy are the files of both reported and unreported cases, which are frequently difficult to obtain. These cases are available from NCLH to anyone desiring copies.

The expertise that NCLH has developed over its existence has benefited individuals in every state of the country. The feeling in 1972 of the need for such a center was an accurate assessment, judging from the development in only five years of major legislation and litigation with the capability of substantially improving the lives of the thousands of mentally and physically handicapped persons in our country.

Advocates as Amicus Curiae: Friends of the Court Effecting Change

By Kent Hull
NCLH Director of Legal Services

NCLH frequently receives requests to participate as amicus curiae in litigation. The purpose of this article is to discuss the role of amicus curiae and to suggest how amicus curiae briefs can be used. One point worth noting early is that in order for NCLH to be most effective as amicus, it is necessary for us to receive requests or to learn of significant litigation as soon as possible. This is important, not only because it enables us to have more time for preparation of a brief, but also because some courts have strict rules as to the time in which amicus briefs may be filed.

The Concept of *Amicus Curiae*

Amicus curiae, meaning "friend of the court," refers to an outside party, other than the plaintiffs and defendants, which is permitted to enter a case and make arguments to the court on the merits of each party's position. It is not necessary for the *amicus* to have a direct pecuniary or personal stake in the outcome of the case (as distinguished from the immediate interests required of another kind of third-party participant called an "intervenor"). Rather, the hallmark of the *amicus* is its specific knowledge of the issues before the court or its

experience and authority in dealing with problems the court encounters in the implementation of a decision. Although the *amicus* is now acknowledged to be a supporter of one side (indeed, the Federal Rules of Appellate Procedure require a prospective *amicus*, in applying for court permission to appear, to declare its allegiance to a party), the traditional office of the *amicus* is to serve the needs of the court, and only those *amici* who remember that obligation are influential in litigation.

Evolution of the Practice

Early American courts and litigants were reluctant to accept *amici curiae* in the process of resolving legal disputes. The common law's rigid, formalistic system of litigation discouraged "outside" participation in a case, despite whatever concrete and practical contributions an *amicus* could offer to the administration of justice. But as courts faced cases of complex political, economic, and social significance, reaching beyond the limited interests of litigating parties, the *amicus curiae* gradually assumed a recognized place. Courts relied on *amici* not only for knowledge and experience, but sometimes for strength in assisting the court to carry out decrees. In two dramatic southern school integration cases — Little Rock in the late 1950's and the James Meredith, University of Mississippi confrontation of the early 1960's — federal courts designated the United States government as *amicus* to assure compliance with court orders.

The Work of an *Amicus*

Generally, the responsibility of an *amicus* is limited to filing a brief or to otherwise making arguments on legal questions and appropriate remedies. Occasionally, an *amicus* may be empowered by the court to present evidence. In appointing *amici*, courts once indulged the fiction that individual attorneys, as officers of the court,

were the *amici*, not the group that the attorneys represented. Now the practice is to permit the filing of an *amicus* brief in the name of the organization. This subtle change, as the political scientist, Samuel Krislov noted, was more than a procedural formality. It was an important development in the dynamics of the adjudication process, because the "interest group" character of *amici* was acknowledged by the courts.¹

Once involved in litigation, an *amicus* has two alternatives: it may merely subscribe to the position already advocated by a party, or it may stand independent of the party, aggressively urging novel arguments to the court, attempting to persuade the court to venture beyond an articulated position. An aggressive *amicus*, while it risks alienating the court, may nevertheless enhance the position of the party it supports by giving that party's contrasting arguments the appearance of restraint and caution.

The Value of an *Amicus*

There is by no means agreement among lawyers about the advisability of using *amici*. Some lawyers believe that to permit outside participation will result in dilution of their control of a case and their authority to direct the development of the case. There is also some sentiment that a few groups use a bandwagon approach to filing *amicus* briefs: after individual parties and their attorneys lay the groundwork of a test case in the lower courts, some organizations rush to file *amicus* briefs in higher courts when victory seems assured and glory imminent. And, although an *amicus* can hazard approaches that are unwise for a party to pursue, some party litigants may wish to impress a court with the "respectability" of a position and not allow an *amicus* to frighten a court from taking a first-step innovation.

The critical question for *amici* is what judges think of their function, particularly those judges on the Supreme Court. In the 1940's, when use of *amicus* briefs became common, Justice Robert H. Jackson condemned an *amicus* brief filed by the

American Newspaper Publishers Association for concentrating more on the size and influence of the organization than on the legal question before the Court. There were suggestions by legal writers in the early 1950's that the Justices were coming "finally to the conclusion that, in most cases, the 'friends' of the court were more trouble than they were worth."² Justice Felix Frankfurter explicitly acknowledged the important contribution of one *amicus* in the 1948 public school religious instruction case of *McCullum v. Board of Education*. In 1954, when the Court tightened a rule which Justice Hugo Black perceived to limit the access of *amici* to the court, he noted his objection that the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs.

Government Participation

When the Solicitor-General of the United States, as the government's sole advocate before the Supreme Court, decides to enter a case as *amicus*, the situation changes from those cases where private groups seek to appear. The government may wish to participate because a case involves a challenge to an administration's policies or because a decision might have the final effect of restricting or burdening the executive branch.

During the 1960's, such liberal Solicitors-General as Archibald Cox and Thurgood Marshall exercised their *amicus curiae* authority on behalf of civil rights sit-in demonstrators and on behalf of state and local legislative reapportionment efforts. Particularly in the reapportionment cases, the editors of the *Yale Law Journal* concluded that the Solicitor-General's office acted not as a disinterested participant but as a partisan advocate and chief strategist for the reapportionment cause.³ To a private litigant, an alliance with the Solicitor-General as *amicus* offers the benefits of both the government's prestige before the Court and the intimate knowledge the Solicitor-General's staff possesses of the inclinations and prejudices of the individual Justices.

NCLH as *Amicus Curiae*

NCLH has found the role of *amicus curiae* to be quite effective. When the Center is asked to participate in a case, an evaluation process occurs based upon specific criteria. Four questions are invariably considered in every case prior to making a decision.

One fundamental consideration is the particular issue raised in the case. For example, is this a dispute which raises an issue that is important to handicapped persons; one that affects many persons; or one that is basic to the advancement of the legal rights of handicapped persons generally? In the past, cases accepted by NCLH are ones raising such issues as whether individuals may bring lawsuits to enforce the civil rights provisions of the Rehabilitation Act of 1973 (*Lloyd v. Illinois Transit Authority*) or cases involving unique questions pertaining to voting rights (*Selph v. Council of the City of Los Angeles*); marriage rights; institutionalization and the right to treatment (*Horacek v. Exon*); the right to accessible transportation (*Martin v. the Municipality of Metropolitan Seattle*); and the rights of mentally retarded defendants in criminal proceedings. NCLH is also interested in the use of state statutes protecting the rights of handicapped persons, and cases which can utilize those statutes as effective bases for legal relief.

A second question to be considered concerns the court in which the case is pending. *Amicus* participation is customarily in appellate courts or the Supreme Court. For instance, NCLH recently filed an *amicus* brief in the Supreme Court case of *Stump v. Sparkman*, which raised the issue of whether damages can be sought from a judge by a person ordered to be sterilized by the judge. NCLH has also found, however, that in certain cases, the *amicus* role can be effective in trial court.

A third criteria in the decision-making process is whether the record made in lower courts adequately presents and raises the issues that NCLH wants to address. Sometimes cases that begin by raising important substantive issues become entangled in subsidiary procedural arguments

which prevent raising the substantive questions at a certain stage in the litigation, and an *amicus* role is therefore not appropriate.

The fourth criterion for consideration is the resources of NCLH at the time a request is made and whether the request involves one of the areas in which NCLH devotes most of its energies; that is, the areas of education, employment, right to treatment and community services, and accessibility. Depending on the workload of NCLH staff at the time and our judgment that our experience would be useful to the court, we may then decide to seek permission to enter a case. We may also decide that non-legal material — particularly from a social science viewpoint — may be useful to a court and incorporate that into the *amicus* brief.

While there may be other criteria that enter into our decision to participate as *amicus*, this discussion indicates some of the major factors. Because of limited staff, we sometimes have to decline participation in cases where our criteria have been met, and we believe our participation would be useful. The *amicus* role, however, while a limited one in the advocacy process, is, from our experience, useful and effective.

Footnotes :

1. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy," 72 Yale L.J. 694, 703 (1963).
2. Harper and Etherington, "Lobbyists Before the Court," 101 U. Pa. L. R. 1172 (1953).
3. Note, "Government Litigation in the Supreme Court: The Roles of the Solicitor-General," 78 Yale L.J. 1442, 1479 (1969).

Advocacy Under The Developmentally Disabled Bill of Rights

By Edward G. Maloney, Jr.

The Developmentally Disabled Assistance and Bill of Rights Act, PL 94-103, was enacted in 1975 to amend the Developmental Disabilities Services and Facilities Construction Act.¹ Final regulations implementing PL 94-103 were issued by the Department of Health, Education, and Welfare (HEW) on January 27, 1977.² To assist states in the implementation of the Act's provisions, the Developmental Disabilities Office of HEW has issued a set of interim guidelines.³

The Developmentally Disabled Assistance and Bill of Rights Act of 1975 was enacted to assist states in the development of a comprehensive plan that will provide services to the developmentally disabled in the most effective and efficient way, while assuring the rights and dignity of all those being served. The Act is not designed to set up separate mechanisms for achieving this high level of efficiency, but rather is to be a "gap-filler" for a state's existing general services so that they can be specially adapted to the needs of the developmentally disabled.⁴

A second purpose of the Act is to set out specifically the rights of the developmentally disabled in a "Bill of Rights."⁵

Scope of the Act

The Act is designed to improve services and protect the rights of persons with developmental disabilities. Therefore, it is important to know

who qualifies under the Act as a person with a "developmental disability."

In order to meet the Act's definition of "developmental disability," a person's disability must be attributable to one of the following conditions: mental retardation, cerebral palsy, epilepsy, autism or any other closely related condition which results in an impairment similar to that of mental retardation, or requires treatment or services required by mentally retarded persons. A disability attributable to dyslexia is also included if it results from one of the above conditions.⁶

Any of these disabilities must also have originated before the person reached the age of 18, has continued or is expected to continue indefinitely, and constitutes a substantial handicap to such a person's ability to function normally in society.⁷

Obligations of the State

In order to assure that the states follow through in meeting the goals of improved services and protection of rights for the developmentally disabled, the Act sets out the means by which these goals are to be accomplished. Each state is required to set up a State Planning Council to identify the "gaps" in the state's existing services, and then to approve, monitor and evaluate the implementation of a plan to improve those services. The State Planning Council is also required to serve as an advocate for persons with developmental disabilities.⁸

In order to give substance to the Act's "Bill of Rights," a state must also set up an independent agency that will provide protection and advocacy for those rights. These Protection and Advocacy Systems (P&A) are required to be independent of any state agencies or other programs providing habilitation or other services to the developmentally disabled. They are responsible for not only advocating for the rights enumerated in the Act, but must also protect and advocate for other statutory and constitutional rights, as well.⁹ The purpose of this article is to explain the nature and

operation of these P&A systems and the rights they must protect and advocate on behalf of developmentally disabled persons.

Responsibilities of the P & A Systems

The basic principle underlying the P&A systems is that individuals who are developmentally disabled (the DD population) need to be able to reach outside the system of services in order to insure that their rights are not violated or diminished.¹⁰ While the State Planning Council is responsible for carrying out its advocacy role on behalf of the state's DD population as a whole, the focus of the P&A system is on the protection of *individual* rights.¹¹

The basic thrust of the P&A system is advocacy. The Act defines "advocacy" to consist of the speaking for, pleading for, supporting, advising, espousing the rights of, or interceding on behalf of persons with developmental disabilities before any public or private individuals, agencies, organizations or institutions serving such people.¹² The importance of this element of the Act is indicated by the fact that the continued release of federal funds to the states is conditional upon the implementation of a P&A system.¹³

Requirements of the P & A Systems

The P&A systems must be independent of programs or individuals providing habilitation or other services to DD persons. This is an obvious and necessary requirement. The rights of DD persons that most need to be protected concern such things as the sufficiency or quality of care being provided by habilitation services. Where state agencies are the primary providers of such services, it is essential that any challenge to the efficacy of such services come from outside the state system. Otherwise, the pursuit of legal remedies would be hampered by the inherent conflict of interest.¹⁴

HEW has interpreted this independence requirement to mean that even the State Planning Council may not serve as the implementing agency, since representatives of state habilitation and service agencies will serve on it. However, HEW has determined that the State Planning Council may serve as the body that *plans* the P&A system.¹⁵

Pursuit of Legal and Administrative Remedies

The P&A system is charged with the responsibility of pursuing "legal, administrative and other appropriate remedies." The pursuit of legal remedies includes the legal representation of DD persons in litigation concerned with rights, grievances or appeals of such rights or grievances. States are given the flexibility to use the services of either paid or volunteer legal counsel. Law student volunteers may also be relied upon to supplement paid legal advisors.¹⁶

The pursuit of administrative remedies includes the utilization of any internal system for appeal within an agency or facility or between agencies which do not include a judicial adjudication.¹⁷

The guidelines also authorize the P&A systems to pursue "other appropriate remedies" on behalf of the DD population. This broad category includes all kinds of actions, other than legal or administrative, taken on behalf of DD persons to assure that their rights are attainable and available. Such actions may include filing reports to monitoring agencies such as school boards, election inspectors, or prosecutors. Implicit is the authority to participate in negotiations, arbitration, legislative activity, conciliation proceedings, public hearings, and other investigative proceedings. Essential to the effectiveness of this type of advocacy is that the advocate have access to the records of public agencies that provide treatment, services and habilitation to the developmentally disabled — this element is provided for, as well.¹⁸

A final component of the P&A system is its authorization to provide "protective services" to those DD individuals who are substantially impaired in their ability to protect their own self-

interests. Included is the authority to intervene in otherwise private affairs and a responsibility to investigate abuse, neglect or exploitation. While the guidelines do not outline any procedure to be followed to determine when a DD person no longer has the "ability" to look out for his or her own interests, it nonetheless provides that there should be "readiness" on the part of those professionals rendering services to contact the P&A system when legal protection of a DD person is necessary.¹⁹

Anticipated Formats

The guidelines set out a number of possible formats which the states may incorporate into their P&A systems. These are not intended to be limiting, however. The preamble to the regulations makes it clear that the states should have the flexibility to develop the format most appropriate for their own needs, as long as the stringent requirement of independence is met.²⁰

The first suggestion offered by the guidelines is that the P&A system be a public, quasi-public or private non-profit agency appointed by the governor, with clearly stated by-laws, regulations or charter, giving the agency the power to pursue remedies and act as advocate for all DD citizens and residents within the state. Such an agency, and its advocacy function, would be established by state legislation, as well.

The second suggested format is an agency with an administrator selected by the state judiciary system. The agency would also be empowered by law to act as the P&A unit. This type of system is like the Ohio model, where the P&A system is responsible to the Chief Justice of the Ohio Supreme Court.

A third suggestion envisions a format without lawyers as advocates. This alternative makes use of state or local citizen advocacy volunteers coordinated by a paid professional. Legal advocates would be called in where necessary to provide legal or protective services to DD persons. This type format would basically be operated as a lay advocate program.

The remaining format alternatives suggested by the guidelines are not as clear. They include an incorporation of independent consumer advocacy agencies; or, an organization "not exclusively legal," but concerned with administrative and legal advocacy; or, finally, state "ombudsman" offices empowered by law to act as the P&A implementor. If legal advocacy is to be one of the functions of an effective P&A system, it is difficult to understand how these quasi or non-legal systems could provide the necessary representation in any but non-judicial proceedings.²¹

Whatever the format, it seems clear from the regulations and guidelines, and from the Act itself, that the P&A system must have the authority and the means to provide *all* the services necessary to insure that adequate remedies may be pursued to protect and advocate the rights of the DD population.

Bill of Rights

One of the most important aspects of the Act is Congress' recognition and enumeration of specific rights of DD persons. While the guidelines make it clear that this is not an all-inclusive list of rights, it is helpful in that it further delineates the specific obligations of P&A systems to advocate for DD citizens.

The Bill of Rights (Section 111 of the Act) provides for the following specific rights:

- *right to treatment, services and habilitation designed to maximize the developmental potential of the person and provided in a setting that is least restrictive of the person's personal liberty.*
- *right to a nourishing, well-balanced daily diet.*
- *right to appropriate and sufficient medical and dental services.*
- *right to be free from physical restraint unless absolutely necessary, and in no event as a punishment or as a substitute for an habilitation program.*
- *right to be free from excessive use of chemical restraints, and the use of chemical restraints as punishment or as a substitute for, or in an amount that interferes with, services, treatment or habilitation.*
- *right to receive close relatives as visitors at reasonable hours and without prior notice.*
- *right to be free from fire, safety, health and sanitation hazards in any facility providing services.*²²

Section 112 of the Act provides for the right of DD persons receiving treatment, services or habilitation to have an individualized treatment plan designed specifically for them to insure appropriateness of treatment.²³

Other rights that P&A systems should naturally advocate are those included in federal and state statutory schemes to protect handicapped persons. One example of such a federal scheme would be Sections 503 and 504 of the Rehabilitation Act of 1973.²⁴

Relying on legislative history, the guidelines also point out that rights which specifically protect DD and handicapped persons are not the only rights that P&A systems must advocate. The rights of the DD population are to be construed in the widest way to include any legal or other rights enjoyed by other citizens, especially the constitutional rights of due process and equal protection.²⁵

The interim guidelines also set a list of suggested tasks and functions that P&A systems could undertake in order to pursue the full implementation of these rights. While not all-inclusive, the list's recommendations fall into three categories: representation, education and investigation.

Representation includes representing individuals or organizations without otherwise adequate resources; negotiating with relevant agencies; referring DD persons to citizen or lay advocates and other protective service agencies, where appropriate; back-up resources to citizen and volunteer advocates; and appearing in the courts as *amicus curiae*.

Education includes providing information on the rights of the DD population to disabled persons themselves, their families, counsel, surrogates and lay advocates, professionals and public officials; testifying before legislative committees or administrative bodies; and preparing manuals and conducting training sessions on advocacy for the developmentally disabled.

Investigation includes receiving complaints of violations of or non-compliance with the rights of DD persons, and taking appropriate action to investigate and further pursue such complaints; and, preparing "action-oriented" reports on conditions which may have an adverse impact on

the rights of DD persons, with recommendations for corrective action.²⁶

Because of the broad reading given to the rights of the developmentally disabled, the guidelines have set out suggested priorities to aid P&A units in focusing their time and resources where the greatest benefit to DD persons may be obtained. The guidelines state that every P&A system should expressly adopt a set of operational guidelines for determining cases and activities in which to become involved.

The recommended priorities are: cases where the problem is clearly attributable to a developmental disability; actions that may serve as precedents; appropriate cases involving persons least able to obtain other representation; and violations of basic human rights and other constitutional guarantees.²⁷

Analysis of the Guidelines

The interim guidelines do not come out in favor of legal advocacy over citizen or lay advocacy, or vice-versa, but instead take a "middle-of-the-road" approach. They state that "there may be strong and valid arguments on *both* sides in any debate on the advantage of legal advocacy versus citizen advocacy," and that "if the best interests of the total population of the DD are to be served, all advocacy forms should be concerned for the target population."²⁸

While it is without question that legal and lay advocates can, and very often do, serve in effective complementary rolls, the intent of the Act cannot be read to place the choice of alternative advocacy forms in such a permissive, "either/or" context. The rights of DD persons established under Section 111 of the Act are not simply "human rights," which may or may not be legally enforced. They are *legal* rights, with the same force and effect of every other federal law protecting the civil rights of individuals.

If P&A systems are to be truly effective in carrying out their advocacy responsibilities, their primary form must be that of *legal* advocacy. If a particular problem involving the rights of a DD

person does not require legal resolution, then such a problem could easily be referred to a trained lay or citizen advocate.

The importance of having a state P&A system that is primarily a legal advocacy unit is best pointed out by a recent case involving the protection of rights under PL 94-103. In *U.S. v. Solomon*,²⁹ the federal government brought suit for equitable relief against hospital officials for constitutional violations in failing to provide treatment for mentally retarded persons confined in the state hospital. The court held that the U.S. had no authority to bring such a suit, finding unpersuasive the claimed authority in legislative history of the Act which indicated that the rights of DD persons were to be protected and assured by Congress and the courts. The court then referred to the requirements of the Act itself:

Included in the requirements is the need for a state to have in effect a system to protect the rights of persons with DD; the system will have the authority to pursue legal and other appropriate remedies to insure the protection of such persons. But once the grant has been given, the Act imposes no continuing duty on the U.S. to see to its proper application. (Emphasis supplied).³⁰

If other courts follow this same interpretation of the Act, it is clear that the statutory obligation to pursue the enforcement of the rights of DD persons is upon the P&A systems that the states establish. Unless the states adopt systems that are fully capable of seeking redress in the courts, the rights of the developmentally disabled will be no less secure now than they were before the Act was passed. Citizen or lay advocate formats for P&A's will not be enough. What is needed is a system comprised of legal advocates, able to provide readily available and ongoing legal advice, assistance and representation.

Edward Maloney is an NCLH student intern, currently in his third year at the University of Notre Dame School of Law.

Footnotes :

1. PL 94-103, 42 U.S.C. Sections 6000 *et seq.*, (197_) amending PL 88-164. Relevant provisions at 42 U.S.C. Sections 6010, 6011, 6012.
2. 42 *Federal Register* 5273 (January 27, 1977).
3. *Interim Guidelines for Development and Implementation of a System for Protection of the Individual Rights of and Advocacy for Persons with Developmental Disabilities under the Developmental Disabilities Services and Facilities Construction Act* as amended by Section 113 of PL 94-103 (For Fiscal 1978; Revised November 1, 1976).
4. 42 *Federal Register* 5288.
5. 42 *Federal Register* 5289.
6. 42 *Federal Register* 5277.
7. *Id.*
8. 42 *Federal Register* 5288, 5289.
9. Interim Guidelines (see footnote 3), p. 8.
10. 42 *Federal Register* 5291.
11. *Id.*
12. Interim Guidelines, pp. 4-5.
13. Interim Guidelines, pp. 7-8.
14. 42 *Federal Register* 5291.
15. Interim Guidelines, p. 5.
16. Interim Guidelines, p. 6.
17. The Act refers to the complaint procedures outlined in Section 503 of the Rehabilitation Act of 1973, and its regulations, as a model for the pursuit of administrative remedies on behalf of the developmentally disabled. *See* 41 C.F.R. 60-741 (1976).
18. Interim Guidelines, p. 6.
19. Interim Guidelines, p. 7.
20. 42 *Federal Register* 5291.
21. Interim Guidelines, pp. 13-14.
22. 42 *Federal Register* 5291.
23. 42 U.S.C. Section 6011 (Section 112 of the Act).
24. 29 U.S.C. Sections 793, 794 (1973).
25. Interim Guidelines, p. 9.
26. Interim Guidelines, pp. 11-12.
27. Interim Guidelines, pp. 17-18.
28. Interim Guidelines, p. 18.
29. ___ F.2d ___, 46 LW 2241 (4th Cir. 1977).
30. *Id.*

Sources of Information Regarding the P & A Systems

1) A roster of the Developmental Disabilities Council chairpersons, directors, and P&A implementors of each state, as well as a directory of developmental disabilities projects of national significance and regional office special project grants relevant to the P&A System, are available from: Jerry Bensberg, Director, Research and Training Center in Mental Retardation, Box 4510, Lubbock, Texas 79409. Limited copies are available.

2) Copies of the individual state plans for implementing Protection and Advocacy Systems are available from the American Bar Association, Commission on the Mentally Disabled, 1800 M St., N.W., Washington, D.C. 20036.

About the P & A Systems

An Interview with Francis Lynch

The following interview was conducted at a conference on the implementation of DD protection and advocacy systems held in Cherry Hill, New Jersey, December 1977.

Francis Lynch is Director of the Developmental Disabilities Office, Office of Human Development Services, HEW. The DD office is responsible for implementing the rights of persons with developmental disabilities, established under Public Law 94-103; the Developmentally Disabled Assistance and Bill of Rights Act. The state protection and advocacy (P&A) systems are established by the Act as the mechanism for assuring the protection of those rights.

AMICUS: Do you feel that the state protection and advocacy systems are given excessively broad responsibilities, considering their limited resources?

LYNCH: From my vantage point, I'm really amazed that this program has gone so very, very well. The original legislative intent was really a vast undertaking. The Senate and House compromise creating the P&A system was seen as a somewhat more modest approach to developing protection and advocacy, or the bill of rights concept for the developmentally disabled. [Refers to Public Law 94-103, the Developmentally Disabled Assistance and Bill of Rights Act. The Senate amendment allocated a far greater amount of federal dollars than the conference substitute.]

But when I see that 54 of the states and territories are involved in the program; that 50 of them have given positive assurances that they have staff on board; that they are an independent operating agency; that they meet the requirements —

and with the fact that there's only three million dollars out there to do this with — I'm really kind of overwhelmed that it's taken on so well; that the tenor has been one not of complete frustration or, frankly, of states wanting to opt out of the program.

AMICUS: Is it accurate, then, that every state has submitted a plan?

LYNCH: Yes, with the exception of two and the territories. We only have one state that's negotiating. But we consider that with that many of them participating and with so few dollars, it really reflects a good deal of interest in the program and a good deal of commitment. Many of the states have gone after other resources, [Congress has authorized \$3 million to the P&A systems for fiscal year 1978, with a \$20,000 minimum per state.] either the basic support grant money or money from state revenues; so it's the second greatest surprise I've had in dealing with this program.

The first one was when we started the program with the previous legislation [Public Law 91-517, 1970, which required states to set up developmental disabilities councils]. The authorization for that first year was in the neighborhood of 60 million dollars, but the actual appropriation was only in the neighborhood of 11 million dollars. And this was to mount a national program. The great expectation was that we were going to have a party but no one would come. At that time, every one of the states participated on the first go round; the governors accepted the program, they appointed councils and moved ahead, and again it was a magnificent surprise.

AMICUS: Returning to the question of capability, do you anticipate the states functioning in a monitoring capacity with regard to their compliance with state and federal laws, such as Section 504 and PL 94-142?

LYNCH: Yes. I think they should have an involvement with both of those, but I'm also interested that they have an involvement in the insurances within the DD [developmental disabilities] realm; for example, the individual written habilitation plan. I think that this is a national concern of monitoring within our own purview; for instance, where the plan indicates that youngsters are eligible for crippled children services, or require vocational rehabilitation services, or whatever — that they have access to those.

AMICUS: Do you think the P&A systems will have difficulty finding access to public records that are necessary in order to do an effective job of monitoring?

LYNCH: No, I don't think there will be a problem obtaining public records. A confidentiality study was made, and materials developed, as the first step in establishing the evaluation network. Also, in the development of the model state plan, we came to a point of clarity between the Freedom of Information and the Privacy Act. We had to take that as a first step, and I think they've developed in the model state plan techniques to avoid that kind of conflict.

AMICUS: Do you foresee problems occurring with the state systems that are not designed to place attorneys on their staffs?

LYNCH: No, I see it as another mode and another model. I don't think the legislative intent or the congressional intent was that it should be an attorney's bailiwick only. We're very happy that it

has stimulated the attention and the involvement of people in the legal profession. There is also room for the necessary involvement of other groups.

AMICUS: It seems, however, that the legal component has to be involved with the system in some way. Don't you agree?

LYNCH: Well, I don't think it has to be; I think it should be. But I think those plans that I've seen that don't provide legal expertise give us a clear indication that they are able to purchase it, or that they are able to acquire that kind of expertise in some way — enough to satisfy that they are going to do a good job.

AMICUS: Is the Developmental Disabilities Office planning programs for the training of lay advocates or legal advocates on a nationwide basis?

LYNCH: Well, I can't say that we have concrete plans in addressing that at the moment, but what we've felt for a period of time is that the University Affiliated Facilities system, if there is such a thing as a system, should essentially be the resource to train and to provide continual training. They are an identifiable, continuing part of the legislation, and are different from special projects which are usually stimulatory, and their longevity has to be acquired in some other way. But we have, and still do have, the University Affiliated Facility program, and it will probably grow. A blue ribbon panel from the office of the Assistant Secretary for Planning and Evaluation issued a report indicating that it [UAF's] should grow as the training facilitator in DD. We also feel that before it can, we have to establish standards for training and standards for assessing the University Affiliated Facilities. Now, in that construct, I can say yes, that in the overall plan and development there will be a place to train citizen advocates, to train in the law schools of the universities, to do cross-training in this area, and

that's probably the way we'll approach it; it's probably our long-range plan.

AMICUS: The court ruled in the case of U.S. v. Solomon that the states systems, under the DD act, rather than the U.S., have the authority to bring suits for developmentally disabled people. Is that going to place an even heavier burden on the state P&A systems in terms of litigation?

LYNCH: Yes. Not being an attorney, I really don't know what the burden will be or what the anticipated burden will be, but it certainly is going to focus a little more attention on the role of the states to do this.

AMICUS: Doesn't this emphasize an even greater need for litigative capabilities?

LYNCH: That's right.

AMICUS: Which, again, would require that training function?

LYNCH: Yes, that's an interesting point. It may well do that. I was just talking earlier to a general counsel about some of the things we'll probably be doing in a new legislative go-around. I think that's a good point — we'll have to address that. In any case, I think it's helpful that *Amicus* and other periodicals can keep us really aware of these kinds of things.

Legal advocates appear in many forms. Projects established by federal legislation and granted federal funds, such as NCLH and the P&A systems, are only one type. The following four profiles are additional examples of individuals and organizations working to establish and defend the rights of the handicapped.

The Disability Law Resource Center functions as an adjunct to the Center for Independent Living located in the San Francisco Bay area.

Another offshoot of a parent organization is the Legal Advocacy Subcommittee of the Epilepsy Foundation of America. By creating a network of existing law firms that will accept cases of discrimination, the subcommittee is aiming for a nationwide impact.

David Lopez is a rather unique private attorney with a large handicapped clientele. Few private attorneys are either capable or willing to take on cases of discrimination based upon handicap. In the final article to this Special Report, Brian Linn chastises private attorneys for neglecting their responsibilities in this area and counsels those who wish to bring a case on how to select a competent attorney.

And finally, Ohio state statute established the Ohio Legal Rights Service to protect mentally retarded individuals.

These examples are by no means an exhaustive list of the variety of legal advocacy groups across the country. NCLH, for example, has trained attorneys who are now litigating handicap discrimination cases in legal aid offices in Vermont, Washington, D.C., and the state of Washington. And the U.S. Department of Justice has entered cases involving the rights of institutionalized persons.

Each group of advocates described in this report is uniformly overwhelmed by the volume of cases received. Although the number of legal advocates is expanding, the need is still far greater than the supply.

NCLH is compiling a directory of attorneys who accept a substantial number of handicap discrimination cases. Contact the Center if you are interested in receiving a copy upon completion.

Disability Law Resource Center Assists Disabled to Lead Independent Lives

Disability, as a minority status, is one without a heritage. The cultural traditions are learned from peers, and it is a culture of perceived weakness, pity and dependence — images that society has of disabled people. From our experience, it is important that community-based groups of disabled people be created . . . and involved in advocacy for full implementation of our civil rights.

—Robert Funk, DLRC Director

The Disability Law Resource Center (DLRC), located in Berkeley, California, was established in November of 1977 through a CETA grant received by the Center for Independent Living (CIL) in 1976. Prior to becoming the DLRC, the paralegal program in 1976 began assisting disabled persons who felt they had been discriminated against under state or federal provisions prohibiting discrimination against handicapped persons.

The paralegal program was soon inundated with problems involving discrimination against the disabled in a wide range of areas, such as employment, public accommodations, housing, public assistance, and access to the judicial system. The need for technical assistance on behalf of the disabled trying to cope with a myriad of problems soon became evident. DLRC was established with this need in mind.

Throughout the history of the paralegal program, it has been staffed primarily by disabled

persons. In order to meet the rapidly multiplying demands, the staff was recently expanded by adding five paralegal trainees. Of the nine permanent staff members (two attorneys and seven paralegals), all but two are disabled. The Center also sponsors a volunteer program in which college students interested in the field of law and the handicapped may receive academic credit for doing volunteer work at the Center. DLRC currently has six volunteers working at the Center, four of whom are disabled.

The Center provides technical assistance and support services to both consumers and professionals interested in enforcing the civil rights of handicapped persons. For example, the Center offers direct assistance to parents of disabled children attempting to insure their educational rights; investigation of complaints of physical inaccessibility, including client representation in litigation; review of proposed state and federal legislation

affecting the rights of the disabled; and training of attorneys, paralegals, and administrators in disability law.

The DLRC staff is currently producing a technical assistance manual entitled, *Civil Rights of the Disabled: An Introductory Legal Reference*. The Center also publishes *Access*, a monthly newsletter designed to "disseminate news and commentary on legal/political issues affecting the civil rights of the disabled community, particularly the right to an independent lifestyle."

In the spring of 1978, the Center plans to hold a series of training seminars for parents of

disabled children to inform them of rights offered their children under Public Law 94-142, the Education for All Handicapped Children Act. DLRC is hoping to create a model workshop that can be replicated throughout the country based on the seminars.

The goal of the DLRC, according to Robert Funk, Director, is to help the disabled gain full participation in American society. DLRC operates under the premise that the best way to achieve its stated objectives is to grant disabled people the opportunity to establish independent lifestyles.

Epilepsy Foundation Establishes Legal Advocacy Subcommittee

As more rights have been secured for the handicapped, and as greater awareness of these rights is generated among those affected, the number of those requesting assistance of a legal nature has increased sharply.

— Ann Britton

The Epilepsy Foundation of America (EFA) established its Legal Advocacy Subcommittee in the summer of 1977, chaired by Dan Walker, former Governor of Illinois and President of the Illinois Epilepsy Association. The subcommittee, located at the National EFA office in Washington, D.C., is the primary impetus for creating a nationwide legal advocacy network.

The EFA is currently obtaining commitments from law firms across the country to handle meritorious discrimination cases on a *pro bono* (on behalf of the general public) and pay-for-costs-only basis, where the person involved cannot afford to pay a legal fee. Plans are also in progress to establish "a small special fund to support out-of-pocket litigation expenses in a few selected cases where

plaintiffs cannot afford this expense," according to Jack McAllister, EFA executive director.

The subcommittee plans to work closely with existing epilepsy organizations. When a discrimination case involving epilepsy is brought to the attention of a local chapter, and it is unable to procure results, or if the case appears to be one of national significance, it is referred to EFA's national advocacy staff, comprised of John Niemitz (social worker) and Ann Britton (attorney). The committee then refers the case to the appropriate law firm for action.

The need for an advocacy committee of this type became increasingly apparent to the EFA's Board of Directors Legal and Advocacy Committee, as requests for legal assistance have been rising steadily at the EFA's national office. The foundation receives daily at least 70 letters asking for some type of assistance. Approximately 90 percent can be handled routinely with informational

brochures and local referrals, but the rest need individual attention.

Most of the problems received by the main office are related to employment discrimination. (The unemployment rate among persons with epilepsy is twice the national average.)

In outlining the subcommittee's objectives, Ann Britton stated: "We hope that we will be able to serve clients who are not served by the P&A systems (either because of local eligibility requirements or too heavy caseload, etc.), to handle cases of a more national than local thrust (for example, a class action involving plaintiffs nationwide), and to provide *amicus* and other support to cases being handled by other advocacy means (local attorneys, legal services, P&A systems, etc.). We hope to be able to establish some precedents which will be of help to other advocacy efforts and thus reduce the stress on them."

Lopez and Associates Litigating for the Disabled

David T. Lopez and Associates, a private law firm in Houston, Texas, has extended its involvement in employment cases to include an increasing and varied case load involving the physically and mentally disabled.

Retained in 1973 to prosecute the employment discrimination case of a paraplegic woman, Lopez sued the National Aeronautics and Space Administration (NASA) for both sex and physical disability discrimination. The trial court, in what was probably a first in the country, entertained jurisdiction of the physical disability claim, then found discrimination on both grounds and awarded an \$800 a month retroactive raise and attorney's fees. The Fifth Circuit Court of Appeals, affirming the sex discrimination finding, did not reach the physical disability jurisdictional question.

There were numerous inquiries to the firm after the trial court ruling in the NASA case, which attracted national attention. The firm agreed to represent the Coalition for Barrier Free Living, and a firm associate, Albert M. Bronson, negotiated an agreement with the City of Houston bus company after federal pleadings had been prepared. City specifications on 100 buses to be bought with federal assistance will now require that the vehicles be accessible to the elderly and persons using wheelchairs.

The firm represents a mortgage-loan processor who was fired when her employer learned she had been hospitalized for psychiatric treatment. The Department of Labor ruled that Section 503 of the Rehabilitation Act was violated, and litigation appears likely. In another 503 complaint, Lopez

obtained a settlement under which one of the nation's largest department store chains dropped from its national personnel manual an automatic five year disqualification of any person with a diagnosed malignancy. The claimant who had enrolled in college after being fired received a cash settlement. Settlement negotiations are continuing in a case in which the Labor Department determined that Section 503 was violated by a utility company's refusal to hire a bookkeeper with a degenerative nerve disease that caused a limp.

The threat of a Section 504 complaint caused a state agency to cancel a firing notice, and also to promote the claimant to a position he had sought for three years. The agency involved deals in part with research on developmental disabilities. Scheduled for trial in March, is another 504 case against a private university which denied tenure to a deaf professor because he could not effectively participate in a federally funded physics research program.

Other employment cases on the firm's docket involve clients with claims arising from blindness,

epilepsy, heart disease, high blood pressure, muscular dystrophy, schizophrenia, and back problems. An appeal has been filed on the disqualification of a Texas Maritime Academy cadet for seaman's papers because one leg was amputated.

A claim in behalf of two autistic children under the new Education for All Handicapped Children Act presently is awaiting a decision by the State Commissioner on proper educational placement. The firm has offered to assist Advocacy Incorporated, a project of the State Bar, in assuring there is legal representation for children claiming their rights under that law.

Referrals of disability cases from the Houston Chapter of the American Civil Liberties Union are accepted by the firm on a *pro bono* basis. Lopez considers the role of the private Bar as essential in advocating the rights of the disabled. The firm maintains close contact with NCLH and many other advocacy groups throughout the country, and Lopez has lectured at various seminars on employment discrimination because of disability.

Ohio Legal Rights Service Protects Rights of the Mentally Retarded

The Ohio Legal Rights Service (OLRS) was established July 1, 1975, by state statute to protect the rights of patients within institutions for the mentally retarded, as well as those who were previously institutionalized, and those who are confronted with the possibility of institutionalization.

Attorney Doug L. Rogers was appointed as director of the Service for a term of five years by the Chief Justice of the Ohio Supreme Court. The OLRS staff consists of nine full-time attorneys, two social scientists, two administrative profession-

als, two persons employed under the VISTA program, and one under the CETA program.

In spite of obvious limitations due to a small staff, the Service has been entrusted with a wide range of responsibilities and methods it may utilize in seeking remedies for the people it represents. OLRS is declared independent of other state agencies under Ohio law, and thereby, may legally bring suit against other state agencies.

The agency conducts "investigations or inquiries about institutional conditions or practices, or practices or conditions in the community;

general advocacy," and it may give advice as an informational service to private individuals and to "other government officials over the phone or in person."

challenging unconstitutional conditions at Apple Creek State Institution (Ohio). On a motion for preliminary injunction, the defendants agreed to hire and employ 200 additional care staff at Apple

The need for an agency endowed with the powers and scope of responsibilities of OLRS has long been apparent.

—Doug Rogers

Regulations coordinating the activities of the Service stipulate that: "The primary goal of the L.R.S. is to represent individuals or classes of individuals. . . . When representing an individual who can communicate, the L.R.S. must advocate the express desires of that individual, not any interests perceived possibly to be more important to the attorney. . . . If an individual cannot communicate, then the L.R.S. attorney must exercise discretion in determining what would be the expressed desires of that client. The L.R.S. can represent parents and guardians if the interests of the parent or guardian and the child do not conflict."

Notable accomplishments of the Service to date have included: 1) negotiation on behalf of about 80 clients which helped procure their discharge from mental retardation institutions; 2) preventing the firing of 1400 resident-employees of state mental retardation institutions by negotiations over a six-month period; and 3) investigating health care services at Gallipolis State Institute (Ohio), and obtaining for residents a procedure to apply for discharge.

In the area of formal legal remedies, OLRS has filed a class action suit in *Siddes v. Delaney*,

Creek within four months and to prepare a plan within two months detailing the additional staff, equipment, and other improvements.

In coordinating its efforts with other advocacy agencies, the Service maintains close ties with the Developmental Disability Law Reform Project of Ohio State University Law School and the Ohio Association for Retarded Citizens. Furthermore, the OLRS has recently developed a Developmental Disabilities Unit to represent developmentally disabled individuals. The unit also offers "protective functions" and "representation of clients where appropriate within its statutory responsibility" when called upon for assistance by the Ohio Association for Protection and Advocacy for Persons with Developmental Disabilities.

C. William O'Neil, Jr., a member of the Ohio House Judiciary Committee, expressed his view of the Service's significance by stating that OLRS clients are "obviously under-privileged most of the time and have no opportunity for representation through the private bar, especially where the mentally retarded are concerned."

Justice For Sale

How Much Is That Lawyer In The Window?

By Brian Linn
NCLH Staff Attorney

After the events of the past decade, it should come as no surprise that the obligations and role of attorneys are coming under more intense and critical scrutiny. While it would seem unrealistic to hold the American Bar responsible for our tragic experience in Vietnam, that is perhaps the only catastrophe of recent years in which lawyers have not played a significant role. With every other social institution under reexamination, the legal profession cannot hope for immunity.¹

As the Civil Rights movement of handicapped individuals continues to grow at a burgeoning rate, the dependency of disabled individuals upon members of the legal profession increases proportionately. While the judicial system offers disabled individuals only one of many forums in which to advocate on behalf of their rights, it is a system for change which is receiving much attention.

Public interest law centers, protection and advocacy systems and legal services offices, among others, can provide individuals with disabilities some of the legal resources needed to enter the courts; however, there exists a substantial disparity between supply and demand. As our country's disabled population becomes more knowledgeable of its rights and increasingly activist about those rights, all possible avenues for achieving fair and competent legal representation will be pursued.

As increasing numbers of private attorneys are being retained by handicapped individuals, it is particularly important that these individuals understand the nature of the responsibilities of the lawyer in the attorney-client relationship and pos-

sess some knowledge of how to choose a lawyer, evaluate the lawyer's competence and commitment, and determine a fair fee. Although the following discussion of these factors refers primarily to private lawyers, much of it would apply to all lawyers.

The Lawyer's Duty To Make Legal Services Available To All

In the past decade, we have seen lawsuits which have sought such far-reaching goals as the right to treatment for institutionalized persons, the right to accessible buildings and accessible transportation, the right to education and the right to freedom from discrimination in employment. While such cases have been brought on behalf of disabled individuals, the social policies established will be to the benefit of the entire society.

In searching for a lawyer to represent them in such cases, most individuals generally assume that payment for the lawyer's service — frequently very costly payment indeed — will be required. In many cases, this expectation has proven true; however, in other cases, individuals and groups have found competent, interested and effective legal counsel who have been willing to "volunteer" their time.

Unfortunately, such lawyers have been the exception to the rule. However, the Code of

Ethics, which governs the activities of lawyers, sets forth clear responsibilities on the part of all lawyers, including lawyers in private practice, to provide legal assistance to individuals who cannot afford representation and who, without such "volunteer" assistance, would be foreclosed from pursuing judicial relief. The Ethical Considerations of the Code provide that:

*Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer. . . .*²

While the language of the Ethical Considerations may not be mandatory, it does set down basic responsibilities which each lawyer should meet. However, the aggregate failure of the lawyers to meet these responsibilities is well documented. One commentator has written:

*The legal profession as it is currently organized in the United States has failed to meet the need of many individuals and groups within our society. It has also failed to play a significant role in the quest for social justice and a viable society.*³

Criticism has also come from some members of the Bar who have advocated for the mandatory obligation on the part of all lawyers to provide a degree of free legal representation.⁴

Despite the resistance of some lawyers to providing "volunteer" services, anyone seeking the assistance of a lawyer with regard to a case involving broad implications for handicapped individuals, should not hesitate to discuss the Ethical Considerations and the lawyer's duty to make legal services available to all who need it. Handicapped groups such as the Paralyzed Veterans or the Association for Retarded Citizens should not be embarrassed by their lack of sufficient funds to pay an attorney's hourly rate. Where an individual seeks to bring an employment discrimination suit against a school district whose policy is to not hire any disabled teachers because of stereotyped notions concerning the ability of disabled individuals and because of inaccessible classrooms, such blatant, unmitigated and unjustified discrimination forms the basis of a social policy which should be addressed by the judicial system. Attorneys have an obligation to readjust their usual fee arrangements to insure that such an individual is not prevented from pursuing a court action solely because of the lack of funds.

*Whether the legal profession cares to recognize it or not, it has played a significant role in arriving at and failing to ameliorate present inequities in wealth, power, degrees of freedom, and human dignity within our society. The legal profession now has a duty, and always had a duty, to participate in major reshifting of wealth and opportunity.*⁵

Although some lawyers will continue to ignore their professional responsibilities, the maximization of the availability of legal services will certainly not occur unless individual lawyers are asked to respond to their ethical duties.

. . . most individuals generally assume that payment for the lawyer's services — very costly payment indeed — will be required . . . in other cases, individuals and groups have found competent, interested and effective legal counsel who have been willing to "volunteer" their time.

Choosing A Lawyer

In two recent decisions of the United States Supreme Court, the practice of the legal profession of disguising itself as a "noble" or "learned" profession, which should be protected from the type of regulation that professions are subjected to, has been dealt a severe blow. By striking down the use of fee schedules⁶ (wherein local or state bar associations maintained the practice of setting minimum fees which were to be charged by all lawyers in the particular jurisdiction) and by holding unconstitutional the practice of preventing the publication in newspapers of truthful advertisements concerning the availability of routine legal services by an individual lawyer or law firm,⁷ the Supreme Court has brought the legal profession several steps closer to the population which it purportedly serves. Nevertheless, it remains extremely difficult for an individual to make informed judgments concerning whether or not to retain a particular lawyer, even assuming that one has sufficient funds to pay for the lawyer's services.

Finding A Lawyer

Traditionally, the most common method for selecting a lawyer has been simply that of chance — by finding a name in the yellow pages, by meeting lawyers at social functions, or by passing a lawyer's office on the way to work. Unfortunately, such methods may lead to disaster. Given the level of incompetence in the legal profession generally and given the complexity of the law, such methods put the individual at an initial disadvantage. Therefore, other options which may increase the individual's advantage vis-a-vis the lawyer should be considered.

In many areas, the state or local Bar Association operates a bar referral, which, if properly run, should be able to point an individual in the direction of several attorneys who have some degree of professional competence in the specific area of law. However, many bar referrals do not have the

sophistication to make such appropriate referrals. These act as mere lotteries, listing the names of all attorneys in the area in a specific order, and referring potential clients to them in sequential order. Therefore, one should determine whether a particular service is any more useful than merely throwing darts at the telephone book.

Recommendations from other lawyers, especially those who have an interest in the specific area of law which involves your case, can be helpful. Even where an individual is ineligible for free legal assistance through the local Legal Services program, it may still be possible to receive a good lawyer referral from that organization. In cases which involve civil rights issues, the local chapter of the American Civil Liberties Union or the Lawyer's Committee on Civil Rights Under Law may be of great assistance in referring you to a competent, committed lawyer.

Another possibility is to contact attorneys who are members of particular sections of the Bar Association that are relevant to your case. Frequently, Bar Associations have committees which study areas of the law such as mental health law, school law, employment law, or civil liberties. Attorneys who are members of such committees generally have an expressed interest in the particular area of the law, and they frequently have substantial experience as well.

If there is a law school nearby, you may wish to call the dean's office to determine the names of faculty members who teach courses in the area of law which concerns your case. Such law professors may be in a position to put you in touch with a member of the Bar who is practicing in your locality and who has expertise in the particular area of the law.

Disabled individuals should also consider contacting local organizations which have formed for the purpose of advocating for and protecting the rights of disabled individuals. Such organizations may have information concerning lawyers who have handled similar cases. Occasionally, national organizations of a similar nature can also be of assistance in locating good legal counsel.

Sometimes, leads can be developed by asking the advice of individuals who have some familiarity

with the matter which is involved in your case. If you are seeking information with regard to estate planning for a mentally retarded child, an officer in your bank may be able to recommend several lawyers who work in that area. If you are seeking legal representation with regard to disability benefits under Social Security, Supplemental Security Income, or Worker's Compensation, your physician may be in a position to recommend lawyers who have expertise in those areas.

The potential drawback to using professional sources for referrals is that the individual may be more concerned about referring a new case to their "lawyer friend," than they are about ensuring that you receive competent counsel. Therefore, it would be advisable to talk with friends and relatives whose opinion you respect. Although their advice may not be as technically knowledgeable as that of professionals, it may be more trustworthy.

Although none of the particular methodologies insure a failsafe procedure for obtaining a competent lawyer, it is important, where possible, to enter the lawyer's office with some advance information concerning him or her. The fact that you have been referred to a specific lawyer by one or more individuals can frequently provide a tactical advantage of informing the lawyer that individuals other than yourself may become aware of the quality of the legal representation which is provided to you. Because lawyers are highly dependent upon word-of-mouth referrals for their business, there is frequently an increased incentive to them to do good work in a case which has been referred to them by someone who will be likely to continue to make referrals in the future.

Determining A Lawyer's Competence

When initiating a search for an attorney, one must first understand that the diplomas, citations, and other awards adorning a lawyer's law office are not necessarily reflective of his or her competency. Chief Justice Burger has recently made repeated comments concerning the incompetency of lawyers who appear before the Supreme Court.

The noted trial attorney, F. Lee Bailey, after admonishing law schools for their failure to offer formal training for trial lawyers, makes the following analogy:

Our colleagues in medicine (who opted for license specialization long ago) at least use cadavers for their practice efforts to diminish the cost of a mistake. We [lawyers] cut our teeth on real live clients.⁸

Perhaps an even more troublesome problem than the incompetency of attorneys is the general lack of knowledge in the legal profession about the specific legal issues facing disabled individuals. While some law schools offer broad courses in areas such as law and psychiatry, law and psychology, or law and the handicapped, such courses are generally not attended by a large number of students. And, even in these courses, there is little time to dwell in depth upon the various statutes, regulations, and cases affecting the handicapped. A negligible number of courses deal exclusively with the rights of handicapped individuals under such important statutes as the Education for All Handicapped Children Act, the Rehabilitation Act, or the Developmental Disabilities Assistance and Bill of Rights Act.⁹

Therefore, the parents who seek to find a lawyer to represent their child with regard to an inappropriate placement in the public school system or the individual who feels that he has not received appropriate treatment by his vocational rehabilitation counselor may be especially hard pressed to find a competent lawyer. In approaching lawyers, such individuals should clearly inquire as to the general background of the attorney. One should not hesitate to ask questions concerning the attorney's rank in law school, the particular classes which he or she took, and the continuing legal education classes, if any, he or she has attended since graduating from law school.

One should not feel uneasy asking the attorney about his or her experience with similar cases. Although it is not necessarily a prerequisite to competent representation, the total lack of relevant experience in similar litigation may be an indication of his or her inability to adequately represent an individual in a particular case.

Determining A Lawyer's Commitment

Although not a complete substitute for knowledge and experience, a lawyer's personal commitment and interest should be weighed in determining his or her overall competency.

The traditional view of the lawyer is that of an unbiased, objective mercenary — the "have gun, will travel" concept of the lawyer as a soldier of fortune. Under this view the lawyer who has a personal belief in the client or a personal conviction with regard to the client's cause which is seen as too strong may be considered "unprofessional."¹⁰

While acknowledging that "many lawyers representing public interest or politically radical clients have too strong an emotional bond with them and lack the detachment necessary to perform the lawyer's function,"¹¹ a lawyer who is committed to eradicating social injustice can be a most effective advocate. The excitement that is generated by a personal commitment to a case can usually be sensed by the perspective client. While it should never be the determining factor in the decision-making process, the existence of an honest belief in the case can be related to the ultimate work product of the attorney.

Determining The Intangibles

After making some initial determination with regard to the competence and the commitment of a particular attorney, a number of other subtle considerations should be weighed. These subjective considerations concern how comfortable one is with the particular attorney. While in the attorney's office, and especially while in the waiting room, does there appear to be a well organized, systematic method for getting work accomplished? A disorganized system, with files or letters piled high on tables or the floor may indicate an inefficient operation in which the clients are the ones who ultimately suffer.

Is the attitude among the various workers (attorneys, paralegals, investigators, secretaries,

etc.) professional and courteous? Do they seem to work well together?

During interviews with the attorney, are legal complexities explained in a manner which is easily understandable, or do Latin maxims and other incomprehensible legal jargon flow from his or her lips?

During your communications with the attorney and his or her support staff, are your questions answered fully, adequately and courteously? If you are uncomfortable with the attorney and the attorney's staff, or if they seem uncomfortable with the number or nature of your questions, this may be an indication that future misunderstandings or difficulties will arise.

During the initial interview, as well as during all subsequent communications, it is most important that you are able to reach satisfactory mutual understandings with your attorney. The responsibilities of both of the attorney and the client should be agreed upon very early in the relationship. A determination should be made concerning procedures for keeping the attorney and the client advised with regard to new developments in the case. You should not hesitate to ask who you can talk to when you have future questions, how you go about contacting the attorney, how quickly your telephone calls or letters will be responded to, and whether you will receive promptly copies of all letters which your attorney sends or receives, copies of all court documents which are filed and/or other notification of significant developments.

It should always be remembered that the client is the one in charge of the relationship; it is the client's decision whether or not to retain the attorney. The contractual relationship with the attorney does not differ significantly from other contractual relationships which one might enter into such as agreements to repair an automobile, paint a house or purchase a television set.

Although the attorney-client relationship has historically been clothed with secrecy in a manner which makes comparison-shopping difficult, it is not impossible for an individual who is unskilled in the law to make reasonable determinations with regard to the competency, commitment and other intangibles which form to make a good lawyer.

... there is some tendency to believe that a correlation may exist between the amount of the fee and the quality of the work. Such a correlation is, however, probably insignificant at best, and one would certainly be foolish to base his or her decision-making process entirely upon the amount of the fee.

Determining The Price

Assuming that the particular lawyer has not agreed to take the case on a "volunteer" basis, the most unpleasant aspect of the attorney-client relationship is frequently the seemingly excessive (and often exorbitant) fees of the lawyer.

Joseph Goulden, in his book about Washington law firms, tells of the incident wherein Clark Clifford charged a \$25,000 fee for "a handful of hours" work to Charles Revson, the President of the Revlon Corporation. The work performed regarded a Senate committee investigation of the scandal over rigged television quiz shows. (Revlon Corporation sponsored the infamous "\$64,000 Question.") Clark Clifford's discussion of this fee is described as follows:

"I was thinking about sending him a bill for \$25,000." ... "When Revson gets the bill," he said, "he'll cuss and call me a sonabitch and the whole business. But he'll pay it and next year when he is down in Miami Beach playing gin rummy with his buddies, he will talk about his 'friend Clark Clifford' and his 'lawyer Clark Clifford,' and how much the so-and-so charged — and it'll be worth \$25,000 to him." He did it too.¹²

While most individuals would not consciously equate prestige with the excessiveness of their lawyer's fee, there is some tendency to believe that a correlation may exist between the amount of the fee and the quality of the work. Such a correlation is, however, probably insignificant at best, and one would certainly be foolish to base one's decision-making process entirely upon the amount of the fee.

Before seeing a lawyer, one may wish to determine the amount, if any, for the initial interview.

Many lawyers will see a prospective client initially without charge in order to determine whether he or she is interested in the case. In such a situation, however, one should not expect to receive a substantial amount of legal advice.

If, after the initial interview, it appears that the lawyer is competent and willing to represent you, the fee arrangement should be discussed openly and frankly. You should feel free to discuss the different types of fee arrangements which are generally available.

The Flat Fee

One arrangement is the flat fee. Although most frequently used for routine kinds of cases or services, such as divorces or drafting wills, the flat fee may also be appropriate for legal representation which is subject to well-defined considerations such as representation in right to education hearings or civil commitments.

In any fee arrangement, the lawyer should be willing to put the fee agreement in writing. In the case of a flat fee, the contractual agreement should specify clearly the total amount of money to be paid, the nature of the payments to be made (the amount of any down payment and the amount and dates of subsequent installments or other similar terms), and a complete description of the services which the lawyer will perform (investigation and case preparation, brief writing, representation at hearing, representation in appeals, etc.). The written understanding between the lawyer and client should also include information with regard

to who will bear the cost for expenses such as filing and service fees, photocopies, long distance calls, court transcripts, travel expenses for the lawyer, and expert witnesses.

Hourly Rate

Another common form of fee agreement involves an hourly rate. While inquiring about the hourly rate which the firm charges, one should investigate whether there are different charges for senior lawyers, junior lawyers, and investigators or paralegals. One should not hesitate to frankly ask a lawyer how time is recorded to ensure that the hourly rate billing is fair. It is not uncommon for lawyers to have set hourly rates for work performed in the office and a different flat rate for each day or half day in court. Under such circumstances, lawyers sometimes charge the full rate for court appearance even if the case is continued or otherwise disposed of soon after the court proceeding actually begins.

Attorneys who take a case on an hourly rate basis will frequently require the advance payment of a retainer. As with the flat fee agreement, a written document should record the understanding as to the hourly rate and the retainer. The document should also specify that the client will receive a refund if the actual hours spent on the case are less than the amount which the client has previously paid through the retainer or other installments.

Because it may be difficult for an individual to determine how many hours a particular case will require, it is especially important that the client receive some general indication from the lawyer concerning the amount of time which will be required. The lawyer should be willing to make a written estimate of what the ultimate charges for his or her service will be.

Contingency Fees

Access to the legal profession can be greatly enhanced in some cases by the use of contingency fees. These fees have traditionally been used in personal injury cases, such as automobile accidents

or medical malpractice cases, and in other suits seeking monetary damages. With this kind of agreement, the individual does not pay an hourly rate or a flat fee, but rather agrees to pay the attorney a specified percentage of any money awarded to him or her as a result of the successful prosecution of the case. Generally, the percentage amount rises as the case proceeds through the various possible stages.

The contingency fee basis may be especially attractive to individuals who could not otherwise afford an attorney on an hourly rate or a flat fee basis. The arrangement lends itself well to employment discrimination cases, where an ultimate back pay award can form the basis for the percentage agreement. Social Security, Supplemental Security Income, and Worker's Compensation cases are also frequently taken on a contingency fee basis. In such cases, the upper limit on the fees are generally established by federal or state laws.

As with all forms of attorney-client fee agreements, the written understanding should include information concerning who is expected to pay the out-of-pocket expenses discussed earlier.

Reasonable Attorneys' Fees

Finally, a growing number of state and federal statutes permit the prevailing party to recover reasonable attorneys' fees from the losing party. Under the judicial system as it has developed in the United States, each party must pay their own attorneys' fees unless a statute specifically provides that one party may recover from the other in the event of successful litigation.¹³

A recent amendment to federal law provides that, where a suit is successfully brought under certain federal civil rights statutes, the attorney for the prevailing party can recover reasonable attorneys' fees from the losing party.¹⁴ For example, many civil rights cases which involve defendants in state, county or municipal government¹⁵ may result in the payment of reasonable attorneys' fees to successful plaintiffs under this new law.

Other examples of statutes specifically providing for the recovery of reasonable attorney fees include the federal law prohibiting discrimination against otherwise qualified handicapped individuals in programs and activities receiving Revenue Sharing funds¹⁶ and some state statutes prohibiting discrimination against handicapped individuals in employment and public accommodations.¹⁷ Attorneys' fees have been awarded in discrimination cases brought by disabled individuals, even when such cases ultimately did not go to trial.¹⁸

Given the responsibility of members of the legal profession to provide a certain amount of "volunteer" work in public interest areas and considering the availability of contingency fee agreements and the recent adoption of statutes permitting the prevailing plaintiff to recover reasonable attorneys fees, most disabled individuals and advocacy organizations with significant cases should, theoretically, be able to locate and retain competent counsel despite the inability to pay expensive flat fee amounts or hourly rates. Unfortunately, this theoretical concept may not always find applicability in the every day world. However, where an individual must resolve to pay — and perhaps pay dearly — for the services of an attorney, there does exist some opportunity for comparison-shopping, by visiting more than one lawyer before making an ultimate determination concerning the most appropriate person to retain and through negotiating the fee arrangement with each prospective lawyer.

One author has described the cynicism with which the legal profession is commonly viewed:

*There seems to be somewhat of an attack on established systems and professionalism as utilized in many quarters including the legal profession. The lay world has always tended to regard lawyers with some uneasiness and distaste. As Chicago's Mayor Daley might say, lawyers do not plant any trees. They live off the troubles of others. They are too clever and speak a mysterious argot clearly intended to bewilder common folk. The cleverest get bought up by the rich and powerful to help them get around our laws and cheat the public. Everyone senses this strain, which is not unique to this country or this era . . .*¹⁹

Lawyers In The Marketplace

With the increasing power of the consumer movement, the mythical veil of secrecy has been lowered and the nakedness of the once aristocratic legal profession has been exposed. The reality is that the services provided by the legal profession are more like other services available in the market place than one might expect.²⁰

With the increasing growth of the disability rights movement, lawyers will be called upon more and more frequently to participate in the process of social change. In calling upon attorneys to perform a role, individuals and organized advocacy groups who question rather than assume, who analyze rather than accept, and who intelligently and incisively shop for their legal counsel should not be disappointed with the results.

Footnotes:

1. Garrett, Jr., *The Social Responsibility of Lawyers in Their Professional Capacity*, 30 U. MIAMI L. REV. 879 (1976) (hereinafter referred to as Garrett).
 2. Code of Professional Responsibility, Ethical Consideration 2-25.
 3. Marks, *A Lawyer's Duty to Take All Comers and Many Who Do Not Come*, 30 U. MIAMI L. REV. 915 (1976) (hereinafter referred to as Marks).
 4. Woytash, *What's the Difference Between a Job and a Profession?*, 63 A.B.A. J. 602 (1977); Marks, *supra* note 3 at 924-25.
 5. Marks, *supra* note 3 at 925.
 6. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).
 7. *Bates v. State Bar of Arizona*, ___ U.S. ___, 45 L.W. 4895 (1977).
 8. Bailey, "Watch Out for Trial Lawyers", *NEWSWEEK* Jan. 2, 1978, at 7.
 9. See generally Kelso, *The Duty to Deliver Competent Counsel*, 30 U. MIAMI L. REV. 847 (1976).
 10. See Garrett, *supra* note 1 at 889.
 11. Dorsen & Friedman, *DISORDER IN THE COURT* 135 (1973).
 12. Goulden, *THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS* 96-97 (1971).
 13. Comment, *Reasonable Attorneys' Fees and Treble Damages — Balancing the Scales of Consumer Justice*, 10 GONZ. L. REV. 593 (1975).
 14. 42 U.S.C. Section 1988.
 15. 42 U.S.C. Section 1983.
 16. 31 U.S.C. Sections 1242, 1244.
 17. For a listing of state statutes, see *Amicus* Vol. I, No. 6, pp. 30-35 (September, 1976).
 18. Two examples show the potential for utilizing the statutory provisions for reasonable attorneys' fees. In one case, a state trial court awarded the attorneys for a handicapped individual \$22,473.20 after the plaintiff prevailed in a complex employment discrimination suit brought under state law. *Holland v. Boeing Company*, 11 E.P.D. Paragraph 7641 (Wash. Super. Ct. 1976). In another case, a federal court awarded \$3,000.00 attorneys' fees to a handicapped plaintiff's attorneys for their work in preparing a successful Motion for Temporary Restraining Order, even though the case did not ultimately go to trial because of an amendment in state law which occurred after the filing of the lawsuit and which effectively permitted the plaintiff to retain his employment. *Johnson v. Department of Administrative Services*, No. C-177-348 (S.D. Ohio January 5, 1978).
 19. Garrett, *supra* note 1 at 880.
 20. *How to Choose a Lawyer (and what to do then)*, *CONSUMER REPORTS* Vol. 42, No. 5 pp. 284-290 (May, 1977) is an interesting article on dealing with lawyers, and readers seeking additional information may wish to consult this source.
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