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VOL. 4 NO. 5 & 6 • SEPTEMBER—DECEMBER 1979

Special Double Issue

- Vocational Rehabilitation and
- Sheltered Workshops

Amicus

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Note From the Director—Please Excuse Our Delay

The National Center for Law and the Handicapped has been undergoing some basic structural changes in the past few months. This has delayed our publication timetables and we apologize for that. However, all subscribers still receive their six issues prior to the necessity to renew. We hope to speed up the publication process in the next few months. The present issue constitutes a double issue, given the importance and comprehensiveness of the topics presented.

As you may note from our address, the Center has moved on to the campus of the University of Notre Dame. The Center is in the process of becoming integrated administratively into the Notre Dame Law School and will function as a University Center. We will continue to provide legal advocacy, education and research assistance on a national basis and will endeavor to maintain the high quality of our bi-monthly journal, *Amicus*, which you, as our readers, have helped make so successful and so significant.

Ronald M. Soskin
Executiver Director

Readers Invited to Comment

We invite your contributions to the Readers' Forum. Letters may take almost any form. We ask only that they be well written, reasonably brief (no more than 500 words), and responsible. We will not accept anonymous letters, and we ask that you include a line or two of self-identification.

To avoid unnecessary paperwork, we will not acknowledge receiving letters unless you include a stamped, self-addressed postal card that can merely be checked and returned to you. We will not return letters. We reserve the right to edit letters for style and grammar.

Send your letters to

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publications

Kent Hull, The Rights of Physically Handicapped People

Kent Hull, former director of legal services and staff attorney at the National Center for Law and the Handicapped, is the author of the latest issue in the American Civil Liberties Union series on individual rights. *The Rights of Physically Handicapped People* deals with the topic of the civil rights of all physically handicapped people and gives illustrative examples of the application of those rights to specific types of handicapping conditions.

Mr. Hull traces the "quest for equality" by describing the history of the development of a national public policy toward handicapped persons, which has progressed from a fundamental benevolent paternalism to an active enforcement of civil rights. He discusses past laws and cases which were blatantly violative of equal rights for handicapped persons and looks at the stereotypical opinions and fearful public attitudes which have resulted in segregation and its crippling effects. Explaining the major legislation that had been passed for the benefit of handicapped persons, Mr. Hull notes the failures of agencies to implement important provisions of the statutes and the resistance of employers and educators to many of its provisions.

The book includes a "primer on rights" which examines the scope, definitions and policies of the HEW §504 regulations, and gives a general introduction to the implementation of civil rights for handicapped persons. One chapter, for example, is devoted to the right to access and discusses the major provisions of the Architectural Barriers Act, criticisms of the Act and court cases brought to en-

force it. Practical questions regarding the scope of the §504 regulations are considered in terms of program accessibility in existing facilities, transition plans affecting structural change and new construction of facilities. State architectural barriers laws and accessibility requirements are similarly examined.

A second "right to access" chapter deals with accessibility of public transportation. Mr. Hull looks at early post-§504 court decisions and their judicial deference to administration interpretations, emphasizing their failure to recognize that the right of access to public transportation is no right in reality if handicapped persons must be assisted onto the public transportation. A shift in attitude of the courts toward the right to access becomes evident in later cases, including *Lloyd* and *Bartels*, which Mr. Hull discusses in depth. He also considers later court cases, the DOT final implementing regulations for §504, and the 1977 Secretary of DOT "Transbus mandate." Accessibility on interstate buses, on airlines and on AMTRAK is also discussed.

Several chapters of the handbook deal with the right to education at preschool, elementary, secondary and post-secondary levels. Noting that the "legal rights of physically handicapped persons to education are perhaps clearer than other legal rights" discussed in the book, Mr. Hull compares the §504 concept of "free appropriate public education" with the Education for All Handicapped Children Act, the two dominant federal statutes governing education. Provisions and definitions of both acts are considered. Under the Education for All Handicapped Children Act, for example, the right of handicapped children to participate in athletics, the due process hearing requirements, the problems with the testing and evaluating materials used to measure students, and the least restrictive alternative requirements are analyzed. Mr. Hull cites court cases which recognize the "right to placement" in regular classrooms.

The Rights of Physically Handicapped People demonstrates how the §504 regulations apply to postsecondary education and describes some of the major provisions of the regulations as they pertain to admission and recruitment. Mr. Hull reviews *Davis v. Southeastern Community College*, along with the criticism which has followed from handicapped persons and their advocates. The book also gives examples of the requirements which federally funded recipients must meet under §504 in providing equal opportunities for qualified handicapped persons to participate in educational programs and activities outside of school, as well as in school.

A chapter on employment rights was contributed by Paul Hearne, former executive director of the Handicapped Persons Legal Support Unit in New York City. Mr. Hearne covers sheltered work-activity centers, examples of past employment discrimination by the federal government and present government plans for hiring handicapped people. In greater detail, the chapter outlines the provisions of the §501 regulations, including procedures available to handicapped persons challenging employment discrimination. It also covers the regulations under §503 of the Rehabilitation Act, including the affirmative action plan and the recourses available to individuals who feel they have suffered discrimination.

The handbook concludes with a chapter on "The Right to Live in the World," which briefly discusses the remedies under the major federal statutes and the issues that arise as handicapped persons seek to overcome the consequences of handicapping public attitudes. The Model White Cane Law, the Michigan Handicappers' Civil Rights Act, a Maryland architectural barriers ordinance, and a North Carolina statute on the rights of handicapped persons are reproduced in the appendices.

Written in an easy-to-read, question-and-answer-format, the book, according to a *New York Times* book review, "reveal[s] many of the complications of the laws." It should be extremely useful to handicapped persons and their advocates and is available for $2.25 at bookstores, from ACLU affiliates, or from Avon Books at Mail Order Department, 250 West 55th Street, New York, N.Y. 10019 (mail orders to Avon should add $.25 for handling).

Kent Hull, while still working with NCLH on special projects, including briefs and training sessions, now officially holds the position of Assistant Professor and Director/Developmental Disabilities Project, Michigan State University, East Lansing, Michigan.

Stanley S. Herr,

From Rights to Realities: Advocacy By and For Retarded People in the 1980's, President's Committee on Mental Retardation, U.S. Department of Health, Education and Welfare, Office of Human Development Services. DHEW Publication No. (OHDS) 79-21026

In a well-written sixteen page pamphlet, Stanley S. Herr outlines the need to establish priorities for the coming decade as related to legal advocacy by and for the mentally retarded. He discusses alternate legal resources, including community legal services programs, state advocacy systems, consumer organizations, legal services corporation, and the general Bar and law schools. Also explored are the potential contributions from the Executive branch and by Congress and state legislatures, with a recommendation for a new act entitled "Community Reintegration of the Mentally Disabled." The paper concludes with the acknowledgment that "with some single exceptions, the quantity and quality of advocacy for disabled clients leaves much to be desired" and that steps need to be taken to "increase the staying power and skills of advocates interested in these underserved clients."

The pamphlet is available from President's Committee on Mental Retardation, HEW, Washington, D.C. 20201.

COMMITTEE PUBLISHES DIRECTORY

The People-to-people Committee for the Handicapped, headquartered in Washington, D.C., published in February the 6th edition of its highly-acclaimed DIRECTORY OF ORGANIZATIONS INTERESTED IN THE HANDICAPPED, according to Alan A. Reich, Committee Chairman.

The Directory has come to be known as a fine reference source for those involved in affirmative action plans and programs. It supplies quick information on those public and private groups working with and for people with disabilities.

Reich, also President of the U.S. Council for the International Year of Disabled Persons-1981, stated that the Directory "will be a cooperative bridge between the voluntary and public agencies in the rehabilitation field and the marketplace where the jobs are." He further noted that, relative to IYDP '81, "the United States will be called upon more increasingly to share with counterparts throughout the world information on coping with handicapping conditions." The Directory will be an invaluable contribution.

More than 80,000 copies, so far, of past Directories have been distributed to concerned individuals and organizations.

"The revised and up-dated edition," said James Burress, Committee Executive Director, "will have added information including public and private organizations concerned with developmental disabilities; state employment security agencies, and state vocational rehabilitation agencies."

"It will continue to serve," added Burress, "business and industry planners and affirmative action programs in compliance with new Regulations 503 and 504 of the Rehabilitation Act of 1973."

Copies of the Directory are priced at $2.00 per copy to handicapped individuals and families and $3.00 to all other parties. Special reduced bulk rates are available on request. Orders may be sent to: People-to-People Committee for the Handicapped, 1522 K Street, N.W., Suite 1130, Washington, D.C., 20005.

news

Compliance Board Cites GSA and Atlanta Firm Over Barriers in Office Complex

The federal Architectural and Transportation Barriers Compliance Board recently cited the U.S. General Services Administration (GSA) and Piedmont Courtland Associates, their Atlanta Building manager, with failure to meet accessibility standards issued under the Architectural Barriers Act of 1968.

The Compliance Board, created by Section 502 of the Rehabilitation Act of 1973, enforces the federal law requiring access for disabled persons to and in most federal and federally funded buildings and facilities. The Board can order corrections to inaccessible buildings and withhold or suspend federal funds.

The building was leased in 1977 and, as part of the lease agreement, the building owner was to make the facilitiy fully accessible. A recent inspection showed a negotiated deadline for completing the changes had been virtually ignored.

The most serious violation cited was the lack of a passenger elevator from the main lobby to the basement where a public cafeteria is being completed and from an adjacent parking garage to the basement which physically disabled persons must use in order to have access to the building. The Board found the building's freight elevator unacceptable for passenger service because it was unsafe, inconvenient, and undignified.

Other barriers cited were inaccessible handrails, insufficient visual fire warnings for deaf persons, offices without raised letters or number and improperly placed identification for blind persons, narrow toilet stalls with curtains as doors and toilet doors without jambs for persons in wheelchairs.

Under the Compliance Board's regulations, GSA and Piedmont Courtland had fifteen days to respond to the citation. The Board will ask an administrative law judge to order the parties to comply with the Architectural Barriers Act: that order would be final and binding.

The Board has only recently reached a settlement in another long-running dispute with federal agencies apparently unwilling to comply with the accessibility requirements. Washington's Hubert H. Humphrey Building, the home of the Department of Health, Education and Welfare, will now be made more accessible as a result of an agreement reached between the Board, the GSA an HEW. This agreement also includes the modification of two freight elevators, which will be converted for passenger use, and a rear lobby leading to these elevators, which will be redecorated.

The GSA Commissioner of public buildings has also reportedly written to regional administrators regarding continued use of freight elevators by handicapped persons.

Philadelphia Cited For Section 504 Violation

The Office For Civil Rights (OCR) of the Department of Health, Education and Welfare has issued a decision holding that the failure to provide an appropriate education to bilingual handicapped students violates both Section 504 of the Rehabilitation Act and Title VI of the Civil Rights Act of 1964.

The decision was rendered in response to a complaint filed in July, 1978, by Education Law Center.

At the time the complaint was filed, 5.7 per cent of 257,942 Philadelphia school children were in full-time special education programs. Of the 14,138 Hispanic children within the school district, however, only 3.15 per cent were receiving special education services.

Bilingual education was being provided to 34 per cent of the Hispanic students, but Education Law Center had identified 152 handicapped students who were in need of bilingual education and were not receiving it.

OCR determined that Philadelphia did not have adequate procedures to identify bilingual handicapped children and that the school system lacked qualified bilingual diagnostic personnel.

In response, OCR proposed a plan for the school district to identify and properly place students whose primary language is not English. In addition, all parents must be informed, in their native language, of the child's need for assessment, the results of any preplacement evaluation, and the child's educational program.

legislation

Proposed Regulations for DD Ammendments of 1978

The Rehabilitation Services Administration of HEW proposed regulations (44 Fed. Reg. 68, 564) last November to implement the vocational rehabilitation and independent living rehabilitation (ILR) programs of the DD Amendments of 1978 (Pub. L. 95-602).

The 1978 Amendments added an extensive state-federal grant program to expand vocational rehabilitation services.

The Amendments authorized grants to states which provided ILR services to severely handicapped individuals and older blind individuals and which established protection and advocacy systems for severely handicapped individuals receiving independent living services.

Centers for Independent Living For Severely Handicapped Persons

The proposed rules state that the purpose of centers for independent living is to provide a broad range of assistance to severely handicapped persons in order to enable them to achieve greater independence in either their family or in community living situations. The rules were drafted to implement section 711 of the DD Act.

The center is to be a facility offering a combination of independent living services, including intake counseling, referral and advocacy services, attendant care, peer counseling, independent living skills, housing and transportation assistance, health maintenance programs, individual and group social and recreational activities, and other training and assistance of "substantial benefit in promoting the independence, productivity and quality of life of severely handicapped individuals."

A state unit may apply for federal assistance, and local public agencies and private nonprofit organizations may in the absence of a state application.

The proposed rules state that the center must assure that severely handicapped individuals will be substantially involved in policy direction, and, to the greatest extent possible, will be employed by the center.

The rules define severely handicapped individuals as those handicapped individuals who have severe physical or mental disabilities which seriously limit one or more functional capacities in terms of employ-ability, whose vocational rehabilitation can be expected to require multiple services over an extended period of time, and who have one or more physical or mental disabilities resulting from one of many causes, including arthritis, blindness, cancer, cerebral palsy, deafness, mental retardation or mental illness, sickle cell anemia, and spinal cord conditions.

For Older Blind Individuals

State units administering the ILR services program may apply for federal grants for programs to assist older blind individuals in adjusting to their blindness and in learning to be independent despite their blindness. These grants are intended for short-term ILR services to persons age 55 or over with severe visual impairment and for whom ILR goals are possible, and may be up to 90% of the total costs of services. Services are to include those designed to help arrest blindness, services leading to mobility, mobility training, guide and reading services, transportation, and supportive services (such as home mechanics and home economics).

P & A Services

Any state unit which does not provide treatment and vocational rehabilitation services to handicapped individuals may apply for grants for protection and advocacy services for severely handicapped individuals receiving ILR services. No minimum matching share is required of applicants. Any system which is funded must have authority and capacity to pursue legal remedies and must be independent of any ILR services program.

State Plans for ILR Services

The proposed rules establish eligibility requirements that state plans must meet in order to receive federal grants under the Amendments. The plan must assure that the state unit study the ILR services needs of severely handicapped individuals and the possible alternatives to institutionalization. The state unit must conduct an evaluation of each severly handicapped person who applies for ILR services and certify him or her as eligible or ineligible. It must prepare individualized written rehabilitation programs which are updated periodically. Further, the plan must assure that sixteen ILR services, as outlined in the rules, be available, including a wide range of physical and mental medical rehabilitation services, counseling, transportation, housing, interpreter services for deaf persons, job placement services, recreational services, services for members of the family, and many more.

NCLH Comments on Proposed Changes to 503 Enforcement Regulations

The National Center for Law and the Handicapped, Inc. has recently submitted comments on proposed changes to the Office of Federal Contract Compliance Program's enforcement regulations under Section 503 of the Rehabilitation Act. The proposed rule makes a number of general changes to certain regulatory provisions under Executive Order 11246, under Section 402 of the Vietnam Era Veterans' Readjustment Act of 1974, and under Section 503 of the Rehabilitation Act. The proposal attempts to consolidate and integrate certain portions of the regulations under sections 402 and 503 into that section of the Code of Federal Regulations presently concerned only with regulations implementing Executive Order 11246 (41 C.F.R. Part 60-1). (Executive Order 11246 was intended to promote equal opportunity for all persons, regardless of race, color, religion, sex, and national origin, seeking employment with federal government contractors.)

In its comments, NCLH emphasizes the importance of ensuring that the regulations, when issued in final form, be as easy to read and contain as many cross-references as possible to facilitate use of the regulations by non-lawyers as well as by lawyers. NCLH also requests clarification of certain proposed changes concerning preaward reviews and the definition of "qualified handicapped individual." It suggests that a list of government contractors and subcontractors be made available in a certain location to handicapped persons and that such a location be identified in the regulations. NCLH also recommends that the present provisions allowing the deadline for filing complaints under both sections 402 and 503 to be extended "for good cause shown" be amended to include specific examples of what OFCCP considers to constitute "good cause." Finally, NCLH urges OFCCP to explicitly state in the regulations that it recognizes a private right of action, without exhaustion of administrative remedies, under §503 of the Rehabilitation Act.

Fair Housing Amendments Advance

The House Judiciary Committee has reported the Fair Housing Amendments of 1980, H.R. 5200, to the full House of Representatives by an overwhelming 24-5 vote while also defeating three destructive amendments.

It is expected that the three amendments will be resubmitted on the House floor. The three amendments include attempts to delete the administrative enforcement mechanism in the bill, and to basically grant much wider latitude and exemptions to real estate appraisers and to insurance companies.

The bill should reach the House floor in late April or early May. (For comments made by NCLH on earlier versions of this bill, see *Amicus*, 3, No.3.

Update:

Justice Department Bill Passes Senate

The United States Senate has approved the Justice Department Bill, S10, which would allow the Justice Department to initiate lawsuits against states on behalf of institutionalized handicapped individuals to protect their constitutional rights. (See *Amicus*, 4, No. 1). The bill now goes to conference to resolve differences with a similarly passed House bill (HR,10). The bill passed despite strong opposition by Senators who argued that the federal government should not interfere with the states' right to handle these civil rights issues.

Indiana Passes New Zoning Statute

Senate Bill 186 has been signed into law in Indiana as a means of overcoming local restrictive zoning ordinances which exclude group homes for developmentally disabled individuals from single family residential areas.

The Bill prohibits zoning ordinances from excluding group homes of 8 or fewer developmentally disabled individuals from any residential area solely because the group home is a business or because the residents are unrelated, subject to a requirement that it not be located within 3000 feet of another group home. It also rules that restrictive covenants which effectively discriminate against group homes are void as against the public policy of the state.

Local planning councils are permitted until May 1, 1981, to submit alternative plans for approval to a newly created state developmentally disabled residential facilities council. These plans can be approved as long as the intent of the statute is not frustrated.

P.L. 94-142 Funding Efforts Fail in New Mexico

Proposals introduced by State Rep. John Padoven and State Sen. Manny Aragon which would allow New Mexico to apply for funding under Public Law 94-142 were recently tabled in state legislative committees during the past session of the New Mexico legislature. New Mexico is the only state which does not receive federal funding under the Education For All Handicapped Children Act (P.L. 94-142). These measures, had they been passed by the legislature, would have served to add almost $4 million in federal funds to the state's special education budget.

The action of the legislative committees came shortly after a federal court order cited the state board of education and Albuquerque public schools for violations of Section 504 of the Rehabilitation Act of 1973. The state was ordered to present a viable special education plan to the federal court by February 22, 1980.

During its past session, however, the legislature made efforts to correct some of the deficiencies of the special education system which had been noted by the Court. It eliminated a funding option which allowed the local school districts to divert special education funds for other purposes. In addition, the legislature authorized the hiring of three state special education specialists to provide assistance to local school districts and also appropriated $50,000 to study the special education funding formula within the state.

New Action to gain state approval for an application for P.L. 94-142 funding is expected when the legislature reconvenes in January, 1981.

Regulatory Monitor: Education

Applying the Learning Disability Regulations

By S. James Rosenfeld, Esq.
Blair, Quenstedt & Rosenfeld
Washington, D.C.

One of the major purposes of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) was to ensure that each handicapped child be properly evaluated. Without accurate evaluation, it is virtually impossible to develop an appropriate educational plan for the child or to provide proper educational services. One of the most difficult areas concerns children with learning disabilities.

Recent actions involving two State educational agencies, the Bureau of Education for the Handicapped, and the Office for Civil Rights, raise questions about uniform applications of the learning disability regulations, about State compliance with the regulations, and, possibly, about equal protection of the law.

There is no widespread agreement about what constitutes a learning disability. BEH's regulations define "severe learning disability" as a disorder in one or more of the basic psychological processes involved in the understanding or use of language, written or spoken, which may manifest itself as an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations.[1] Examples of learning disabilities are dyslexia and developmental aphasia. However, the term does not include learning problems that are primarily the result of visual, hearing, or motor handicaps, mental retardation, emotional disturbance, or environmental, cultural, or economic disadvantage.

In order to conclude that a child has a specific learning disability, BEH regulations require, among other things, that a multidisciplinary evaluation team find that the child has a "severe discrepancy" between achievement and intellectual ability in one or more specified areas.[2] The problem arises in determining how much of a discrepancy there must be between these two levels and whether whatever criteria are used are applied flexibly.

In their original form, the Federal regulations included requirements for a quantitative definition of severe discrepancy that used a formula and a percentage. That requirement was deleted from the final regulations, however, as was a provision for a discretionary classification by the evaluation team. It appeared, therefore, that the matter was left up to the States.[3]

New York State regulations used a formula/percentage method; its regulations defined a learning disabled child as one who "exhibits a discrepancy of 50 percent or more" between achievement and ability."[4] The application of this standard generated complaints to BEH, however; it was contended that the 50 percent test was being applied rigidly, resulting in the denial of education to children who in fact had learning disabilities.[5] An attendant problem was the "yo-yo" syndrome, defined as follows:

> *". . . a strict interpretation of the 50% discrepancy would create a situation wherein the school district need only provide services sufficient to bring the child to a functioning level of more than 50% of potential rather than providing an education to bring the child up to grade level. This can create a yo-yo syndrome because if the child does not gain enough strength in the remediated areas, he will fall below the 50% discrepancy and again require services. Not only is this detrimental to the child's well being, but extremely costly."*[6]

BEH's response to this argument was vague, but it strongly implied that use of an absolute percentage cut-off was compatible with Federal regulations. "Use of the 50% discrepancy level," it said, "is not required by federal regulation. On the other hand, there is nothing in the regulation that prohibits a State from using the 50% discrepancy level for determining whether a child has a specific learning disability."[7]

In a subsequent review of a due process hearing, the New York Commissioner of Educa-

tion ruled that the New York regulations, and specifically the 50% test, were consistent with the Federal regulations.[8]

New York State educational personnel explain, however, that some flexibility exists because local evaluation teams are given latitude in deriving the discrepancy percentage. Thus, the evaluation may include non-quantitative psychological and teacher assessments. Nevertheless, it appears that the State emphasizes a quantitative standard, with the percentage test being used as a "baseline." The State does not require the use of a mathematical formula in deriving a child's discrepancy, but neither is such an approach prohibited.

Curiously, BEH adopted a different posture in dealing with Washington State regulations by objecting to the strict quantitative standard developed by the State in 1978. The strict Washington standard was developed to prevent the "dumping" of children into handicapped programs, especially learning disability programs, without thorough evaluations,[9] and to guarantee that different children in different school districts would be judged equally. The regulation required that a student be shown to be deficient in each of two general categories, and this deficiency was defined as:

> *"a delay of one year or more at or below the first and second grade levels, a two year or more delay at the third and fourth grade levels, and a three year or more delay at the fifth grade level . . ."* [10]

This regulation was adopted in October 1978 and approved by BEH in April 1979 as part of the State's Annual Program Plan for FY 1979.

However, the regulation was called into question during the summer of 1979 in the course of an investigation by HEW's Office for Civil Rights, which had cited the Seattle School District for violating §504 of the Rehabilitation Act of 1973 by using improper eligibility criteria for Learning/Language Disabilities programs. But this finding raised at least an inconsistency and possibly an embarrassment: If the school district's procedures violated §504, but were in compliance with State policy, then the State's policy must also violate §504. However, BEH had already approved the State's plan under which the policy was submitted.

In order to remedy this situation, OCR called on Seattle to "develop a plan to provide coverage of students that do not meet the current State criteria, which would eliminate State reimbursement for those L/LD students." In addition, OCR called on BEH to approve this local plan, which would then be submitted to OCR. OCR's requirement that BEH approve a local policy, OCR admitted, "would set a precedent." Finally, OCR recommended that BEH review the State's criteria for learning disabilities, warning that if BEH were to approve an annual program plan with discriminatory provisions, "the Federal Government could be placed in an embarrassing position."

Following a review by BEH, Washington revised its regulations, changing the quantitative criteria by which a child is judged to be learning disabled and, more importantly adding a discretionary provision which allows the evaluation team to classify a child as learning disabled even if he/she does not exactly meet the required percentage discrepancy test. The regulation reads:

> *"Where the results of the intellectual, academic or perceptual/language measures provided for in WAC39-1811-1355 do not document a specific learning disability, the multidisciplinary team, when it is deemed advisable by the team, may deviate from the criteria set forth in WAC 392-171-355 within the standard error of measurement of the selected assessment instrument(s) and determine the appropriateness of placement in a special education program . . ."* [11]

Accordingly, Washington State now has a discretionary test, New York State a quantitative/percentage test, and BEH appears to be satisfied that each complies with Pub. L. 94-142. Thus, it is still unclear how narrowly or rigorously a State may define the "severe discrepancy" requirement before it will be considered as having violated the law. This dif-

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**Mr. Rosenfeld is managing editor of EDUCATION for the HANDICAPPED LAW REPORT.*

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ferential interpretation of the law raises the possibility that a child could be refused access to special education programs and related services in one State, but be entitled to them in another. Could one then argue that this constitutes discrimination, in that it denies a child the right to full and equal educational opportunities, in violation of the equal protection clause of the 14th Amendment? Could it also be contended that HEW, by approving both State plans, had sanctioned an inequity in the implementation of P.L. 94-142 and, thereby, had itself violated the equal protection clause?

A final practical problem concerns faithful implementation of the P.L. 94-142 mandate. Increasingly, States find themselves squeezed between the legislative and administrative demands of the law, as spelled out in Federal legislation, and shrinking fiscal resources, aggravated by the Federal government's failure to fully fund required programs. Historically, the States have responded to this dilemma by reducing all their social services. One way of doing this in education is to impose, consciously or unconsciously, a more restrictive interpretation on certain categories of handicapped children. Where the Federal definition and standard for evaluation of learning disabled children is very general in the first place, the possibility for such a restriction would seem even more attractive.

Citations

CITATIONS: *Scoville* (BEH-3/3/78), 2 EHLR 211:14; *Sewall* (BEH-3/10/78), 2 EHLR 211:16; *Hudson* (BEH-8-16-78), 2 EHLR 211:56.

Case No. 9883 (NY SEA), 3 EHLR 501:138.

41 Fed. Reg. 52406 (Nov. 29, 1976), 1 EHLR 11:504- 11:505; 42 Fed. Reg. 65082 -65083 (Dec. 29, 1977), I EHLR 11:522 -11:523.

Notes

1. 45 C.F.R. 121a.5 (b) (9). The term "learning disability" is not defined in the law, possibly because, as Representative William Lehman (D-FL) remarked during the House floor debate, "No one really knows what a learning disability is." Congressional Record (June 29, 1975), p. H7755, 1 EHLR 11:134.
2. Procedures for evaluating learning disabled children are set forth at 45 C.F.R. 121a.540 - 121a. 543. The criterion that there be a "severe discrepancy" between achievement and intellectual ability is contained in 45 C.F.R. 121a.541(a) (2).
3. *Compare* 41 Fed. Reg. 52406 (Nov. 29, 2976), 1 EHLR 11:504 - 11:505, with 42 Fed. Reg. 65082 - 65083 (Dec. 29, 1977), 1 EHLR 11:522 -11:523. HEW explained, in adopting the final regulations which dropped the percentage, formula, and discretionary criteria, that "[o]f the 982 letters of comment at the public hearings, the most frequently expressed concern was the inclusion of the use of a formula as part of the diagnostic criteria. With the exception of the composition of the evaluation team, there were relatively few comments on other portions of the proposed regulations. *Ibid.*

   See also the following BEH Policy Letters: *Scoville* (BEH-3/3/78), 2 EHLR 211:14; *Sewall* (BEH-3/10/78), 2 EHLR 211:16.
4. 8 NYCRR 200.1(d) (4).
5. *Hudson* (BEH-8/16/78), 2 EHLR 211:56.
6. *Ibid.*
7. *Ibid.*
8. Case No. 9883 (NY SEA), 3 EHLR 501:138.
9. Washington State's quantitative standard originally was the result of a court order instructing the State Department of Public Instruction to assume the costs of all public education, for both handicapped and nonhandicapped children, in order to equalize the availability of services Statewide. *Seattle School District, et al. v. State of Washington,* Docket No. 53950 (Thurston County (WA) Superior Court, Jan. 14, 1977). By eliminating direct fiscal responsibility at the local level for the education of handicapped children, however, the court caused concern among State officials that local districts would "dump" children into handicapped programs, thereby avoiding financial responsibility.
10. WAC 392-171-355(1).
11. WAC 392-171-356.

in the courts

NCLH Files Friend of Court Brief

transportation

Baker v. Bell, No. 79-2173 (5th Cir.)

The National Center for Law and the Handicapped has filed an *amicus curiae* brief in a Fifth Circuit Court of Appeals case, challenging a District Court judgment that compliance with §504 may be based on compliance with the "5%" provisions of the DOT regulations and arguing that claims under §504 require *de novo* reviews in the district court. (See *Amicus*, 4, No. 2)

In 1976, DOT promulgated regulations concerning standards for recipients of financial assistance from the Urban Mass Transportation Administration and establishing prerequisites for federal financial assistance. DOT-UMTA did not specify a program designed to meet the "special efforts" requirement but did provide illustrative examples of levels of efforts that would satisfy the requirement, insofar as wheelchair users and semi-ambulatory persons were concerned. Among these was the 5% standard, which permitted an UMTA recipient to spend an average annual amount equivalent to 5% of §5 apportionments to an urbanized area. DOT emphasized that the examples were not "regulatory standards or minimums."

Limiting its exercise of jurisdiction to a post-administrative remedy judicial review, the District Court in *Baker* granted summary judgment to appellees, public transportation officials, upholding an administrative decision that they had complied with §504 requirements by enforcing the 5% standard.

In its brief, NCLH argues that the 5% provision results in inadequate and inferior levels of transportation services, and, as such, violates §504. The 5% provision was issued before guidance from HEW in the implementation of §504, states the brief, and does not comport with §504's anti-discrimination mandate. Also, when scrutinized the 5% standard is shown to be promulgated primarily to implement the special efforts statue (§16 (a)), rather than §504 itself, despite Federal Register notes that §504 is the statutory basis. The disparity between the DOT 5% requirement and §504, says NCLH, is even more evident in light of the HEW Executive Order Guidelines of 1978, in which HEW adhered to stringent requirements for substantial efforts against discrimination and in which it clearly refrained from endorsing the DOT regulations as being consistent with §504. "Nothing in the Guidelines permits such a limited commitment by public transit resources *per se* to fulfill §504," argues *amicus*.

NCLH further contends that the question before the Court of Appeals is not solely what the *regulations* require, but what §504 itself requires. The Court, argues NCLH, should look to the final DOT §504 regulations (which fail to incorporate the interim regulations) as implicit acknowledgement that the low levels of service resulting from the 5% requirement do not comply with §504. The District Court erred in relying upon the interim regulations without requiring a determination of the sufficiency of the transportation services resulting from that level of funding. Such a determination would have shown that qualified handicapped persons are denied the opportunity to participate in and benefit from the transportation services, in clear violation of §504.

This District Court failure to hold a *de novo* review (that is, a full trial) was error because §504 is a civil rights statute, argues NCLH, and it requires courts to exercise active independent judicial review. *Amicus* cites to what it terms "overwhelming weight of authority" in other districts to support the requirement of *de novo* review and requests the Court to reverse and remand the judgment of the District Court.

Copies of the NCLH brief are available for $3.00.

American Public Transit Association v. Goldschmidt, C. A. No. 79-1697 (D.D.C., February 7, 1980)

In a lengthy decision, a federal district court has refused to enjoin the implementation of Department of Transportation regulations governing mass transportation programs but has ordered the Department to prepare an environmental impact statement to accompany the regulations.

Plaintiffs, who include an association of public transit authorities, challenged the validity of DOT regulations which require recipients of federal grants for transportation to make each individual mode of federally funded transportation accessible to the handicapped (for example, at least half of all bus systems, *etc.*). The regulations were adopted in May, 1979, following extensive debate about the costs and benefits of such requirements. Alternative recommendations were to provide less expensive, door-to-door, special service transportation systems, but the final regulations resolved all issues in favor of the mainline, as opposed to the special service, solution.

Plaintiffs argued that the resulting regulations exceeded statutory authority, were the result of arbitrary and capricious decisions, and were procedurally defective. The court rejected these claims but upheld an additional claim that DOT failed to comply with the National Environmental Policy Act by failing to prepare an environmental impact statement.

In challenging the DOT Secretary's authority to issue the regulations, plaintiffs relied on *Southeastern Community College v. Davis*, 99 S. Ct. 2361 (1979), which held that HEW could not require a grantee "to make substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals." The *APTA* decision distinguishes the Supreme Court case by stating that the Secretary of HEW relied solely upon §504 statutory authority, while the DOT secretary's authority rested not only on §504, but also upon additional statutes, such as the Urban Mass Transportation Act, permitting promulgation of terms for grants for transportation facilities. These statutes not only complemented the authority vested in DOT by §504, the court held, but also furnished independent justifiction for the regulations.

In dicta which is not binding but which may influence future decisions, the court restrictively interprets Davis to mean that regulations which govern architectural barriers removal, resting solely on §504, "may well be collateral to the 'nature' of the mass transit program itself" and therefore an imposition of an affirmative action obligation which exceeds statutory authority. *APTA* goes far to state that *Davis* suggests that §504 would not independently justify the DOT regulations and that the regulations "might be in tension with the Supreme Court's prohibition against conditioning funds on affirmative action by recipients," in so far as they require not only accessibility of future construction, but improvement of existing inaccessible transportation systems as well.

While the *APTA* court found that the Secretary of DOT was empowered through the additional statutory authority to choose mainlining, it stated that the "wisdom of the choice . . . is not free from doubt" and "DOT may have interpreted HEW guidelines as *requiring* more extensive accessibility than they actually did or could have . . . under 504."

Granting plaintiffs' motion for summary judgment as to the claim that DOT failed to prepare an adequate environmental impact statement to accompany the regulations, the court took judicial notice of published information regarding the impact of the new regulations on the more than 5.3 billion bus and 2.25 billion subway and commuter rail passengers in the United States (based upon 1977 statistics) and upon the environment itself. The single decision to require lifts on urban buses, said the court, will increase "dwell time" and have, as yet, uncalculated effect on, for example, fuel requirements, vehicle emissions and traffic congestion. According to the court, the Department apparently ignored readily available information about the potential implications by summarily concluding in a six-page Final Negative Declaration that the regulations would not "significantly affec[t] the quality of the human environment." The Department failed to take a "hard look" and gave no indication of what served as the basis for its conclusion, held the court.

The court concluded that implementation of the regulations should not be enjoined pending completion of an Environmental Impact Statement because any persons who were threatened with injury could ultimately receive administrative and judicial relief. Also, plaintiffs had largely ignored this claim in early states of the litigation and were not themselves threatened with injury. On the other hand, said the court, enjoining implementation of the regulations would seriously delay a program for possibly millions of

beneficiaries, to their irreparable detriment.

Subsequent to the decision, the Secretary of DOT issued notice of its intent to prepare an Environmental Impact Statement covering the entire §504 regulation, not only the program of assistance to mass transportation [45 Fed. Reg. 36, 11495 (February 21, 1980)]. A meeting to identify issues to be analyzed was to be held in Washington in late March. The Environmental Impact Statement will also consider alternatives to the regulations as promulgated, including modifications of waiver provisions, time frames for compliance and accessibility requirements.

employment

E. E. Black v. Marshall, Civil No. 79-0132 (D. Haw. 1979)

The National Center for Law and the Handicapped, Inc. has recently submitted a memorandum in support of defendant's cross-motion for summary judgment in a case currently pending before the federal district court for Hawaii, *E. E. Black v. Marshall.*

The case, which holds important implications concerning the validity of the definition of "handicap" under Section 503 of the Rehabilitation Act, arose out of an employer's refusal to hire an applicant for the position of carpenter's apprentice based upon a pre-employment physical examination which revealed a minor back anomaly. The applicant subsequently filed a complaint with the Department of Labor (DOL) charging he had been unlawfully refused employment under §503. Although the administrative law judge who conducted the hearing recommended that the complaint be dismissed, Daniel Elisburg, the Assistant Secretary for Employment Standards of DOL who reviewed the decision, found that the company had violated §503 and ordered E. E. Black to offer employment and award back pay to the rejected applicant. Elisburg ruled that individuals who are regarded as being handicapped are protected under §503 and that the applicant in this case had been discriminated against solely because of his perceived impairment (See *Amicus*, 4, No. 2).

The company then filed suit in Hawaii against the Secretary of Labor, Ray Marshall, and other officials, claiming that the portion of the definition of handicap covering those persons regarded as handicapped was unconstitutionally vague since it prevented employers from knowing what was expected of them.

In its memorandum NCLH argues that federal protection of persons regarded as handicapped is essential to carrying out the intent of Congress to combat employment discrimination based upon handicap and to establish a federal civil rights mandate to protect qualified handicapped individuals. The memorandum cites the special concern about employment of the handicapped reflected in the Congressional declaration of purpose accompanying the Rehabilitation Act of 1973 and also points out that of the four civil rights provisions included in Title V of the original Act, three provisions explicitly apply to or have been interpreted to apply to employment discrimination. The 1978 Amendments to the Act which, among other provisions, provide for community service employment pilot programs and for projects with industry for the handicapped show continued concern on the part of Congress that the Act be used to provide employment opportunities for handicapped individuals. In the light of this concern, NCLH maintains that the Court should carefully weigh any attempt to limit the utility of the Act in combating employment discrimination. Invalidation of the portion of the definition protecting individuals perceived to be handicapped would greatly impede the purposes of the Act.

The memorandum also notes the significance of the fact that in 1974 Congress amended the definition of handicapped in the original act to include those individuals regarded as having a handicap. NCLH emphasizes that this amendment is consistent with Congressional intent to establish a national civil rights policy to protect handicapped individuals. The memorandum suggests that two events subsequent to the 1974 amendment support the rationality of the new definition. The first is the fact that in 1978 Congress again amended the definition of handicapped but without changing the 1974 language. Secondly, the 1979 decision by the Supreme Court in *Southeastern Community College v. Davis* (99 S. Ct. 2361) recognized, at least implicitly, the

validity of the definition.

NCLH also indicates that the decisions of state courts and agencies, in broadly interpreting the definition of handicap found in state legislation and in recognizing discrimination based on perceived handicaps, support the rationality of granting civil rights employment protection to individuals regarded as handicapped.

Among the state decisions referred to in the memorandum is a recent decision by the Michigan Civil Rights Commission, *Dingler v. General Motors Corp.*, No. 37293-E1 (October 23, 1979), in which the commission ruled that an employer's refusal to hire a job applicant because of a back condition, revealed in a pre-employment physical examination, violated the Michigan Handicappers Civil Rights Act. The Commission found that the applicant's back condition was unrelated to her present ability to perform work.

The memorandum also cites a long line of Wisconsin cases which have expanded the definition of handicap under Wisconsin law and which have extensively considered the problem of when future ability may justify an employer's refusal to hire. In 1977, for example, a Wisconsin circuit court in *Dairy Equipment Co. v. Wis. DILHR*, 15 E.P.D. ¶ 8052, held that the loss of one kidney constituted a handicap under the Wisconsin Fair Employment Code. More recently, the Wisconsin Supreme Court in *Bucyrus-Erie Co. v. Wis. DILHR*, 20 E.P.D.D. ¶ 30,105 (Wis. 1979), affirmed a finding by the Wisconsin Department of Industry, Labor, and Human Relations that an employer had unlawfully discriminated against a job applicant whose pre-employment physical examination disclosed three congenital back defects. The Court declared that, if the applicant is presently able to perform the duties of the job, the employer must establish to a reasonable probability that the employment would be hazardous to the health or safety of the applicant or other employees in order to justify refusal to hire on the basis of future employment ability. The Wisconsin Court of Appeals used the same reasoning when it upheld a decision requiring a railroad company to reinstate a welder with epilepsy because the employer had not shown a reasonable probability that the welder, if he had a seizure, would injure himself or others. *Chicago v. North Western R.R. v. Wis. Lab. - Ind. Rev. Comm.*, 20 E.P.D. ¶ 30,210 (1979).

Several California decisions are also mentioned. In one decision by the California Fair Employment Practices Commission, *In the Matter of the Accusation of Sterling Transit Co.*, 2 Empl. Prac. Guide (CCH) ¶ 5109 (July 23, 1979), an employer was ordered to offer employment and back pay to a truck driver who had been terminated because of his back condition. The Commission ruled that an employer could lawfully refuse employment only if the applicant's physical handicap presented a substantial immediate danger due to his health. The Commission found no such evidence and further found that the company's policy of requiring normal backs in order to limit its exposure to liability for work-related injuries was not a bona fide occupational qualfication and violated the company's obligation to test individual ability.

Copies of the NCLH memorandum are available for $3.00

Attorneys for the defendant are David L. Rose and Maimon Schwarzchild, U.S. Department of Justice, Civil Rights Division, Washington, D.C. 20530.

Rogers v. Frito-Lay, Inc. Moon v. Roadway Express, Inc. 611 Fed. 2d 1074 (5th Cir. 1980)

In a long-awaited but disappointing decision, the Court of Appeals for the Fifth Circuit has held that a private right of action is not to be implied under Section 503 of the Rehabilitation Act of 1973.

Affirming the judgements of U.S. District Courts in Texas [*Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977)] and in Georgia [*Moon v. Roadway Express, Inc.*, 15 E.P.D. ¶7903 (N.D. Ga. 1977)], consolidated for purposes of appeal to the Fifth Circuit, the court in a 2-1 decision concluded that Congress had not authorized handicapped individuals to enforce their rights under §503 by means of a civil suit in federal court. Section 503 requires affirmative action to hire and promote qualified handicapped individuals on the part of federal contractors and subcontractors.

Writing for the majority, Judge Rubin, after turning to the legislative history of the Rehabilitation Act to determine if

Congress had intended either to create or to deny a private right of action under §503, found that the legislative history prior to passage of the Act in 1973 offered no guidance as to Congressional intent on the subject. Statements made subsequent to passage of the statute were, in the judge's view, either ambiguous or based on unwarranted assumptions that such a right existed. The court concluded that what happened subsequent to the passage of a statute was not part of the legislative history of the original enactment.

The majority also declared that the statute's provision of an administrative remedy with the Department of Labor provided some basis for concluding that a private right of action would be inconsistent with Congress' purposes in passing the statute.

In a strong and lengthy dissent, Judge Goldberg argued that the case was a clear one for finding an implied private right of action. Examining the legislative history of the Rehabilitation Act, the 1974 Amendments to the Act, and the 1978 Amendments to the Act, the dissent agreed that discussion prior to enactment of the Act in 1973 shed little light as to Congressional intent on the matter. However, statements made before passage of the 1974 Amendments and the fact that Congress included a provision in the 1978 Amendments allowing attorney's fees to be awarded to the prevailing party in a §503 action presented, in the dissent's opinion, strong evidence that Congress had intended a private right of action under §503.

Citing the Supreme Court's recent decision in *Cannon v. University of Chicago* [441 U.S. 677 (1979)] as authority for rejecting the majority's refusal to find this legislative history persuasive, Judge Goldberg declared that it would be unreasonable not to find Congressional intent to provide a private right of action under §503.

The dissent also stressed the fact that both the Department of Labor and its Office of Federal Contract Compliance Programs (OFCCP), the agency responsible for enforcing §503, believed that such a right existed and that it would assist the agency in its administrative enforcement of the statute. These positions were stated in briefs submitted by the United States in litigation before a New York district court (see In the Courts: *Chaplin v. Consolidated Edison of N.Y.*, p. _____), copies of which, Judge Goldberg acknowledged, had been presented to the court by *Amicus Curiae,* National Center for Law and the Handicapped, Inc.

In light of the fact that OFCCP had admitted that it lacked adequate resources to protect the interests of handicapped employees, the dissent concluded that a private right of action would be consistent with the Congressional purpose of protecting handicpped persons from employment discrimination by federal contractors and also declared that exhaustion of administrative remedies should not be required.

Attorney for appellant in Moon: *Beverly Bates, Bates, Baum, and Landey, Suite 2301, 101 Marietta Tower, Atlanta, Georgia 30303.*

Attorney for appellant in Rogers: *James C. Barber, 8035 East Thorton Freeway, Suite 519, Dallas, Texas 75228.*

Chaplin v. Consolidated Edison of N. Y., No. 79 Civ. 730 (MEL) (S.D.N.Y., Jan. 18, 1980)

A Federal District Court in New York has recently held that a private right of action is to be implied under Section 503 of the Rehabilitation Act. The plaintiff, a young woman with a history of epilepsy, had brought suit against Consolidated Edison charging that the company's hiring policies discriminated against qualified job applicants who suffered from epilepsy in voilation of the Rehabilitation Act. In denying defendant's motion to dismiss plaintiff's complaint, the court also ruled that exhaustion of administrative remedies under §503 was not required, and that, even if exhaustion were necessary, plaintiff had exhausted what remedies were available to her.

The United States Government had filed a memorandum in the case, supporting its motion to participate as *amicus curiae,* in which it also took the position that handicapped individuals should be allowed to bring private suits to enforce their rights under §503.

Additionally the memorandum reiterated the Government's position that §504 of the Rehabilitation Act permitted a private right of action. [See, for example, the Government's memorandum filed in *Whitaker v. City University of N.Y.,* 18 E.P.D.

¶8693 (E.D.N.Y. 1978)]. Section 504 prohibits discrimination because of handicap by any program or activity receiving federal financial assistance. (However, the Government's memorandum failed to reflect the fact that §504 was amended in 1978 to also apply to any program or activity conducted by the Federal executive branch.)

The United States also argued that private litigants should not be required to first pursue administrative remedies with the Department of Labor (DOL) or the Department of Health, Education, and Welfare (HEW) (the agencies responsible for enforcing sections 503 and 504), before bringing suit in court. The memorandum declared that both DOL and HEW object to such a requirement because of the large volume of complaints received by the agencies. The director of DOL's Office of Federal Contract Compliance Programs, for example, has stated that DOL has a large backlog of §503 complaints which the agency will not be able to investigate and resolve expeditiously.

Anderson v. Musser, Civil No. 79-0540-R (E.D. Va., Nov. 27, 1979)

A United State District Court in Virginia has dismissed a complaint alleging employment discrimination under Section 504 of the Rehabilitation Act. Following the decision of the Court of Appeals in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), the court ruled that there is no private action under §504 to redress employment discrimination unless a primary object of the federal financial assistance received by the employer is to provide employment.

The plaintiff with greatly impaired vision and hearing had been terminated from his position as store-keeper-supervisor with the Commission for the Visually Handicapped of Virginia. The complaint alleged that the plaintiff had been unable to perform his duties to the extent demanded because of the Commission's failure to afford him reasonable accommodation. The plaintiff also claimed that because of his visual handicap he was a primary beneficiary of the federal aid to the Commission, and, thus, the alleged discrimination fell within the exception recognized in the *Trageser* decision. That exception would permit a private action where the discriminatory act necessarily causes discrimination against the primary beneficiaries of the federal financial assistance. However, the court, distinguishing the plaintiff's status of employee of the Commission from his status of beneficiary, found that the alleged discrimination did not affect him as a primary beneficiary.

The decision is being appealed to the Court of Appeals for the Fourth Circuit.

Attorney for the plaintiff: Hugh T. Antrim, Thompson & McMullan, 13 East Franklin Street, Richmond, Virginia 23219.

Silverstein v. Sisters of Charity, No. 78-135 (Colo. Ct. Ap. 1979)

The Colorado Court of Appeals has ruled that a hospital's policy of excluding all persons with a history of epilepsy from positions involving direct patient care violates the Colorado statute prohibiting employment discrimination against handicapped persons. The court interpreted the statute to require individual consideration of each application to determine whether a particular disability prevents that person from performing the work. The ruling reversed in part a lower court decision which had permitted the defendant hospital to refuse employment as a respiratory therapist to plaintiff Lynne Silverstein because of her history of epilepsy.

However, the Court of Appeals affirmed the lower court's decision that plaintiff had no claim under Section 504 of the Rehabilitation Act. Citing the recent decision of the Fourth Circuit in *Trageser v. Libbie Rehabilitation Center* [590 F.2d 87 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 2895 (1979)], the Colorado court declared that Silverstein could not bring a private suit alleging discrimination under §504 because the primary purpose of the federal aid received by the defendant hospital was not to provide employment. One enlightened judge disagreed, however, stating that he was not persuaded by the analysis of the Fourth Circuit in *Trageser* and that, therefore, he dissented from the ruling dismissing plaintiff's §504 claim.

Attorney for Plaintiff: Bruce C. Bernstein, Legal Center for Handicapped Citizens, 1060 Bannock Street, Suite 316, Denver, Colorado 80204, (303) 573-0542.

education

UPDATE: *New York State ARC v. Carey*, 612 F. 2d 644 (2nd Cir. 1979) 3 E.H.L.R. 551:559

In September, 1978, the federal district court for the eastern district of New York issued an order prohibiting the exclusion of mentally retarded children suspected of being hepatitis carriers from the regular classroom (*Amicus*, 4, No.1). The New York Board of Education appealed this decision, calling into question the standard by which a federal district court may review the factual determinations of a state administrative agency. The Second Circuit Court of Appeals has now affirmed the lower court's order.

The State of New York had instituted a deinstitutionalization plan as a result of a 1972 class action suit brought on behalf of children at Willowbrook Developmental Center on Long Island. Pursuant to this state plan children from the institution were placed in group homes or family care placement which entitled them to enroll in the local public schools. Approximately forty of the children placed under this plan had been identified as carriers of hepatitis B, or serum hepatitis.

A case of possible serum hepatitis was reported in a New York City elementary school in September, 1977. Subsequently the New York City Department of Health decided to isolate mentally retarded children who were known hepatitis carriers in special classrooms within the regular schools. The Board of Education requested more drastic action and informed parents that these children would be excluded from school until appropriate arrangements could be made.

The federal district court granted an injunction to prevent implementation of the exclusion plan. Thereafter the Board of Education developed its own plan to effect the placement of the children identified as hepatitis carriers.

The Board of Education contended that its plan should be upheld if found to be reasonable and that the Board should not be required to prove the validity of its plan in court.

The Court of Appeals conceded that the power of the Board of Education to isolate a small group of children in order to prevent the spread of serious disease is within the power of the state to protect the health and safety of its citizens. However, the means utilized by the Board of Education in this instance threatened important constitutional and statutory guarantees.

The court determined that the appropriate standard of review is under Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against otherwise qualified individuals on the basis of handicap. Regulations issued under the authority of §504 relate directly to discrimination against handicapped children in elementary and secondary education.

A general principle of federal discrimination law is as follows: once plaintiffs have made out a case sufficient to infer that discriminatory activity is taking place, the defendant in the action must present evidence to rebut this inference of illegal conduct. Therefore, a government agency accused of a §504 violation must establish justification in court for any action which may be construed as discriminatory.

The Court held that the Board must make some showing that its plan was justified. The Board, however, was unable to prove that there was a significant health risk associated with the presence of these children in the public schools.

On the other hand, the appellees introduced impressive evidence at the trial level concerning the harm which would be done to these children by isolating them in special classes. Several examples of potential harm were cited by the Court of Appeals. Assignments to new classes and new teachers would cause serious disruption of the educational process. Segregation would limit future educational opportunity and the extent to which these children could associate with their non-handicapped peers, *e.g.*, during recess and at meals.

Such imposed isolation would do little to eradicate the stigma which currently marks these children, all of whom are former residents of Willowbrook.

The Court of Appeals concluded that the trial judge was not

*Citations to EHLR are to *Education for the Handicapped Law Report*, 1156 15th St., N.W., Washington D.C. 20005.

in error by requiring the Board of Education to make a substantial showing that the health risk posed by these children justified their segregation in special classes. It upheld the lower court's order prohibiting the exclusion of children, known to be carriers of hepatitis B, from the regular classroom.

Attorneys for the plaintiff, New York Association of Retarded Children, are: Chris Hansen, New York Civil Liberties Union, Mental Health Law Project, 84 Fifth Avenue, New York, New York 10011; Jonathan Siegfried of Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York 10022.

New Mexico Association for Retarded Citizens v. State of New Mexico, No. 75-633-M Civil (D.N.M. January 9, 1980), 3 E.H.L.R. 551:495.

A federal district court has held that although New Mexico has chosen not to receive funds for the education of handicapped children under Public Law 94-142, the state's failure to provide handicapped children with a free, appropriate education constitutes discrimination prohibited by Section 504 of the Rehabilitation Act of 1973.

The plaintiff class, consisting of children between the ages of 5 and 21 who have been or may be classified as handicapped and are not receiving a free appropriate education, sought declaratory and injunctive relief from defendant's failure to provide an appropriate education and related services.

The court recognized the discretionary Nature of Public Law 94-142 and held that a state decision not to benefit from the funding provisions of this law was not subject to judicial inquiry.

In discussing the §504 issue, the court determined that the state receives federal financial assistance for educational programs. The court held that the state's general failure to fund educational programs for handicapped children violates §504. In addition, the court held the state's specific funding formula to violate §504.

The New Mexico funding formula permits local school districts to elect between two funding options. One of the options does not require the establishment of specific special education programs which are related to the needs of handicapped children within the school district. The court found the option funding formula discriminatory because it resulted in the provision of fewer programs and services for handicapped students.

The court granted declaratory relief and enjoined the defendants to provide class members with a free appropriate education as defined by the regulations under §504.

Hoffman v. Board of Education of City of New York, No. 562, (N.Y. Ct. of Appeals, December 17, 1979) 3 E.H.L.R. 551:382

The New York Court of Appeals, the highest state tribunal in New York, overturned the decisions of two lower state courts in refusing to sustain a cause of action for "educational malpractice."

The plaintiff, Daniel Hoffman, entered the New York City School System in 1956. Initial testing led to a determination that the plaintiff was mentally retarded and he was subsequently placed in a class for children with retarded intellectual functioning. But because plaintiff also suffered from a severe speech defect which could have interfered with an accurate diagnosis of intellectual functioning, the psychologist responsible for the diagnosis recommended that plaintiff's intelligence be retested at two year intervals.

Plaintiff remained in the program for children with retarded intellectual functioning. Despite the recommendation of the psychologist his intelligence was not retested until 1968 when he entered a vocational training program for retarded youths. The test administered indicated that plaintiff had an I.Q. of 94 which was well within the range of normal.

After the conclusion of the school year plaintiff was not allowed to continue his vocational training program. It was then that plaintiff commenced a lawsuit against the New York City Board of Education alleging that negligence in the failure to diagnose his educational disabilities and provide him with an appropriate remedial program resulted in emotional harm, inability to develop required academic skills and reduced employment potential.

At trial the jury awarded plaintiff $750,000. The Appellate Division affirmed this judgment, relying on the failure of the school district to re-test plaintiff's intelligence at two year intervals

as originally recommended.

But the New York Court of Appeals reversed, having determined that the professional judgment of educators and government officials entrusted with administering the schools could not be subjected to the scrunity of the courts or the jury except in the most exceptional of circumstances. The court found that public policy concerns for the effective functioning of the schools militated against the institution of lawsuits every time a proposed educational placement or program failed to produce the desired results.

One judge dissented, labeling the omissions of the school district in failing to re-test plaintiff, as recommended, affirmative acts of negligence clearly identifiable as the cause of plaintiff's damages.

Attorney for Plaintiff: Perry Pazar, Pazar & Epstein, P.L., 401 Broadway, New York, New York 10013.

Tatro et al. v. State of Texas et al., No. CA-3-79-1281-G (N.D. Tex. 1979), 3 E.H.L.R. 551:502.

On December 21, 1979, a federal district court for the northern district of Texas filed a memorandum order denying the plaintiffs' request for a preliminary injunction which would allow their child to remain in school pending a determination of their claim.

Plaintiffs' child is a 3½ year old female with spina bifida. As a result, she has orthopedic and speech impediments and a neurological bladder condition. The bladder disorder requires catheterization approximately every three hours by a quick and simple procedure known as Clean Intermittent Catheterization (CIC).This procedure may be performed by laymen after proper training, and the child will be able to perform the procedure at the age of seven years. Failure to perform CIC will result in chronic kidney infections.

The child was scheduled for participation in an early childhood development program. The school, however, refused to perform CIC during the school day. Subsequently, the parents brought suit against the state of Texas and the state and local educational agencies, alleging that the provision of CIC by the school district is required by the "Education For All Handicapped Children Act" (Public Law 94-142) and Section 504 of the Rehabilitation Act of 1973.

The court recognized that the provision of special education and related services to handicapped children is mandated by federal law. It nevertheless found that the condition for which CIC was needed was not sufficiently related to the provision of special education services. The court found that CIC only makes possible the continued health of the child and does not enhance the benefits of a particular form of special education. (The court chose to ignore the fact that without CIC the child could not participate in a special education program at all). According to the court, CIC is neither a related service nor a health service normally provided by a school nurse, as defined by the regulations under P.L. 94-142.

Likewise, the court also denied relief under §504 of the Rehabilitation Act of 1973. It found no clear connection between provision of CIC and an equal opportunity to participate in education.

The decision in *Tatro* is in direct conflict with previous interpretations of the regulations under §504.

In *Hairston v. Drosick*, 423 F. Supp. 180(S.D. W. Va. 1976), a school district sought to exclude a seven year old physically handicapped child from participation in the regular classroom. The child has a spina bifida condition and, as a result, exhibited a slight limp and incontinence of the bowels.

The school district offered the parents three alternatives: 1) The child could enroll in the public school conditioned upon the attendance of her mother two or three times daily to attend to her personal needs; 2) the child could receive homebound instruction; or 3) the child could be placed in a special education class for the physically handicapped.

The court stated that the right of a minimally handicapped child to attend a public school cannot be conditioned on the mother's presence at the school.

Furthermore, the exclusion of a minimally handicapped child from a regular public classroom situation without a bona fide *educational* reason is in violation of §504.

More recently, the Office For Civil Rights, which is entrusted with the administration of §504, informed the North Kansas City School District in Missouri that failure to provide intermittent catheterization to a handicapped child is a violation of §504.

The school district claimed that catheterization is a medical service and thus not required by

federal law. (Only medical services for diagnostic and evaluation purposes need be provided free under §504 regulations.)

The Office for Civil Rights concluded, however, on the basis of statements provided by medical personnel, that catheterization is routinely provided by nurses and trained laymen. It is therefore not a medical service but a health service which is clearly mandated by the federal regulations.

The court in *Tatro*, in reaching its decision, ignored not only the analysis provided in the *Hairston* decision and by the Office For Civil Rights, but also the fact that the failure to provide the plaintiffs' child with CIC would effectively exclude the girl from public education until she is able to perform the procedure for herself.

An interlocutory appeal has been taken to the Court of Appeals for the Fifth Circuit. It is expected that BEH will make a policy statement of CIC under the regulations implementing Public Law 94-142 prior to the resolution of the appeal.

Attorney for the plaintiffs is Craig Enoch of Moseley, Jones, Enoch and Martin, 6060 North Central Expressway, Suite 850, Dallas, Texas 75206.

Doe v Koger, Civil Action No. S-79-0014 (N.D. Ind., 1979)

A federal district judge in northern Indiana recently denied a motion for summary judgment made by the defendant school board in an action brought by a handicapped child challenging the procedures by which he was expelled from school. The plaintiff contends that his expulsion, without adherence to the procedural safeguards provided in the "Education For All Handicapped Children Act" (Public Law 94-142) is a violation of his rights under the Act and a violation of the Equal Protection clause of the Fourteenth Amendment.

Dennis Doe, a mildly mentally retarded student was expelled from the Mishawaka School district for disciplinary reasons pursuant to state educational procedures. Following the expulsion, Doe requested a due process hearing regarding the change in his educational placement as required by Public Law 94-142 and Indiana Rule S-1.

The court dismissed plaintiff's equal protection claim for failure to allege invidious discrimination against handicapped individuals.

However, the court noted that one intent of Congress in passing the "Education For All Handicapped Children Act" (Public Law 94-142) was to limit the ability of a school to expel a student whose handicap causes him to be disruptive.

The court determined that where a handicapped child is faced with expulsion because of disruptive behavior he first must be provided a hearing to determine whether the disruptive behavior is the result of improper educational placement. If the child's educational placement is found to be inappropriate the proper remedy is a change in the educational placement as opposed to expulsion.

The court relies on the analysis utilized by the federal district court in Connecticut in *Stuart v. Nappi*, 443 F.Supp. 1235 (D.Conn. 1978). The *Stuart* decision was the first to treat the problematic relationship between special education and school disciplinary proceedings.

Kathy Stuart was a learning disabled teenager attending high school in Danbury, Connecticut. Plaintiff, though supposedly enrolled in special educational classes, was receiving little actual instruction. She was expelled from school after participation in school-wide disturbances. Because of the irreparable injury likely to result from an interruption of her educational placement, plaintiff filed in federal district court for an injunction delaying enforcement of the expulsion proceedings until a hearing regarding the appropriateness of her educational placement could be held.

The district court found that plaintiff's expulsion prior to a resolution of her educational complaint would be in violation of Public Law 94-142. Plaintiff was entitled to a hearing determining the adequacy of her educational placement and any change in placement must be effectuated in accordance with the requirements of the Act.

The problem of how to deal with disruptive handicapped students, however, is a disturbing one and there is little agreement, even among the federal agencies charged with administering and enforcing federal education legislation.

In a *proposed* policy interpretation regarding the suspension and expulsion of handicapped children, the Office for Civil Rights

(OCR) within the Department of Health, Education and Welfare, entrusted with enforcing Section 504 of the Rehabilitation Act of 1973, has offered several recommendations.

For instance, OCR's proposed policy interpretation would permit the suspension of a handicapped child for seriously disruptive behavior for up to ten days per school year. Suspensions for more than a total of ten days would constitute a significant change in a child's educational placement and require a re-evalution of the child's educational needs and a new placement.

Before a handicapped child may be expelled for seriously disruptive behavior a determination must be made whether the objectionable behavior is an element of the handicapping condition or the result of an inappropriate educational placement. If the objectionable behavior is the result of the handicapping condition the school system must provide for a re-evaluation and new placement.

Where, however, the disruptive behavior is not related to the child's handicap or educational placement then the child would be subject to the same disciplinary measures as would be a non-handicapped child, including expulsion in accordance with procedures mandated by state law.

The Bureau of Education for the Handicapped (BEH), which is entrusted with the administration of Public Law 94-142, has taken the position that a handicapped child may never be expelled regardless of whether the disruptive behavior results from the child's handicap or educational placement. The requirement that a "free appropriate education" be provided to all handicapped children is strictly construed requiring as a response to disruptive behavior either the suspension of the child for a reasonable period of time or placement in an alternative educational setting in accordance with the due process procedures mandated by federal law. Under this interpretation children placed in hospitals or juvenile detention centers because of serious disruptive behavior must continue to receive a free, appropriate education.

Counsel for Plaintiffs in Doe v. Koger *is Legal Services Corporation of Northern Indiana, South Bend, Indiana.*

Mrs. A. J. v. Special School District No. 1, Civ. No. 4-77-192 (D. Minn., October 12, 1979), E.H.L.R. 551:423

Plaintiff brought an action under 42 U.S.C. §1983 challenging the procedures by which the Minneapolis School District suspended her daughter from school for a fifteen day period. Section 1983 provides a cause of action for the deprivation of a constitutional right under color of state law.

Plaintiff's daughter, K.J., who had previously been suspended from school for disruptive behavior, was in the process of undergoing a formal educational assessment for the purpose of determining whether she was in need of special educational services at the time of the challenged suspension. In addition to a §1983 violation, the plaintiff further alleged that the defendant school district did not comply with procedures required by the Education For All Handicapped Children Act and the Due Process Clause of the Fourteenth Amendment.

The court held that suspension of the child without adherence to the procedures required by the Educational For All Handicapped Children Act—an educational reevaluation and hearing to determine whether the complained of behavior was related to a handicapping condition—was not required because K.J. had not yet been identified as an educationally handicapped child.

The court did find, however, that the procedures utilized by the defendant school district violated the Minnesota Fair Pupil Dismissal Act and ordered the school district to expunge reference of the suspension from K.J.'s records. The court found it unnecessary to treat plaintiff's constitutional claims.

On May 16, 1977, K.J., an eighth grade student in the Minneapolis School System, was suspended from school for a fifteen day period. The suspension followed a fight between K.J. and another student. After a consultation with K.J. the assistant principal imposed the suspension with homework to be provided during that period.

Minnesota law provides that a child can be suspended for no more than five days. The suspension period could be extended to fifteen days if a determination was made that the child presented

an "immediate and substantial danger to persons or property around him . . . "

The court held that if the school district had decided to extend the period of the suspension beyond the five days permitted by statute, the child was entitled to a hearing, before each extension, to determine whether the child indeed presented a danger to the school community and whether the child agreed to conform her behavior to school norms.

Failure to adhere to procedures specified in the Fair Pupil Dismissal Act entitled the plaintiff to the equitable relief of expungement even if the grounds for the original expulsion had been appropriate.

Attorneys for the plaintiff: William Messinger, Minneapolis, Minnesota, James E. Williamson, III, Coalition For Protection of Youth Rights, Minneapolis, Minnesota.

Southeast Warren Community School District v. Department of Public Instruction, No. 23] 63181 (Sup. Ct. Iowa, November 14, 1979), 3 E.H.L.R. 551:378

The question presented in this case is whether the local school district is empowered to expel a special education student under Iowa state law.

The Southeast Warren Community School District attempted to expel a special education student for repeated violations of a school ordinance against smoking.

Upon being notified of the District's plans to expel her son from school, the boy's mother appealed to the district court to enjoin the explusion hearing and also to the State Department of Public Instruction. The Department of Public Instruction subsequently informed the school district that it was prohibited by state statue from expelling a special education student. The school district appealed this ruling to the district court which ruled for the school board on the merits.

In affirming the district court's ruling, the Iowa Supreme Court relied on a provision of state law which allowed the school district to refuse admittance to "any child whose presence in the school may be injurious to the health of other pupils or to the welfare of such school."

Although the Court recognized the decision of the federal district court in Connecticut, *Stuart v. Nappi*, which held that a child could not be expelled from school because explusion would deny the child access to alternative educational placements, the Iowa Court insisted that Iowa law empowered the school district to expel a child.

The court modified this seemingly harsh application of the rule by noting that the Education Code also imposes a duty to provide special education and services even to those children who cannot benefit from these services as provided in the schools or in a home living environment. Although this policy does not preclude the expulsion of handicapped children it does require that more stringent safeguards be followed before expulsions may occur, procedures which were not followed by the local school district in this case.

Expulsion procedures must be preceded by a re-evaluation of the child by a diagnostic education team, reports and recommendations to the board, and a determination of whether an alternative placement will serve the needs of the child and the school. Expulsion should be considered the last resort, to be used only when no alternative placements are available.

The Supreme Court of Iowa held in this case that even though the school district had the power to expel a special education student, in this case the district erred for failure to enact the special safeguard articulated above.

Counsel for School District: Kathleen A. Risner, Des Moines, Iowa; Counsel for Dept. of Public Instruction: Thomas J. Miller, Attorney General, Howard O. Hagen, Asst. Attorney General, State of Iowa.

Gittelman v. Scanlon et al., Civil Action No. 80-1034 (E.D., Pa., filed March 12, 1980)

Plaintiffs have filed a class action suit challenging a Pennsylvania State law which stipulates a maximum monetary amount for funding of private placements for handicapped children.

The Education For All Handicapped Children Act and Section 504 of the Rehabilitation Act of 1973 guarantee all handicapped children the right to an education, suited to their unique needs, at state expense.

This provision anticipates that when a child is assigned to a private school because the local school district is unable to provide an appropriate education, the cost of the placement will be carried by

the state, the local district, or both.

In this action plaintiffs allege that their child, a 15 year old severely socially and emotionally disturbed teenager, has been placed in a private residential program with the recommendation of the local school district and the approval of the Pennsylvania Department of Education.

Cost of the residential placement is in excess of twenty thousand dollars a year. The local school district and the Department of Education pay less than one half this sum, forcing plaintiffs to incur a financial liability in excess of six thousand dollars per year.

Neither the State Department of Education nor the local school district have offered plaintiffs an alternative placement.

Complaints were filed with the Office for Civil Rights, which administers §504, and with the Bureau for Education for the Handicapped, entrusted with administration of the Education For All Handicapped Children Act. No opinion has yet issued from either office. Regardless, neither agency has the authority to require Pennsylvania to raise the state's statutory maximum in funding private placements. Neither would existing due process procedures be useful in accomplishing this result.

Plaintiffs have instituted this suit on behalf of themselves and all other parents within the state of Pennsylvania who are similarly affected. It is estimated that there are approximately 6,000 handicapped children in private schools in Pennsylvania.

The complaint alleges violations of §504, the Education For All Handicapped Children Act, the Equal Protection Clause of the Fourteenth Amendment and Pennsylvania state law.

Plaintiffs request, among other relief, that the Department and local school officials be required to fully fund any private school placements and that the Court enjoin the operation of the Education For All Handicapped Children Act in all cases where its application precludes the provision of free, appropriate education to any child within the State of Pennsylvania.

Attorney for Plaintiffs: Education Law Center, Inc., Suite 2100 Lewis Tower Building, 225 South Fifteenth Street, Philadelphia, PA 19102 (215) 732-6655

Casement v. Douglas County School District, Civil Action No. 4935 (D.Ct. Douglas County, Colorado, October 25, 1979)

Relying upon the Equal Protection Clause of the Fourteenth Amendment and Colorado statutory law, a state court recently struck down a local school board policy which denied handicapped students free school transportation.

The two sets of plaintiffs were parents and guardians of handicapped children residing in Douglas County, Colorado. Because it lacked appropriate facilities, the defendant school district was unable to provide the plaintiffs' children with an adequate education as required by federal law. Instead, the school district elected to purchase services from a training center in a neighboring county.

In order for their children to attend the training center, plaintiffs were required to transport them to a bus stop which was eleven miles and twenty-three miles from their homes.

Plaintiffs had requested that defendants either provide transportation from home to the school bus stop or pay plaintiffs a sufficient amount to cover the cost of hiring transportation for the children to the bus stop.

Upon denial of this request, plaintiffs filed a complaint in July, 1978, requesting an order directing defendants to provide the transportation from home to school and to reimburse them for expenses and inconveniences which they had already incurred.

Plaintiffs alleged that defendants provided nonhandicapped school children with free transportation to their schools; the school district maintained that it was not economically feasible for them to maintain school buses for handicapped children within the district.

In its *Conclusions of Law* the court noted the duty of a local school district, under the state's Handicapped Children's Education Act [Colo. Rev. Stat. §22-20-107 (1973)], to provide at its own expense, education and training programs for handicapped children.

Furthermore, the Public School Finance Act of 1973 [Colo. Rev. Stat. 22-50-101.5 (1973)] reflects the intention of the general assembly that state school transportation aid be expended for handicapped and nonhandicapped students equally.

The court concluded that a school board policy which denied only handicapped children benefits

of free school transportation is a violation of the Equal Protection mandate of the Fourteenth Amendment unless the school board can show a compelling interest for the policy.

In light of the requirements of the Public School Finance Act, the court concluded that economic feasibility was not a compelling interest, and ordered the school district to show cause, within twenty days, why bus transportation should not be provided to the children.

The court declined to consider plaintiffs' allegations under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), stating that such claims should be asserted in the federal courts.

Plaintiffs' attorney is Bruce Bernstein, Legal Center For Handicapped Citizens, 1060 Bannock Street, Suite 316, Denver, Colorado 80204, (303) 573-0542.

right to medical treatment

Update: *In re Phillip B.*

The United States Supreme Court has refused to hear the case of Phillip B., thus letting stand the decision of the California Court of Appeals. That decision affirmed a trial court's dismissal of the state's attempt to obtain needed surgery for a Down's Syndrome child over the objective of his parents. As a result, Phillip B. is now consigned to undergo a progressive physical deterioration, caused by a congenital heart defect, which will significantly shorten his life expectancy. (See case report and article in *Amicus*, 4, No. 3).

right to refuse treatment

Rogers v. Okin, No. 75-1610-T (D. Mass. October 29, 1979)

A federal district court in Massachusetts has enjoined practices regarding forced medication and seclusion of mentally ill patients in non-emergency situations in two units of Boston State Hospital.

In discussing a right to refuse the administration of psychotropic drugs, the court distinguished emergency from non-emergency situations. The court defined an emergency situation in this context as one in which the failure to medicate "would result in a substantial likelihood of personal harm to that patient, other patients, or to staff members of the institution." The court found no right to refuse treatment in such an emergency situation.

However, in non-emergency situations, the court found a right to refuse treatment by psychotropic drugs. Recognizing that these drugs cause alterations in a person's moods, attitudes, and capacity to think, the court based the right to refuse their administration both on a right to privacy and on first amendment grounds.

The court maintained that any committed mental patient is to be presumed competent to make treatment decisions in non-emergency situations. In the case of a person adjudicated incompetent, the guardian of that person is to exercise his ward's right to make treatment decisions. In addition, the court held that voluntary patients had the same right as involuntary patients to refuse non-emergency treatment. In so holding, the court rejected the notion that a voluntary patient's contractual agreement to treatment contained in the admission form was a knowing and voluntary waiver of the right to refuse treatment.

The court found that both the state and the Department of Mental Health regulations governing seclusion had been violated. The statute permits seclusion to be used solely in emergency situations. An emergency warranting seclusion is limited to situations in which there is an "occurrence of [or] serious threat of extreme violence, personal injury, or attempted suicide." The regulations require certain procedural safeguards regarding seclusion, including: a written authorization from the hospital superintendent or a designated physician, a time limitation of 8 hours, a periodic visitation by staff members during seclusion, a review after 8 hours, and a record noting the reason for the seclusion.

The court found that seclusion was routinely used as part of a treatment plan to modify behavior which was not evidencing a threat of extreme violence, personal injury, or attempted suicide. The court enjoined the defendants from using seclusion in non-emergency situations. The court further found that the violation of the required procedures for seclusion constituted a violation of the

patient's due process rights.

The court upheld the state's "good faith" defense to plaintiffs claims for damages under 42 U.S.C. §1983. The court found the defendant's actions regarding medication and seclusion to be motivated by a desire to help and treat the patients. Hence, the court concluded that, given the totality of circumstances, the award of damages would be unfair and contrary to public policy. The court also rejected plaintiffs' stated claims for damages.

Counsel for plaintiffs: Richard Cole, Esq., Greater Boston Legal Services, 466 Blue Hill Avenue, Roxbury, Massachusetts 02120. Telephone: 617/442-0211.

Rennie v. Klein, No. 77-2624 (D.N.J. September 14, 1979

A federal district court in New Jersey has issued a preliminary injunction against the forced administration of medication to patients in five hospitals for the mentally ill operated by the state of New Jersey unless certain conditions are met.

Procedural History

The litigation was initiated by Plaintiff Rennie in 1977, when he charged the defendants with various constitutional violations. Sebsequently the litigation focused on the right to refuse treatment.

In 1978 the court found a qualified right to refuse treatment, based on the constitutional right to privacy, 462 F. Supp. 1131 (D.N.J. 1978) However, in balancing the patient's right to refuse treatment with the state's interest, reflected in (1) the patient's danger to other patients and staff, (2) the patient's capacity to make a treatment decision, (3) the existence of less restrictive treatment and (4) the risk of permanent side effects of the proposed treatment, the court refused to issue an injection against the forced medication of Rennie.

In 1979 the court allowed Rennie to amend his complaint in order to enlarge his suit to a class action. The subclasses include adults voluntarily and involuntarily committed to five New Jersey facilities: Ancora Psychiatric Hospital, Marlboro Psychiatric Hospital, Trenton Psychiatric Hospital, Greystone Park Psychiatric Hospital, and Glen Gardner Center for Geriatrics.

Terms of the Preliminary Injunction

The injunction involves sweeping changes in procedures in the five facilities. There are five basic components to the order:

(1) Consent forms must be signed by a patient prior to the prescription of psychotropic drugs by hospital physicians in non-emergency situations. The consent form must contain information concerning the patient's right to refuse medication. Additionally, the forms must contain information regarding the short-and long-term side effects of the specific drugs to which the patient is consenting. One form may provide for consent for as many as three medications.

(2) The State must hire an "adequate" number of Patient Advocates to establish a system of persons trained both in the effects of psychotropic medication and the principles of legal advocacy. The Patient Advocates are to assist patients wishing to refuse treatment. Specifically, the Patient Advocates have two areas of responsibility. First, if an involuntarily committed patient is not legally incompetent, but is considered by the treating physician to be functionally incompetent to give consent, the Patient Advocate is to make an analysis of the case and may seek in-hospital review or review by an independent psychiatrist. Second, the Patient Advocate is to act as informal counsel to patients whose refusal of treatment invokes an informal due process hearing.

(3) The State must hire an independent psychiatrist to review decisions to medicate an involuntarily committed patient against his will. In a non-emergency situation, if an involuntarily committed patient refuses to sign a consent form or orally refuses medication to which he has given prior consent, after in-hospital procedures have been exhausted, an informal hearing is required before the patient can be forcibly medicated. Notice and informal counsel (Patient Advocate) are required. The independent psychiatrist is to act as a "neutral factfinder." In reaching an opinion he may, although he is not required to, conduct a medical examination and request hospital employees to appear. If the independent psychiatrist makes a decision to forcibly medicate, the period of such medication shall not exceed 60 days.

(4) The New Jersey statute giving voluntary patients the right to refuse treatment is to be enforced. A voluntarily admitted patient may not be medicated against his will.

(5) Forced medication is allowed in emergency situations. The court defines an emergency situation as "a sudden, significant change in the patient's condition which creates danger to the patient himself or to others in the hospital." Such medication may be given for 72 hours and extended for 72 additional hours, by certification of the medical director of the hospital, if the danger continues.

Plaintiffs are represented by: Sheldon Gelman, Assistant Deputy Public Advocate, 10-12 North Stockton Street, P.O. Box 141, Trenton, New Jersey 08625.

In Re: The Mental Health of K.K.B., No. 51, 467 (Okla. Supr. Ct. Jan. 15, 1980)

The Supreme Court of the State of Oklahoma, drawing upon the decisions in *Rennie* and *Rogers* (reported in this issue) has found that a legally competent adult involuntarily committed to a state mental hospital has a right to refuse to consent to the use of prescribed psychotropic drugs.

This "right to decide whether they wish to be helped" was based on the broader "constitutional right to privacy." Focusing specifically on the use of "organic therapy," therapy "which can change a patient's behavior without his cooperation," the court noted the significant potential for harm to the individual. It found that a "strong countervailing" state interest was necessary to qualify an individual's right to refuse such treatment.

The court examined three possible interests, response to emergency, policy power, and *parens patriae* power, yet found each one lacking in this context. (1) This was not an emergency situation, but an ongoing use of drugs as part of a treatment program. (2) The use of psychotropic medication to protect the general public under the police power is unnecessary since the public is protected by the commitment. (3) The *parens patriae* relationship does not materialize until an individual has been judicially determined to be incompetent. The court emphasized that "competency is not a medical decision and should not merge with the commitment decision." A separate independent proceeding is needed to determine incompetency, and since such a proceeding was not held, the state could not invoke this interest.

Thus, the only viable purpose for using the medication was to "help the patient," yet inherent in an individual's right to privacy is one's choice of "whether to be helped, or to be left alone."

Counsel for Appellant: Charles R. Hogshead, Legal Services of Eastern Oklahoma, 123 West 4th Street, Suite 200, Tulsa, Oklahoma 74127 and Christopher A. Hansen (Amicus Curiae), New York Civil Liberties Union, Mental Patient's Rights Project, 84 5th Avenue, New York, New York (212) 924-7800.

right to treatment—deinstitutionalization

Halderman v. Pennhurst State School and Hospital, 612 F. 2d 84 (3rd Cir. 1979)

The United States Court of Appeals for the Third Circuit has found that mentally retarded persons have a right to habilitation[1] in the least restrictive environment, and a private right of action to enforce that right, under the Developmentally Disabled Assistance and Bill of Right Act (42 U.S.C. Sections 6001-6081 (1976).[2]

The appeal was from an order granting class action injunction relief against the continued maintenance of Pennhurst State School and Hospital, a facility for the care and training of mentally retarded persons. The original action was brought by a minor retarded resident of Pennhurst and later expanded to a class action, the class consisting of all present and future residents of that institution. The plaintiffs alleged that the existence of a variety of inhumane and dangerous conditions and a lack of habilitative programming in the institution violated their rights under:

(1) the Eighth and Fourteenth Amendments of the United States Constitution,

(2) Section 504 of the Rehabilitation Act of 1973,

(3) the Developmentally Disabled Assistance and Bill of Rights Act, and

(4) the Pennsylvania Mental

Health and Mental Retardation Act of 1966.

The lower court held that the mentally retarded have a federal statutory right to nondiscriminatory habilitation (under Section 504), a Pennsylvania statutory right to minimally adequate habilitation, and federal constitutional rights to nondiscriminatory habilitation, freedom from harm, and adequate treatment by the least restrictive means. Each of these rights was found to have been violated by the conditions of confinement at Pennhurst. The court:

(1) ordered that Pennhurst eventually be closed and suitable community living arrangements and support services be provided for all residents,

(2) ordered that individualized program plans be developed for each resident with participation by each member or his next friend,

(3) ordered that plans for the removal of the residents to least restrictive environments be submitted to the court,

(4) provided for the appointment of a Special Master to supervise this process, and

(5) established a "friend-advocate" program to monitor the provision of community living arrangements.[3]

The Court of Appeals, predicating its move on the grounds that "the federal courts have long been directed to decide whether causes of action can be supported on statutory grounds before they adjudicate constitutional law issues," confined its discussion to the D.D. Act[4] and the state statute. The practical result, however, with the exception of some qualification of the specific relief granted, remains the same: all mentally retarded persons have a right to habilitation in the least restrictive environment; the state must provide a realistic framework to guarantee that those rights are preserved; and in all but "rare cases," the least restrictive environment will consist of some form of community placement.

The Right to Habilitation

The court, explicating the right to habilitation under the D.D. Act, focused on the Bill of Rights section (42 U.S.C. §6010), which it found to be a clear expression of Congressional "intention to establish a right to treatment." Specifically, it referred to the language in §6010 (1) ("persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities") and in §6010 (3) (A) ("the Federal Government and the States . . . have an obligation to assure that public funds are not provided to any institution that . . . does not provide . . . habilitation which is appropriate to the needs of such persons.")

That intention was found to be reaffirmed by §6063,[5] which mandated the submission of a plan designed "to improve the quality of care and the state of surroundings of persons for whom institutional care is appropriate . . . " by any state which wished to take advantage of the Act.

This reading of the statutory language was found to be reinforced by the legislative history of the statute. Indicative of that history is a reference in the Conference Report which states that "the developmentally disabled have a right to appropriate treatment, services, and habilitation."

Private Right of Action under the D.D. Act

Because of the statutory grounds of its holdings, the court also had to consider whether private litigants may enforce the rights granted under the Act.

Accepting the analysis from *Naughton v. Bevilacqua*, 458 F. Supp. 610 (D.R.I. 1978), the only other court to have confronted this problem, the court affirmed that right. It found the standard for a private right of action articulated in *Cort v. Ash*, 422 U.S. 66, 78 (1975), "eminently" satisfied.[6] Particular attention was paid to the fact that this decision would not infringe on basic state prerogatives. This implication of a private right of action rests not only on the spending power of Congress, but also on an independent constitutional basis, Section 5 of the Fourteenth Amendment, which "the Supreme Court has acknowledged . . . may . . . establish certain restrictions that otherwise might implicate the prerogatives of the states."

The court also relied on its recent decision, *National Association for the Advancement of Colored People v. The Medical Center*, 599 F. 2nd 1247, 1258-59 (3rd. Cir. 1979), in which it recognized a private right of action under Section 504 — "another statute designed to improve the lives of handicapped persons."

Right to the Least Restrictive Environment

Although the court admitted that "there is substantial case law support for the trial court's constitutional position," basing the least restrictive environment finding on due process, again its analysis remained within statutory bounds.

Drawing upon the language of the D.D. Act, the court found a "clear congressional preference for deinstitutionalization." Section 6010 states that "the treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty." Also, the plans mandated under Section 6063 must be geared "to eliminate inappropriate placements in institutions of persons with developmental disabilities," must "support the establishment of community programs," and must provide for "maximum utilization of all available community resources."

The statutory language again was found to be reinforced by an extensive legislative history, exemplified by the Conference Report's "Statement of Purpose," which emphasized the importance of providing a "setting that is least restrictive to (a person's) personal liberty."

Within this framework, however, the court found that "the Act does not . . . articulate a *per se* rule prohibiting institutions."[7] The court emphasized that a determination of least restrictive environment must be made on an individual basis. An institution could conceivably be the least restrictive environment for a particular person, but only in the "comparatively rare" case in which "adequate habilitation could not be accomplished in any setting less restrictive."

Relief

Aside from the qualification of the *per se* rule on closing of Pennhurst and a correlative revision in the order banning all future admissions,[8] the Court of Appeals affirmed the trial court's order. It found that each of the provisions went to remedying "the 'condition' to be 'cured' . . ., the failure to provide the retarded with adequate habilitation in the least restrictive environment."

Notably, the court found that because of the "complex and lengthy process" which will be required to implement this order, the use of a master to supervise such efforts, "with the aid and assistance of all parties to the lawsuits," was "particularly appropriate." The master should oversee an individualized appraisal of the "special needs and desires of each individual" with the understanding that there should be a "presumption in favor of placing individuals in Community Living Arrangements."

The court also approved of the "friend-advocate system" to monitor the continued availability of community services to the retarded. It noted that such a system would "help to effectuate the rights of the retarded, (and would) reduce the need for judicial oversight."

Eleventh Amendment

The defendants, relying on *Edelman v. Jordan*, 415 U.S. 651 (1974), challenged the relief granted on the basis of the Eleventh Amendment. They urged "that although the decree is couched in terms of prospective injunctive relief, its effectuation will nevertheless require the expenditure of Commonwealth funds." The court dispelled that concern, reaffirming its position the *Edelman* "quite explicitly left intact the authority of federal courts to enter prospective decrees having fiscal consequences to a state treasury as the necessary result of compliance."

United States Intervention

A significant ancillary issue presented on appeal was the validity of permitting the United States to intervene as a plaintiff in the action. The defendants, relying on *U.S. v. Solomon*, 563 U.S. 1121 (4th Cir. 1977), argued that such a move was inappropriate absent "express statutory authorization." The court rejected that claim. It made the distinction that *Solomon* dealt with an action brought directly by the United States, whereas this suit, brought by plaintiffs with standing to present these statutory claims, was already pending at the time of the intervention. The court explicitly did "not decide whether absent the (private) action the U.S. could independently have sued." Of more importance, though, was the court's rejection of the basic *Solomon* analysis. It was unper-

suaded that the separation of powers problem really exists. The resort of the executive branch to an Article III court to carry out its own constitutional responsibility was not found to be an intrusion on Congressional power. The court suggested that if Congress finds such an action inappropriate it can statutorily proscribe future occurrences.

Extending its discussion, the court referred to Fed. R. Civ. P. 24, which it found to permit intervention "by government agencies interested in statutes . . . relied upon by the parties." Since several executive branch agencies "have important responsibilities" under "extensive legislation directed toward the well-being of the mentally retarded," this intervention was found to be "clearly" within the purview of the rule.

Dissent

The dissent, though "agreeing with the majority that the conditions at Pennhurst . . . fall below a statutory or constitutional threshold of decency so as to merit judicial intervention," could find no basis for "mandating a general right to individual treatment in the least restrictive environment." Significantly, it did "assume that the majority is correct in asserting that patients at Pennhurst have a right to treatment . . ., and an implied cause of action under the Act to enforce that right." Yet it systematically rejected the majority's statutory analysis as well as the alternative statutory and constitutional bases developed by the lower court as legitimate grounds for a right to the least restrictive environment.

The defendants have filed a petition for certiorari in the Supreme Court of the United States.

Counsel for Appellees: David Ferleger, Esq., 37 S. 20th Street, Suite 601, Philadelphia, Pennsylvania 19107, (215)735-7200; Drew Days, III, Arthur E. Peabody, Jr., Dept. of Justice, Washington, D.C. 20530, (202) 633-3470.

Notes

1. The court used the terms "habilitation" and "treatment" interchangeably. See, p. 21, fn. 14.
2. The court found similar rights under the Pennsylvania statute.
3. The order also empowered the Master to establish a plan to provide alternative employment for all Pennhurst employees.
4. The court declined to consider §504 issues, claiming that "one clear federal statute announces the governing rule, and one is enough."
5. This section has since been deleted from the Act. The revised statute incorporates the same concept, however, declaring that the plans must conform to the dictates of the Bill of Rights section.
6. The relevant factors set forth in *Cort v. Ash* are: (1) whether the plaintiffs are especial beneficiaries of the statute, (2) whether there is any indication of legislative intent to create a private remedy, (3) whether a private remedy would further the policies of the statute, and (4) whether the cause of action is one traditionally relegated to the states.
7. The majority and dissent appear to agree that the specific conditions at Pennhurst "fall below a statutory or constitutional threshold of decency," and that these must be remedied before the institution could legitimately be used as a placement.
8. The court also did not agree with the requirements of providing alternative employment for all Pennhurst employees. It found that even under the liberal standards of *Milliken II (Milliken v. Bradley*, 433 U.S. 267, 279-288 (1977)," that mandate did not relate to the rights of issue.

Kentucky Association for Retarded Citizens v. Conn, No. C 78-0157 (W.D. Ky., filed March 21, 1980)

The United States District Court for the Western District of Kentucky has dismissed a complaint on behalf of all current and future residents of Outwood, a residential facility for 300 mentally retarded persons. The action was an attempt to prevent the construction of a new residential facility for 175 persons on the site of the present institution, and to mandate the use of group homes or other community facilities for these persons. The court found that severely and profoundly retarded persons can be placed in such a facility; that such persons should be considered to be involuntarily committed; that such persons have a right to the "minimum standards" set out in Section 6010 (3) (A) and (B) of the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. §6001 et seq.), and to the least restrictive alternative mode of treatment under a state statute (K.R.S. 202B.040 and 202B.060), but that such treatment need involve placement in a community facility only when there is *in existence* a facility which can adequately treat and supervise the resident.

This class action, commenced in May, 1977, actually involved two sets of claims. The first

dealt with various aspects of the ongoing program of care and treatment which the plaintiffs alleged were constitutionally and statutorily deficient. This involved, *inter alia*, physical abuse of residents, excessive use of physical and chemical restraints, failure to provide adaptive equipment, staff shortages, failure to provide habilitative programming, and inadequate assessment and review of the residents' programs. The court issued a series of findings rejecting these claims. It did admit that prior to the suit there were major shortcomings in most of these areas, including excessive use of restraints and medication, and a total absence of systematic review of the residents' programs. It also noted that all parties agreed that the physical plant was "atrocious." However, referring to a "basic upgrading" which it claimed took place in 1977, the court found no vestiges of the past wrongs in the present system.

Significantly, in its discussion of the alleged "staff shortage" problem the court rejected the standards for staff to resident ratios articulated in *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), and *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part and rev'd. in part,* No. 78-1490, 1564, 1602 (3rd Cir. Dec. 13, 1979). The court concluded that a higher ratio was acceptable if it was "adequate to meet the standards imposed by the licensing authority," since it had not produced the "severe abuses" which existed in those cases.

The court then shifted to the plaintiffs' second claim, which challenged the viability of large-scale institutional care for any member of the class. The plaintiffs grounded their claim on Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the "Bill of Rights" section of the D.D. Act (42 U.S.C. §6010 et seq.), the state statute (K.R.S. 202B), and the Eighth and Fourteenth Amendments. They argued that this authority mandates the development of group homes or other community based facilities for this class of persons. In response to this challenge the defendants argued that there are simply not a sufficient number of group homes to handle the entire class, that it is desirable to have a centrally located facility, and that institutional care is appropriate for severely and profoundly retarded persons.

The court began its discussion by noting:

Plaintiffs have shown that, although the State of Kentucky is now committed on paper to a program of placing mentally retarded persons in the least restrictive environment, and to putting them into group homes and community settings, the performance by the State has not yet matched the promise. It also appears that the State has made its plan to construct the new facility without first determining on an individualized basis whether the needs of those persons who are now institutionalized would best be served by community placement or the building of a new facility.

Yet, characterizing the plaintiffs' argument as "one, which under ordinary circumstances, would be addressed to the Legislature," the court refused to act to rectify that imbalance.

The court then turned to the federal statutes. First, it found that Section 504 does not include a legislative mandate for deinstitutionalization. It explicity rejected the anlaysis from *Halderman* in which District Judge Broderick had found such a right. The court said that the Rehabilitation Act means only "that a person who is qualified to perform a task or to enter an educational institution or to receive the benefits of any program or activity which receives federal financial assistance shall not be denied the right to work or to receive the benefits because he or she has a handicap."

As to the D.D. Act, the court concluded that "Congress contemplated that institutional as well as residential programs for the handicapped would continue to be provided, and, further, that the programs which are provided must either provide appropriate treatment and habilitation *or* meet the six standards referred to in (3) (B) (*i.e.,* custodial care)." The court thus rejected the Third Circuit's analysis in *Halderman*. That court had read the D.D. Act to mandate the development of a system of community facilities for persons for whom institutional care would not be the least restrictive alternative. This court found the D.D. Act merely to embody "minimum standards" which must be met by service providers, whether institutions or community facilities which receive funding under the Act.

Next, the court sketched the parameters of the state statutory scheme. It found that under the act involuntarily committed mentally retarded persons "enjoy the right to the least restrictive mode of treatment." It also clarified that

all persons who are or will be confined at Outwood are to be considered involuntarily committed. However, it then found that the "least restrictive alternative treatment for some severely and profoundly retarded persons may, indeed, be (in an instutition)." And further, that even when it is determined by an interdisciplinary team that a person is capable of placement outside of Outwood, the extent of the defendant's obligation is to communicate that fact to the Department of Human Resources and to give that resident "priority" should such a community placement become available. The court did not reconcile that logic with the acknowledged lack of existing community services.

Finally, the court dismissed "the need for a lengthy constitutional analysis," relying on its statutory analysis in response to the Fourteenth Amendment claim and concluding that a factual violation under the Eighth Amendment did not exist.

Counsel for plaintiffs are Brian Lawlor, Esq. and Cynthia Cecil, Esq., Legal Aid Society, Inc., 418 Main Street, P.O. Box 8, Shelbyville, Kentucky 40065, (502) 633-5444.

Update: *New York State Association for Retarded Children v. Carey*, 72 Civ. 356/357 (E.D.N.Y., January 2, 1980)

In the ongoing process of the Willowbrook litigation and implementation (See *Amicus*, 4, No. 2), the federal district court has granted plaintiffs' motion to enjoin defendants from terminating funding for the placement of class members in the home of their natural parents.

On June 28, 1975, the New York State Department of Mental Hygiene expanded its family care program (state supported foster homes) to include natural parents of mentally retarded adults who have been institutionalized for at least two years in a state institution in New York. To meet the placement goals of the Consent Judgment, this was further expanded on December 5, 1975 to allow the placement of minor children of the Willowbrook class into their own homes under the family care program as an emergency measure.

This program, which had limited impact, remained relatively unnoticed until the court decision in *Sundheimer v. Kolb*, NYLJ 1 (Supr. Ct. Bronx Co., March 22, 1979) (See *Amicus*, 4, No. 3). The *Sundheimer* court found an equal protection violation in that "those parents who chose not to admit their children to the well-documented horrors of (the Willowbrook) institution" were now deprived of receiving family care funds for the care of their children or adults in their natural homes. As a result, on May 17, 1974, New York decided to terminate the funding of all natural home placements rather than extending family care benefits to all natural parents of mentally retarded children.

Plaintiffs moved for a preliminary injunction on September 4, 1979, later modifying it to focus specifically on implementing and enforcing the Willowbrook Consent Judgment and abandoning claims to a right to funding under the statutory family care program. The Court was receptive to this modified argument, acknowledging that the funding of natural home placements for Willowbrook class members was similar to but not equivalent to the statutory family care program. Thus, any restrictions on the statutory program would not effect the Willowbrook funding program, which is a component of and funded through the Willowbrook Development Center and implementation plan.

The Court found that for many class members the "least restrictive and most normal living conditions possible," as determined by the Interdisciplinary Treatment Team, is the natural home. Denials of funds to natural parents would result in lack of placement for many class members in their natural home. Viewing the community placement plan developed by the Willowbrook Review Panel, the Court recognized the importance of the natural home as a placement goal and not merely as

a placement option. Thus, the Court concluded that, pursuant to its construction of the Consent Judgment, the defendants must insure that class members are placed "in the least restrictive and most normal living conditions possible," which very often will be the natural home.

Furthermore, the Court favorably cites the Third Circuit's decision in *Halderman v. Pennhurst*, which relies upon the Developmentally Disabled Assistance and Bill of Rights Act to find a right for mentally retarded persons to be provided with the least restrictive environments. The Court rejects the application of *Sundheimer* in that the present decision is limited to members of the Willowbrook class and derives from the language of the Consent Judgment.

Counsel for plaintiffs are Chris Hansen, Esq. and Robert Levy, Esq., New York Civil Liberties Union, 84 Fifth Avenue, New York, N.Y. 10011, (212) 924-7800.

Oliver v. Murray, C.A. No. JP 79-568-C (S.D. Ind., filed July 23, 1979)

Florida Association for Retarded Citizens, Inc. v. Graham (M.D. Fla., filed August 22, 1979)

Two class action suits have been filed in district court in Indiana and Florida seeking appropriate treatment for institutionalized mentally retarded individuals.

Two involuntarily committed patients and one patient voluntarily committed by his legal guardians have brought suit on behalf of themselves and all other persons confined at Madison State Hospital (Madison, Indiana) against the Commissioner of the Indiana Department of Mental Health and the superintendent of the hospital, alleging that the hospital has failed to design a comprehensive treatment or habilitation program, to individually assess and regularly evaluate patients or to prepare them for integration into the community. The complaint alleges insufficient professional staff, unskilled and untrained ward attendants who enforce arbitrary and capricious punishments, hazardous and unsanitary hospital conditions, and physical abuse of patients by other patients. Seeking injunctive and declaratory relief, plaintiffs specifically requested that the court direct appropriate treatment in the least restrictive environment, and that the hospital provide residences which allow freedom of interaction and association of patients, reasonable living conditions, humane care, and appropriate occupational, recreational, educational, physical and psychological therapy.

Charging that the approximately 700 institutionalized mentally retarded residents of Orlando Sunland Training Center have been "gravely harmed" by the state's failure to develop alternative living arrangements and by inadequate staff and deficient conditions of the Orlando Sunland, the Florida ARC and six mentally retarded and physically handicapped residents of the facility have brought a class action suit against Governor Bob Graham and other state officials.

Despite a six-million dollar appropriation by the legislature in 1977 to fund construction of new facilities and, thus, to begin a "phase out" of Sunland, the complaint states, no homes were built and less than half of the community placements were made during the fiscal year. Further, alleges the complaint, the state allowed funds to lapse and delayed its deadline for emptying Orlando Sunland. At the institution itself, it charges, "deplorable conditions" exist: overcrowding, filth and fire hazards, and evidence of abuse and neglect.

Plaintiffs seek a court order barring the Department of Health and Rehabilitative Services of Florida from admitting persons into the institution, and requiring an immediate cessation of harmful practices at Sunland and the creation of community residences, programs and services necessary to meet the needs of all present residents of Sunland.

Representing the Indiana patients are, among others, Jane A. Cullen, C. Chris Sautter, Legal Services Organization of Indiana, Inc., 701 North Walnut Street, Bloomington, Indiana 47401 (812) 339-7668.

For the Florida plaintiffs, are William R. Barker, Larry Morgan, Greater Orlando Area Legal Services, Inc., 128 West Central Boulevard, P.O. Box 1790, Orlando, Florida 32802 (315) 841-7777 and Jane Bloom Yohalem, Developmental Disabilities Rights Center of the Mental Health Law Project, Suite 300, 1200-19th Street, N.W., Washington, D.C. 20036 (202) 467-5730.

social security

Allen v. Harris, H-78-535 (District of Maryland—October 19, 1979); *Kelly v. Harris*, K-78-2306 (District of Maryland—October 10, 1979); *Lewis v. Harris*, K-78-1267 (District of Maryland—October 10, 1979) (settlements).

On February 26, 1979, the Social Security Administration promulgated proposed medical-vocational evaluation regulations for use in determining a person's age, education and work experience in claims. The administration maintained that the regulations reflected long-standing, applicable, but informal policy. They are now final regulations and appear at 20 CFR §404.1502 *et seq.*, and §416.902 *et seq.*

Three individuals whose disability claims were dismissed by an adiminstrative law judge prior to the promulgated regulations filed amended complaints in their appeal to the district court, raising the failure of the administrator to apply these "long-standing" agency policy rules to their claims.

Settlements of the three cases have been estimated by Social Security to involve as many as 40,000 people nationwide, who have been denied SSI or disability insurance and who have been determined to be within the class represented by plaintiffs.

To take advantage of the settlement:

1. Individuals must have been denied disability benefits because Social Security told them that they could do some type of work, even though they could not do their regular work.

2. Persons falling within the class will be invited to reapply for benefits.

It is important to note that persons under age 50 are less likely to have claims which will be allowed.

More information was to be sent in Social Security notices to potential claimants by mid-April.

For additional information, contact Luther Blackiston, Managing Attorney, Legal Services for Senior Citizens, Legal Air Bureau, Inc., 305 W. Chesapeake Avenue, Suite 118, Towson, Maryland 21204 (301)823-7666.

guardianship

Petty v. Petty, No. 20153 (Tex. Civ. App. - Dallas, Dec. 26, 1979)

The Dallas Court of Civil Appeals, in interpreting the due process provisions of the Limited Guardianship Act, *Tex. Prob. Code Ann.*, §§ 130 A-0 (Vernon Supp. 1978-1979), has reversed a guardianship order as invalid. The statute reads in part:

A mentally retarded person for whom a limited guardian has been appointed shall not be presumed to be incompetent and shall retain all legal and civil rights and powers except those which have by court order been designated as legal disabilities . . .

The appellant in the action was a mildly mentally retarded resident of Denton State School. Pursuant to the Act, his parents had been appointed guardians over him, with limited and specific powers. Service of process for the proceeding at which that action was taken was made on Denton State School personnel, yet appellant did not actually receive the process until after the hearing. Appellant also did not consult an attorney prior to the hearing. He arrived accompanied by his parents, without counsel, and during the proceeding made statements apparently waiving counsel. His later discovery of what actually had transpired prompted this appeal.

The court, reversing the guardianship order, held that "consultation with (an) attorney is an essential prerequisite to waiver by the subject individual of any of his rights." The rights protected prior to determination of guardianship were found to include all those provided by the Act since those provisions meant to protect "the subject individual after the determination . . . would be useless . . . if no protection was provided for the individual prior to the court's determination."

That finding has two important implications. First, "because one of the rights that may not be waived absent counsel is the right 'to be represented by counsel,' . . . absent retained counsel, the *court must appoint an attorney* for a subject individual prior to the limited guardianship hearing." (Emphasis added.).

Second, because the appellant did not consult with an attorney before attending the hear-

ing, his presence could not have been an effective waiver of the right to service of process. Since there was no personal service, there was, in fact, a lack of personal jurisdiction by the lower court.

Counsel for appellant is Advocacy, Inc., 5555 North Lamar, Suite K-109, Austin, Texas 78751, (512) 475-5543.

§ 504

Patton v. Dumpson, 75 Civ. 4922 (S.D.N.Y., January 23, 1980) 3 E.H.L.R. 551:526

A Federal District Court in New York has issued a decision, *Patton v. Dumpson,* with positive implications for the enforcement of individual rights under Section 504. The court holds that a private right of action for damages may be implied under §504 and that the doctrine of *respondeat superior* applies to such actions.

Plaintiff is a handicapped child who was the legal responsibility of several public and child welfare agencies. The complaint was filed in his behalf, charging that agency employees had discriminated against him because of his handicap and had denied him the benefit of educational services. It also sought to hold them liable in damages under §504.

Citing *Cannon v. University of Chicago,* 99 S. Ct. 1946 (1979), the court implied a private right of action under §504. It dismissed defendants' claims that the right was limited to injunctive relief, because it found no Congressional directive to that effect, and it found no judicial preference for equitable as opposed to legal remedies. Further, the court held that the remedy of money damages must be available to a plaintiff where, as in the case before it, such damages are the only means of compensating a victim of past discrimination.

Acknowledging a split of authority on the issue of exhaustion of administrative remedies, the *Patton* court held that exhaustion is not required as a prerequisite to private litigation under §504, partially because a "review of the HEW regulatory scheme illustrates that it is totally inadequate as a means of vindicating the rights of individual complainants."

Finally, in deciding a question of first impression, the court held that applying the doctrine of *respondeat superior* to §504 suits was entirely consistent with the statute's policy of eliminating discrimination and was not prohibited by congressional directives. As such, held the court, employers, including the municipal defendants in *Patton*, could be held vicariously liable under §504 for the acts of their employees.

Counsel for plaintiff is Marcia Robinson Lowry, Children's Rights Project, New York Civil Liberties Union, 84 Fifth Avenue, New York, New York 10011, (212) 924-7800.

Miener v. Missouri, No. 79-1050 C(2) (E.D. Mo., January 25, 1980) 3 E.H.L.R. 551:512

Adding to the number of district courts which have decided the issue, the federal court for the Eastern District of Missouri has held that Section 504 supports a private right of action for equitable relief, that the right exists without regard to prior resort to administrative remedies, but that §504 does not give rise to a cause of action for damages.

Plaintiff is a seventeen-year-old, voluntary resident of St. Louis Hospital, suffering from serious physical and emotional disorders. In her complaint against numerous education and mental health officials and agencies, she alleged discrimination on the basis of her disorders and in violation of §504 and the Education For All Handicapped Children Act. She sought mandatory, injunctive and declaratory relief under both of the acts.

Applying *Cannon v. University of Chicago*, 99 S. Ct. 1946 (1979), the Supreme Court decision addressing the issue of private right of action under Title IX of the Education Amendments of 1972, the *Miener* court held that *Cannon's* implication of a private right of action to enforce Title IX without prior resort to administrative procedures mandated a similar conclusion with respect to §504. *Cannon* did not decide the issue of damages, but, reviewing the legislative history of §504, the *Miener* decision stated that there was not the "slightest indication that this Section might be the basis of a private damage suit." Fiscal pressures as a method of enforcement, suggested the Court, is best left to an appropriate government agency. (Compare with *Patton v. Dumpson*).

Similarly, the court found no indication in the legislative history of the Education of All

Handicapped Children Act that a private cause of action for damages was intended. Agreeing with the decision of *Loughran v. Flanders*, 470 F. Supp. 110 (D. Conn. 1979) (*Amicus*, 4, No. 4), the court refused to imply such a private cause of action and dismissed plaintiff's damages claim.

Counsel for plaintiff is Albert J. Haller, 7751 Carondelet, Suite 201, Clayton, Mo. 63105.

zoning

State of Montana v. District Court of the Eighth Judicial District, No. 79-101 (Mont., filed Jan. 28, 1980)

The Supreme Court of the State of Montana has found that a restrictive covenant limiting the use of property to single family dwellings does not preclude the establishment of a community residential home for developmentally disabled children.

The court first outlined the state's policy regarding the care of such persons. It noted both a state constitutional mandate to provide "social and rehabilitative services" for persons who "have a need for the aid of society," and legislation implementing care for the needs of developmentally disabled citizens at the community level. The latter specifically provided for the establishment of "family-oriented residence(s) or home(s) designed to provide facilities for two to eight developmentally disabled persons, as an alternative to existing state institutions." That legislation was found to be reinforced by an amendment of the state's zoning laws mandating that community homes be a permitted use in neighborhoods zoned for single family residences.

In resolving the question of the effect of the covenant, though, the court did not find it necessary to use the above position to "overcome" a conflict. Rather, it found the use in question "entirely compatible with and in conformity with the spirit, intent, and language of the restrictive covenant." "The group home, by law, is structured as a single housekeeping unit, and to all outside appearances is a usual, stable and permanent family unit." Accordingly, the use was found to be "within the ambit and intent of the restrictive covenant."

This decision is consistent with an earlier Montana Supreme Court decision, *State ex rel. Thelen v. City of Missoula*, 543 P. 2d 173 (Mont. 1975), upholding the state statute's preeminence over local restrictive zoning ordinances.

Appearing as amicus curiae *in the case was James Reynolds, Developmental Disabilities Montana Advocacy Program, Inc., 1218 East 6th Avenue, Helena, Montana, (406) 449-3889.*

Malcolm v. Shamie, No. 43548 (Mich. Ct. App., filed Jan. 23, 1980)

A group of home owners attempted to enjoin the establishment of a Foster Care Center, which would serve as the permanent residence of five mentally retarded adult women. The basis of their action was a restrictive covenant applicable to the proposed site which limited use to "one detached single family dwelling." The Court of Appeals of the State of Michigan rejected that claim, finding that the women would be "family" within the meaning of the covenant.

The court recognized that this question presented a confrontation between two basic public policies. First, restrictive covenants are valuable property rights subject to judicial protection. Second, the state of Michigan encourages the maintenance and development of quality programs and facilities.

Balancing those interests, it was found that persons living in a permanent residence "therapeutically designed to emulate a more conventional family environment" should be considered a family and the use of the property an appropriate family residential use. This conclusion was found to be supported by recent legislation which mandated that "a state licensed residential facility providing supervision or care, or both, to six or less persons shall be considered a residential use for the purpose of zoning," and by the basic state constitutional provision in favor of programs for handicapped persons.

The court, however, was careful to limit its holding to facilities which were "permanent" in character, the emphasis being on the identity of function and purpose of that type of program and a normal family use.

Counsel for the defendant Foster Care Center is William Campbell, Michigan Protection and Advocacy Service for Developmentally Disabled Citizens, 230 N. Washington Square, Suite 200, Lansing, Michigan 48933, (517) 487-1755.

Crawford County Residential Centers, Inc. v. Ohio Power Company, No. 79-248-EL-CSS (Ohio Pub. U. Com., filed Feb. 27, 1980)

The Public Utilities Commission of Ohio has found that a group home owned by the complainant, a private, non-profit corporation, and occupied by seven developmentally disabled males, is entitled to receive electrical services from Ohio Power under the company's residential service tariff rather than its general service tariff.

The power company had been levying the higher general tariff on the ground that the home was "primarily used for business, professional, institutional or gainful purposes," and thus ineligible for the residential tariff. The complainant challenged that treatment alleging that the home is in all respects an individual residence.

The Commission agreed with that characterization. First, it outlined the extensive evidence by the complainant which demonstrated the residential character of the home. This included the home's location in a residential neighborhood, its exterior design and interior layout, both of which are "typical of a two-story single family dwelling," and the "daily activities of the residents" which indicate that the home functions as one household. The Commission also found that the home is not used for "business, professional, institutional or gainful purposes." It noted that no mercantile or commercial activities occur on the premises. Although residents do learn independent living skills, such training was found to involve "the same educational process which occurs between parents and children," and thus not to be "strictly professional." Moreover, the residents are in the home by choice, and are not "institutionalized" in any sense.

The Commission concluded its opinion with the observation that the "essence" of the home is to provide "a family setting to developmentally disabled persons," and to that end it should be treated as a family unit. The Commission's finding is consistent with the ruling by numerous courts that group homes for developmentally disabled individuals are to be considered as residential family units for zoning purposes.

Appearances for complainant: Mr. Richard P. Rosenberry, Associate Consumers' Counsel, 137 East State Street, Columbus, Ohio 43215; also Mr. John Guendelsberger, Ohio Legal Rights Service, 8 East Long Street, Columbus, Ohio 43215.

civil commitment

Johnson v. Solomon, No. Y-76-1903 (D. Md. August 17, 1979)

A federal district court in Maryland has ordered important changes in the state's procedures and standards for the involuntary commitment of Juveniles to mental institutions.

(1) The court struck down the commitment standard in the Maryland Juvenile Causes Act as unconstitutional. The Act allowed commitment following a determination that a child is delinquent or in need of supervision or assistance and a further determination that there is an institutional program in the child's best interest. The court declared the standard to be vague, violative of due process, and violative of equal protection because it did not require a specific finding of dangerousness for commitment.

(2) The court mandated automatic periodic review for committed juveniles at six-month intervals. The court recognized that in the absence of periodic review there is a substantial likelihood that juveniles will be committed longer than necessary and will be committed to a more restrictive treatment program than is necessary. Periodic review is required to ensure that continued commitment is based on the standards employed during the original commitment hearing.

(3) The court recognized the right to counsel and to appointed counsel if the juvenile is indigent. The court enjoined commitments without the assistance of counsel. In addition, the court required that counsel be present at any redetermination of the patient's status, such as periodic review. The court ordered the state defendants to file a plan implementing the right to counsel within 30 days.

(4) The court recognized both a constitutional and a statutory right to treatment in the least restrictive setting. However, the court interpreted this right to refer to the least restrictive available setting. As a consequence, the court believed that the state is not

required "to create the best mental health system imaginable." There are requirements, however, that the state explore and provide the least restrictive practicable alternatives to civil commitment and that no juvenile be civilly committed if available services and programs in the community offer adequate care, habilitation and treatment.

The court believed the present deficiencies regarding treatment setting could be dealt with by the following procedural changes:

First, prior to commitment, the juvenile court record must set out the court's determination as to the juvenile's mental status, the extent of his dangerousness to self or others, the basis of the recommended dispostion and the reasons for finding the disposition to be the most appropriate and least restrictive alternative available.

Second, if out-of-state placement is deemed to be the least restrictive setting available, the record must indicate the reasons for the necessity of out-of-state placement and the nature of the treatment which is to be provided.

Third, records must be kept of all medications given. The record must include a statement as to the therapeutic value of the medication. Routine administration of drugs to newly admitted residents is prohibited unless the medication is indicated by emergency conditions or the medication is indicated by the child's medical history as a continuation of therapy. Similar records must be kept regarding seclusion practices.

The court believed the record established by these procedural changes will provide adequate information for a judgment at the time of periodic review concerning the least restrictive setting for treatment.

Among counsel for plaintiffs is Mental Health Project, Legal Aid Bureau, Inc., 341 North Calvert Street, Baltimore, Maryland 21202, (301) (539-5340).

parental termination

In the Matter of Judy and Donald G., (Fam. Ct. N.Y., filed Feb. 1, 1980)

The Family Court of the State of New York has found the application of that state's statute permitting termination of parental rights on the ground of mental illness or mental retardation violative of the due process and equal protection clauses of the Fourteenth Amendment.

The question arose out of a decision by a lower court discharging two children to the Jewish Child Care Association on the grounds of parental abandonment, permanent neglect, and mental illness or mental retardation. The parents were characterized as a male with "dull normal" intelligence and a mild mentally retarded female. The children had resided in foster care homes since 1970. The action was initiated by the association to free them for permanent adoption.

The Family Court began by rejecting abandonment and permanent neglect as appropriate bases for this termination.

Abandonment requires a finding of intent on the part of the parents to "forego (their) parental rights and obligations . . . by failure to visit the child." These parents had tried to see and communicate with the children within their limited abilities. The court found that any apparent abandonment was due to the "agency's decision to curtail visits."

As to permanent neglect, the standard is a failure to "substantially and continuously . . . maintain contact with or plan for the future of the child, although physically and financially able to do so." The court found it irreconcilable that under the statute a parent "is not negligent if he or she lacks the money and physical ability to care for the child," yet could be negligent because of a "mental condition . . . totally beyond his or her control." Again, the parents' efforts, though limited, were recognized.

Turning to the ground of mental illness or mental retardation, the court found the statute and its application lacking in several respects.

First, it found the classification of parents by mental illness as distinguished from parents with other (physical) illnesses impermissible under the equal protection clause. Since termination of parental rights involves "fundamental rights" the court applied a "strict scrutiny" test. Neither of the interests proffered by the state (promotion of welfare of children of mentally ill parents, nor conservation of state funds) were found adequate to meet that standard.

Second, the court noted a "drastic disparity" in the treatment of mentally ill and mentally retarded parents, whose rights are immediately terminated by a finding of mental illness or mental retardation without a separate hearing on the issues of their actual fitness or the child's best interests. This was found to be violative of substantive due process, "in that it terminates parental rights without fault," and violative of the equal protection clause, "by applying a separate and distinct standard" solely to this class of persons. The failure of the statute to provide for a dispositional hearing also was found to violate the procedural due process rights of the parents.

The court's basic conclusion was that the state cannot interpose itself between parents and child, "one of the most delicate of societal relationships," solely because of the parents' mental illness or mental retardation.

Counsel for the respondents: Jay Shusteroff, Esq., Protection and Advocacy System for Developmental Disabilities, Inc., 175 Fifth Ave., New York, New York 10010.

vocational rehabilitation

Handicapped Students v. Hayes, No. 79-2188 - II (Chancery Ct., Davidson County, Tenn. March 14, 1980)

A class action has been initiated by the handicapped students of the Comprehensive Rehabilitation Vocational-Technical Center at Smyrna, Tennessee, for relief from what they allege are oppressive, arbitrary and unconstitutional actions by the defendants, the Center and various state personnel responsible for its operation.

The Center is a state-wide comprehensive rehabilitation and training center established pursuant to state statute for the purpose of providing vocational rehabilitation services. To that end it serves not only as a training center but also as a residential facility for most of the persons in the program. It is the only program of its kind operating in the state, and provides, in effect, the sole opportunity for vocational rehabilitation for persons with severe handicaps.

The original complaint focused on two district problem areas. The first involved a number of management and disciplinary procedures which the plaintiffs alleged were violative of various constitutional provisions. Among the deprivations alleged were a lack of due process in disciplinary and suspension procedures, unconstitutional searches and seizures, and restrictions on individual freedom of association and religious expression. Most of these problems were tentatively resolved with the issuance of a consent order which acknowledged that the defendants had promulgated a series of rules designed to clarify the Center's policies in these areas. Although some question remains as to the adequacy of the new regulations, the emphasis of the action has shifted to the second major problem—inadequacy of services.

The plaintiffs have argued that the state has established a vocational rehabilitation program for a select group of persons, yet has failed to provide the minimum level of services mandated by the state Rehabilitation Plan and the federal Rehabilitation Act of 1973. Specifically, they have alleged that there are an inadequate number of staff, that staff are insufficiently trained, that various services which are necessary components of a rehabilitation program, *i.e.*, medical, psychiatric, psychological, and social, have not been provided, and that the residents have not had an adequate opportunity to participate in the development of their individual programs. The plaintiffs have requested injunctive relief to force an upgrading of the level of services as well as damages for past deficiencies.

The plaintiffs have also suggested that they may expand the basic thrust of their argument to challenge the adequacy of providing any rehabilitative services in an "institution" rather than in a community-based setting. This may, in fact, become a key aspect of the case as the plaintiffs attempt to halt a questionable attempt by the state to institutionalize vocational rehabilitation in contrast to an integrated, community approach.

At this time the parties are awaiting a decision as to the plaintiffs' class certification.

Counsel for plaintiffs are Susan S. Garner, Richard L. Cummings, Gordon Bonnyman, Legal Services of Middle Tennessee, 102½ East Vines Street, Murfreesboro, Tennessee 37130, (615) 890-0905.

Alvarez v. Williams, (M.D. Fla. 1980)

A petition has been filed in the United States District Court for the Middle District of Florida by a blind, developmentally disabled adult alleging that various state officials and employees have failed to fulfill their statutory and constitutional duties to provide and implement an adequate habilitation plan for him.

The plaintiff, assessed as mildly mentally retarded, was accepted as eligible for services by the Department of Health and Rehabilitation Services and the Division of Blind Services on June 1, 1979. At that time a "retardation program habilitation plan" was prescribed as required by 42 U.S.C. §6011. Since that time plaintiff's participation in vocational or rehabilitative programs has been limited to two hours of weekly homebound instruction.

The plaintiff has challenged both the adequacy of the contents of his "plan" and the adequacy of its implementation. Specifically, he presents three claims:

(1) That the "plan" designed by the defendants fails to meet the explicit standards set forth in 42 U.S.C. §6011 (b) (3-5) and thus impedes his "right to appropriate training, services, and habilitation" under 42 U.S.C. §6010.

(2) That the failure of defendants to develop and implement an appropriate habilitation plan has effectively excluded the plaintiff from participation in programs receiving federal financial assistance in contravention of the plaintiff's rights under 29 U.S.C. §794.

(3) That the defendants have failed to satisfy their statutory duties to implement a habilitation plan in "wanton, wilful disregard" of the rights of the plaintiff."

The plaintiff seeks injunctive relief to force th defendants to comply with the appropriate standards for providing habilitation services, as well as compensatory and punitive damages for the defendant's past failure to meet those standards.

Attorneys for the Plaintiff: Sheppard, Carithers & Weinbaum, P.A., 215 Washington Street, Jacksonville, Florida 32202 Telephone (904) 356-9661.

attorney's fees

Watson v. Mason, CV 76-322-WMB (C.D.Cal.1979)

In the first case to decide the issue of attorney's fees under the 1978 Amendments to the Rehabilitation Act, a plaintiff bringing an action against the Veterans' Administration for employment discrimination has been awarded $3,300 in attorney's fees.

Thomas Watson, a blind handicapped veteran, had filed an employment discrimination complaint with the Veteran's Administration which the agency refused to investigate. In a subsequent suit in district court challenging the agency's proceedings, the court ruled that the agency should have processed Watson's complaint under Equal Employment Opportunity procedures issued pursuant to Title VII of the Civil Rights Act of 1964. [5 C.F.R. §§713.211-713.222].

However, on appeal to the 9th Circuit, the Court of Appeals held that although the Veterans' Administration had correctly been required under Section 501 of the Rehabilitation Act to process Watson's complaint, the agency was free to fashion its own rules of procedure and did not have to institute Equal Employment Opportunity procedures.

On remand, the California District Court was faced with the problem of attorney's fees. It concluded that since Watson was successful in his contention that the Veterans' Administration had to process his complaint, he was the prevailing party within the meaning of the 1978 Amendments [29 U.S.C. §794(a)] which allow a reasonable attorney's fee to be awarded to the prevailing party. But the court also decided that the award of fees should be proportionate to the extent that Watson had prevailed. Since he had not been successful in all his claims, the court awarded only $3300 instead of the requested $6400.

Attorney for Plaintiff: Mark A. Borenstein, Tuttle & Taylor, Inc., 609 South Grand Avenue, Los Angeles, CA 90017.

Jayne v. University of Nevada, Civil R-76-183 BRT (D.C. Nev., December 19, 1979)

The district court in Nevada recently ordered attorney's fees awarded to an American Civil Liberties Union lawyer who successfully represented handicapped clients in a claim brought under Section 504 of the Rehabilitation Act. However, because the

court concluded that the ACLU was not entitled to reimbursement on the same basis as a private practitioner, it awarded fees in the amount of $5,000 rather than the $25,780.00 requested. Because of the important effect such a decision may have on the awarding of attorney's fees in future suits brought by public interest organizations, the ACLU has decided to appeal the ruling.

The Court, however, also stated that its determination of the amount was based on its conclusion that the original amount requested was excessive on the circumstances which led to plaintiff's success in obtaining relief. Plaintiffs' complaint against defendant University of Nevada, Reno (UNR) charged that the University's inaccessibility violated the Architectural Barriers Act of 1973 as well as the Rehabilitation Act. One week after the complaint was filed, the Board of Regents requested one million dollars from the Nevada legislature to improve accessibility within the entire state university system. In the two years before the legislature appropriated funds to improve the accessibility of UNR, defendants conducted a full-scale investigation of UNR accessibility problems and made a number of structural modifications, such as making drinking fountains accessible to wheelchair-bound individuals. Because of these developments, plaintiffs eventually succeeded in obtaining the relief requested, and therefore, the court recognized that plaintiffs were the prevailing party despite the fact that relief was obtained through settlement.

Attorney for plaintiffs: Stephen L. Pevar, American Civil Liberties Union, Suite 201, 3570 East 12th Avenue, Denver, Colorado 80206 (303) 321-5901.

special report

Vocational Rehabilitation—Sheltered Workshops

Why is it that, as one source has commented, our society exhibits "the unwillingness to permit the disabled to engage in the entire range of possible jobs and the refusal to grant them 'normal' social interactions that will allow them to become integrated into 'normal' society"?*

Training the handicapped to work is an important task because without work a life is both empty of the satisfaction of meaningful productivity and lacking the security of personal income. This Special Report concerns Vocational Rehabilitation and, as one important aspect of this system, the Sheltered Workshop.

Commissioner Robert R. Humphreys introduces the section with an overview of rehabilitation services of the Rehabilitation Services Administration as it joins the new Department of Education.

Advocacy in vocational rehabilitation is then viewed from several perspectives: Frank J. Laski considers legal advocacy, Edward V. Roberts looks at advocacy from the personal point of view, and advocacy of a client's needs on the group level is presented by Leonard P. Sawisch, James R. Nuttall and Margaret Porter.

A key to advocating change for clients is the ability and willingness of rehabilitation counselors to participate in the advocacy process. Adrian Chan looks at the counselor's role, and then Lisa Frasco outlines a growing area of concern for counselors and vocational rehabilitation agencies—the client's right of privacy.

As changes in rehabilitation affect the VR system, they also affect society. Monroe Berkowitz and Jeffrey Rubin close this portion with a view of societal costs for the changes.

Sheltered Workshops have been one answer to the need for vocational education of the handicapped.

Henry Redkey looks at the successes and failures of this system of training and gives a personal view of needed improvements.

Claude W. Whitehead then questions the role of sheltered workshops and considers how effective they can be in helping trainees enter the competitive work environment.

A view of the future of sheltered workshops ends the Special Report as Kevin L. Lilly looks at the evolution of the workshop as a training station in the VR system.

Tom Zoss

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* Safilios—Rothschild, *The Sociology and Social Psychology of Disability and Rehabilitation*, 4 (1970).

The Federal - State Vocational Rehabilitation Program

by Robert R. Humphreys

With the advent of the 1980's, the State-Federal vocational rehabilitation (VR) program begins its 60th year of serving handicapped Americans. Since the program was launched in 1920, more than 5 million handicapped people have been rehabilitated, and, as the Rehabiliatation Services Administration (RSA) becomes an agency under the Office of Special Education and Rehabilitative Services in the newly created Department of Education, a new phase in rehabilitation begins.

From its early years until just recently, all resources of the VR program were directed to the training and rehabilitation of handicapped individauls for employment. Employability was the key word. If a person were of working age, unable to work because of a physical or mental handicap, and could be made employable through the program, that person could be accepted as a client of vocational rehabilitation. For the most part, this is still true.

Under the State-Federal VR program, RSA provides funds on a matching basis to the State VR agencies which provide rehabilitation services for the restoration of disabled persons to gainful employment. Under the Rehabilitation Act of 1973 priority is given to severely disabled individuals.

Basic services under this program include:

- comprehensive evaluation;
- medical, surgical and hospital care, along with related therapy to remove or reduce disability;
- prosthetic and orthodontic devices;
- counseling, guidance, referral, placement and training;
- use of comprehensive or specialized rehabilitation facilities;
- maintenance and transportation during rehabilitation;
- tools, equipment and licenses for work on a job or in establishing a small business;
- initial stock, supplies and management assistance for small businesses, including establishment of vending facilities by the State agency;
- readers for blind persons and interpreters for deaf people;
- recruitment and training to provide new careers for disabled people in the fields of rehabilitation and other public service areas;
- construction or establishment of rehabilitation facilities;
- provision of facilities and services which promise to contribute to a group of handicapped persons but which do not relate directly to the rehabilitation plan of any one person;
- services to families of handicapped persons when the services will contribute to the rehabilitation of the handicapped client;
- follow-up to help disabled persons hold a job;
- and other goods and services necessary to render handicapped persons employable.

In Fiscal Year 1979, total rehabilitations under the State-Federal VR programs were 288,324, of which 143,375 (49.7 percent) were people with severe handicaps. One million people are served under the program each year.

An independent living authority has been added to our program with the Rehabilitation Act Amendments of 1978. Designed to enable severely disabled persons to live independently in their communities, even though vocational goals for them might not be possible, independent living could include the following services: intake counseling to assess the needs of severely disabled persons, advocacy to ensure that clients receive services to which they are entitled, help in locating accessible housing and transportation, and other services which help them become independent.

The legislation is in three parts: part "A" is a State formula grant program of comprehensive services under a state plan, with a minimum allotment to each state of $200,000. An appropriation of $10,465,000 is required to fund part "A" at the minimum level; part "B" is a program to establish and operate independent living centers. Thus far, this is the only independent living program in operation. Part "C," independent living for older blind individuals, can be funded in an amount not to exceed 10 percent of the amount made available for part "A" in any fiscal year.

Projects under part "B" are awarded for a period of 3 years, with annual continuation, assuming the appropriation of funds and satisfactory progress. There is, therefore, an assumed obligation to continue through the project.

During FY 1979, the first year of this program, RSA awarded 10 grants to State VR agencies for establishing independent living centers. These grants came for $2 million appropriated by Congress for that purpose.

During Fiscal Year 1980 we expect to award between 50 and 65 new grants averaging $200,000 each to establish and operate independent living centers.

Of $15 million specifically earmarked for this purpose, $2 million will be held in reserve for continuing projects which were started in 1979, while $13 million will be available for new projects.

Projects with the best chance of receiving grants are those which serve all disabilities through the utilization of resources in the community, such as CETA, Titles XIX and XX of the Social Security Act, public housing and transportation, and others.

By law, the State VR agency is the principal eligible applicant for these projects. If the State agency has not applied for a grant within 6 months after the RSA Commissioner announces their availability, local private or nonprofit agencies become eligible to apply.

RSA also provides an advocacy focal point for handicapped people through our Office of Advocacy and Coordination.

In addition, RSA has authority to support the following program areas, although some of thse are not currently funded:

(1) formula grants for innovation and expansion of rehabilitation services;
(2) special projects and demonstrations;
(3) client assistance projects;
(4) grants and planning and constructing rehabilitation facilities;
(5) facility improvement and staffing grants;
(6) grants for training services in rehabilitation facilities;
(7) technical assistance for rehabilitation facilities;
(8) support for training rehabilitation personnel;
(9) migratory agricultural and seasonal farm workers;
(10) Native Americans;
(11) Randolph-Sheppard blind vending facility program;
(12) Projects With Industry;
(13) the new Business Opportunities program;
(14) recreational facilities;
(15) spinal cord injury, cerebral palsy, muscular distrophy, pulmonary-respiratory diseases;
(16) alcoholism, drug abuse and mental health; and
(17) the Helen Keller National Center for Deaf-Blind Youth and Adults.

RSA's budget for the current fiscal year is approximately $1 billion.

With the most significant legislation for handicapped persons in place, increasingly active participation by disabled individuals in the rehabilitation process, a greater awareness and sensitivity on the part of all Americans to the needs of handicapped persons, and the active support of an Administration that cares about the needs of our disabled citizens, I believe that the 1980's may well go down in history as the "decade for disabled people."

With RSA's new assignment within the Office of Special Education and Rehabilitative Service in the Department of Education, I look forward to our first opportunity in the history of our program to develop policies and programs which meet the total service needs of handicapped persons, of all ages.

Robert R. Humphreys is Commissioner of Rehabilitation Services, Education Department, for the Office for Special Education and Rehabilitative Services, Washington, D.C.

Vocational Rehabilitation Services for Severely Handicapped Persons: Rights and Reality

By Frank J. Laski

On May 5, 1980, the *Philadelphia Daily News* reported:

> *"It has been a long year for Robert Wasylenko.*
>
> *The 22-year-old retarded man from the Far Northeast attended Spruance School until last June, when the public school system's responsibility for him ended.*
>
> *Since he was 19, Wasylenko has been on a waiting list for a planned sheltered workshop; where he would receive physical and occupational therapy as well as work, maybe on electrical assembly, or packaging.*
>
> *But instead of working this past year, Wasylenko has been at home. Doing nothing."*[1]

This June throughout the country another cohort of "right to education" graduates will join the ranks of severely handicapped adults "at home—doing nothing."

Developmentally disabled adults are largely excluded from the world of real work. Despite the growth in resources for vocational education, training and rehabilitation and despite legal requirements for affirmative action in hiring, severely handicapped persons and the developmentally disabled among them are still denied the opportunity to earn a decent wage, to attain the dignity of productive occupation and to share the benefits of contributing to their own well being and the welfare of the community. There are many reasons why developmentally disabled adults do not get and keep real jobs. The most important reason is that they are excluded from the training and rehabilitation opportunities which they need to be productive citizens. Instead, many developmentally disabled adults, once they finish school, are given short term "work evaluations" and then kicked out of State-Federal Vocational Rehabilitation programs or are tracked into county "work activities" programs which are not work at all but a continuation of play-school, or, worst of all, sit idle at home.

The exclusion of developmentally disabled persons from real vocational training is not because developmentally disabled persons cannot benefit from those programs. All can and when provided with the opportunity, the structure and support, do productive work. In some states where effective training and support services have been provided, developmentally disabled persons are leaving work activity centers "earning" less than 25% minimum wage and are going into competitive employment in industry. Also severely and profoundly retarded and multiply-handicapped persons are, in a number of states, trained and now perform complex assembly work for industries earning competitive wages.[2] The vocational competencies and skills of severely developmentally disabled persons that can be realized after structured training have been shown over and over again to contradict the stereotypes and low expectations many agencies assign to the mentally retarded, cerebral palsied and other developmentally disabled persons. For example, Kevin Lynch reports the results of demonstrations conducted at the University of Michigan where moderately and severely retarded adults "who had been declared nonfeasible by traditional vocational evaluation systems were trained to

produce rapidly and without error a complex 14-piece simulated benchwork assembly."[3] Working a full day, these employees were able to produce, on the average, at 70% of a non-handicapped worker's rate.

Severely and profoundly retarded persons have demonstrated their work potential in assembly of 26-piece print heads; 52-piece cam switch actuators; electronic circuit boards and complex cable harnesses.[4] The work experience of developmentally disabled persons has led vocational experts to conclude:

> *"[O]ver a 20 year period the work potential of this population has been repeatedly demonstrated. . . . The question now . . . is not whether severely and profoundly [developmentally disabled] adults can be taught the skills necessary to function independently in a vocational setting, but rather how best to teach those skills."*[5]

The data are in and now should drive out the uninformed opinions that severely handicapped people cannot be gainfully employed, or can only work for sub-minimum wages in "workshops", or only play at pre-work tasks in "work activities centers."

Lack of money should not be accepted as an excuse for denying developmentally disabled persons necessary training. Nationwide substantial federal, state and local resources are available for adult services. However, developmentally disabled people are either cut out of the programs or the programs funded for them do not provide real training. For example in Pennsylvania:

- In Fiscal Year 1979, the state received over $40 million for its vocational rehabilitation program in which "the most severely handicapped individuals have priority."
- In Fiscal Year 1979 county MH/MR budget requests for vocational habilitation services amounted to over $20 million.
- Other substantial federal resources for vocational services for developmentally disabled persons come into Pennsylvania and all other states from the federal government through titles of the Rehabilitation Act, the Vocational Education Act and the Comprehensive Employment and Training Act (CETA).

Similar resources exist in each state but are not used to prepare severely disabled people for productive work. Nearly $2 billion annually is devoted to vocational rehabilitation and training for disabled people.[6] In addition, Bellamy, *et al.*, estimate that current public expenditures for adult day programs in the U.S. (chiefly from Titles XIX and XX of the Social Security Act) exceeds $330 million.[7] Given the resources designated for vocational services for severely handicapped persons, including the developmentally disabled, the knowledge as to vocational skills of developmentally disabled persons and the tremendous value of vocational services to the handicapped individual, it is important for advocates to document the failures of the existing rehabilitation programs, to target on each agency's responsibilities and to use all legal tools present in federal and state law to secure entitlement to vocational services.

Failure of Rehabilitation Agencies to Provide Real Vocational Services

By and large agencies responsible for arranging for appropriate vocational services for developmentally disabled persons and enforcing the legal mandates for vocational services to date have demonstrated neither the will nor capacity to do so.

There is widespread agreement that developmentally disabled people do not have a fair opportunity to obtain vocational rehabilitation services. In 1978, the U.S. Department of HEW in an audit of a five-state sample reported that a number of fundamental legal requirements were not being met.[8] More than one-half of the clients did *not* have an individualized written rehabilitation plan (IWRP); which like the individual education plan (IEP) is required by federal law. More than one-half the clients were not aware of their right to appeal ineligibility determination. Almost three-fourths were placed in an occupation which did not match the job goal jointly established (as required by law) by the client and BVR counselor. And only eight percent of the clients were referred to another agency (*e.g.*, the county MH/MR office) after being declared ineligible for vocational rehabilitation services.

Vocational Rehabilitation agencies share the failures of other state agencies in vocational rehabilitation for the severely handicapped. As a major study commissioned by the Congress reported:

> *"Because of its vocational orientation, the vocational rehabilitation program seems to be making conservative choices regarding acceptances."*

"Severity of handicap was the most common reason for rejection of vocational rehabilitation services for persons referred."[9]

More specifically as to persons with cerebral palsy, especially those with severe handicaps, UCPA reported that they are:

". . . receiving relatively negligible assistance from state departments of vocational rehabilitation. Many vocational rehabilitation counselors have failed to recognize . . . the employment potential of many persons severely disabled with cerebral palsy. This tendency has caused many individuals to be denied admission to programs even though these same people have subsequently completed training programs sponsored by UCPA and other agencies and have been placed in competitive employment."[10]

Simply put, persons with cerebral palsy and other developmentally disabled persons with most severe handicaps are systematically excluded from vocational rehabilitation programs.

Other agencies, while including the vocational rehabilitation rejects, do no better in terms of effective vocational services. For example, a committee of vocational experts, convened by the Pennsylvania Office of Mental Retardation in 1978 made the following commentary on MH/MR vocational programs, as well as vocational rehabilitation and the Department of Education efforts:

"The Committee sees as the most pervasive problem in the present system of vocational habilitation services for [developmentally disabled] persons as . . . low expectations. Our low expectations and our programmatic inadequacies are all too frequently expressed as 'a person who is [developmentally disabled] cannot . . . .'"

Concerning the Office of Mental Retardation funded programs, the expert committee said:

". . . the $14.3 million investment in vocational programs through DPW's mental retardation system has not been spent in a manner which would provide effective [vocational services]."

". . . OMR has not yet clearly established direction for MR vocational habilitation services. MH/MR county programs have by and large purchased traditional and terminal sheltered workshop/work activities center services at arbitrary fees."

And as to the Department of Education's failures:

"One of the objectives adopted by the federal government for education of the handicapped is to assure that every handicapped client who leaves school has had career and educational training that is relevant to the job market, meaningful to the person and realistic to his or her abilities. However, the Pennsylvania Department of Education has not by and large implemented vocational preparation programs for the more substantially handicapped students . . . that are sufficient to enable them to take their place in the world of work once they exit school."

The failures of Pennsylvania's "vocational services system" were described by the expert committee in three parts:

"First, we have not implemented the new client training technologies which have established that severely handicapped individuals can be trained to be rapid and competent in complex job skills. Secondly, we have ignored the evidence that evaluation and training must . . . take place in a setting that is as close to a regular industrial environment as possible. . . . Third, we have failed to use long available and proven techniques from other fields to enhance the production and business aspects of VR programs."[11]

All these failures, which are not unique to Pennsylvania, result in lack of appropriate vocational services for developmentally disabled persons. Advocates can change the present unlawful situation by (1) focusing on the facts about work potential of all developmentally disabled persons, and (2) using the provisions in federal and state law outlined below.[12]

Rights under the Rehabilitation Act

In 1973, 1974 and 1978 the United States Congress passed legislation to strengthen the rights of handicapped persons to vocational services.[13] In the Rehabilitation Act of 1973, the Congress reversed the direction of traditional services to those individuals with the most severe handicaps. In 1974, amendments were passed to insure that the eligibility determination process did not unfairly exclude persons from rehabilitation services and in the 1978 Amendments, the Congress provided for a new program of independent living services, to be provided through VR agencies, specifically for developmentally disabled persons, and other severely handicapped persons formerly excluded from traditional VR programs. Both in the independent living program and the regular vocational rehabilitation program the state vocational rehabilitation agencies must follow strict procedures to insure persons are not excluded arbitrarily, are consulted with as to services provided, have full individualized written rehabilitation plans

which are annually reviewed and receive the vocational services needed to enable the disabled individual to obtain employment "consistent with his capacities and abilities." In sum, the Congress in these amendments conferred substantial rights to rehabilitation services on disabled persons and imposed new duties on rehabilitation agencies. The following sections detail these rights and duties and how disabled people and their advocates can enforce them.

Scope of Vocational Rehabilitation Services

When we think of vocational rehabilitation services, vocational training either in a workshop or on the job comes to mind. Also physical therapy, occupational therapy and other treatment which alleviates physical conditions which limit vocational functioning are commonly thought of as "voc-rehab" services. However, under the federal law there is a broad scope of rehabilitation services available to disabled persons, and vocational rehabilitation services can include virtually any goods or services that can be used to assist disabled persons in terms of their employability. Each state is required to designate an agency or agencies to operate the federal-state rehabilitation program and carry out the duties and responsibilities specified in the Rehabilitation Act. In some states two agencies operate the rehabilitation program with one agency responsible for providing rehabilitation services to blind and visually impaired persons and a general agency responsible for providing rehabilitation services to all disabled persons except blind and visually impaired persons. Under the federal program the state agency must make available as appropriate to the needs of each individual the following vocational rehabilitation services:[14]

1. **Diagnostic and evaluation services** necessary to determine eligibility and to determine the vocational services to be provided.[15]
2. **Counseling and guidelines services**, including personal adjustment counseling obtained through referral to another agency.
3. **Physical or mental retardation services**, including medical or corrective surgical treatment, hospitalization, drugs, prosthetic or other assistive devices, eye glasses and visual services, physical therapy, occupational therapy, speech and hearing therapy, therapeutic recreation services, psychological services, and other medical or medically related services.
4. **Training**, including personal and vocational adjustment, training books, tools and other training materials. Training may range from a few weeks personal adjustment to short term training in a vocational school or a rehabilitation center to four year training in a college or university.
5. **Income maintenance**, including payment to cover basic living expenses, such as food, shelter and other subsistence necessary during training.
6. **Transportation**, including travel and related expenses during training and vocational rehabilitation process. May include relocation expenses necessary to achieve a vocational objective.
7. **Family services** - services to members of a handicapped person's family when necessary to the vocational rehabilitation objective of the person.
8. **Interpreter services for deaf individuals.**
9. **Reader services**, orientation and mobility services for blind individuals.
10. **Telecommunications**, sensory and other aids and devices.
11. **Placement** of individuals in suitable jobs.
12. **Post employment services** necessary to maintain suitable employment.
13. **Other goods and services** which can reasonably be expected to benefit a handicapped individual in terms of employability.

This listing of services is summarized directly from the Rehabilitation Act and the federal regulations clearly shows that the rehabilitation program is equipped to provide a great range of services to assist disabled people to prepare for and enter the workforce. Of course, no client will require or receive all services. The rehabilitation counselor, working and consulting with the client, has the job of putting the services together in individual plans to enable disabled persons to reach their maximum potential.

The rehabilitation counselor acts as a counselor-broker for the disabled person. The counselor verifies eligibility based upon a finding of physical or mental disability, assists in planning the individualized program for the client, and acts as broker to purchase and arrange services necessary to carry out the program.

Under the law, the counselor can tap a wide array of services and the client, through his counselor, can obtain all necessary services, whether they be medical or medically related, social services or education and training services, in order to complete his rehabilitation program. This flexibility, while necessary to develop a program to fit the needs of the client, does allow for the exercise of a greal deal of power and discretion by the counselor in arranging services and carrying out many tasks which many

disabled persons cannot accomplish independently. Therefore, it is most important that a good relationship be established between the rehabilitation counselor and the client.

While the cooperative relationship is the ideal, the law and federal regulations provide strict procedures on eligibility and development of rehabilitation plans, so that if disagreements, disputes or differences of opinion arise as to eligibility for services or any other aspect of the program, they can be resolved fairly in accordance with due process.

Eligibility for Vocational Rehabilitation Services

Eligibility for vocational rehabilitation services from state vocational rehabilitation agencies is determined on an individual basis. There can be no exclusion based on disability (*e.g.*, too severely disabled), age (*e.g.*, too young), race, sex, color, creed or national origin.[16] Two eligibility criteria must be met:

— The presence of a physical or mental disability which for the individual constitutes or results in a substantial handicap to employment; and

— Reasonable expectation that the provision of vocational rehabilitation services can benefit the individual in terms of employability.[17]

The federal regulations define further the key eligibility criteria. "Physical or mental disability" means "a physical or mental condition which materially limits, contributes to limiting, or if not corrected will probably result in limiting an individual's activities or functioning."[18]

"Substantial handicap to employment" means "that a physical or mental disability . . . impedes an individual's occupational performance by preventing his obtaining, retaining or preparing for employment consistent with his capabilities and abilities."[19]

All applications for services and referrals must be handled to insure that each disabled person receives a speedy and fair determination of eligibility. The first step in the process is the preliminary diagnostic study to establish the existence of physical or mental disability, extent of employment handicap, and whether vocational rehabilitation services will benefit the individual in terms of employability. The preliminary diagnostic study must include an appraisal of health status and for mentally retarded persons a psychological examination. There are three possible results of the preliminary diagnostic study.[20]

1. **Disabled person found eligible.** Then the counselor must prepare and sign a certificate of eligibility and the client will proceed to further evaluation and services.
2. **Disabled person found ineligible.** Then the counselor must prepare and sign a certificate of ineligibility determination and inform the person of the right to challenge the decision, and have an administrative review and fair hearing. The ineligibility certification, like all other decisions in the rehabilitation process, must be made only "after full consultation with the individual or as appropriate his or her parent, guardian or other representative."[21]

Unless the individual refuses or is not available, (*e.g.*, whereabouts unknown) there must be a review within 12 months of all decisions that the individual is ineligible because there is no vocational potential.

3. **Disabled person needs further evaluation to determine eligibility.** In many cases for developmentally disabled persons and other severely handicapped persons it will not be possible to determine vocational potential on the basis of a preliminary diagnostic study or a short term evaluation. In those cases the law and regulations provide for a period of "extended evaluation" which can last for up to eighteen (18) months. Therefore, rather than a yes or no on eligibility for services the person is found eligible for extended evaluation and the counselor signs a certificate of eligibility for extended evaluation. During extended evaluation the client is entitled to a wide array of services to determine vocational potential and has all the rights of a rehabilitation client.

The legal provisions for extended evaluation are among the most important protections in the law for severely handicapped persons whose work potential is not obvious. *In any case, where a disabled person is found ineligible for vocational rehabilitation services on the basis of a preliminary diagnosis that concludes the individual has no vocational potential, the individual or the advocate should request extended evaluation services and, if denied, request administrative review and fair hearing.*

A Few Hints on Eligibility Determination

The eligibility process as outlined above is fairly

simple, however, in practical terms, it may present problems to severely handicapped applicants.

Developmentally disabled persons will rarely, if ever, have a problem meeting eligibility criteria related to existence of disability or substantial handicap to employment. However, the criteria of "employability" is often used to exclude developmentally disabled persons as well as other severely handicapped individuals.

Since the application of the "employability" is essentially a prediction (the law says "an expectation") about an individual's vocational potential it is important for advocates to understand the process for making the determination (who makes it, how, how valid it is, who can challenge it, what happens if no prediction can be made at the time of application). Determinations based on traditional assessment tools (*e.g.*, IQ tests, aptitude tests, adaptive behavior checklists, work samples) should be challenged and subjected to close scrutiny inasmuch as rehabilitation agencies are likely to use these and other assessment procedures originally developed for less handicapped individuals and apply them invalidly to severely handicapped persons.[22]

Special care must be used when the agency finds a disabled person ineligible because the individual is "not feasible" for rehabilitation or not capable of "competitive employment" or "gainful employment." These statements reflect the tradition of vocational rehabilitation agencies to focus on mildly handicapped persons and overemphasize "gainful" and "competitive" employment. Before 1973 the law made specific reference to "gainful employment," however, in 1973 the emphasis was shifted to "employability" and priority was placed on severely handicapped persons who require multiple services over a long period of time to achieve their vocational potential. Still many counselors and supervisors have not adjusted their practices to conform to the letter and spirit of the Congressional reforms.

Once the individual is found eligible for services or extended evaluation, a series of steps must be taken to plan and deliver services. Each step along the way the client is protected from termination from the program unless it is established "beyond a reasonable doubt" that the client has no vocational potential.[23]

Priority for Services - Order of Selection

Rehabilitation agencies, like many other agencies serving disabled people, have a greater demand for services than they can supply. At various times shortage of staff, lack of funds, and shortage of providers make it impossible to serve all clients. To deal with this problem Congress requires state rehabilitation agencies to set forth in writing the order to be followed in selecting groups of handicapped individuals to be provided to all eligible individuals. This "order of selection" must assure that those groups of individuals with the most severe handicaps are selected for service before any other group of handicapped individuals.[24] Therefore, under the law severely handicapped individuals have more than equal access to rehabilitation services, they have a priority. They must be served first.

Most developmentally disabled persons fall under the definition of severely handicapped person[25] and are entitled to priority consideration from the agency. If a developmentally disabled person's vocational rehabilitation services are being delayed or denied because of lack of services or because the agency "cannot serve everyone," the client or advocate should question whether the priority to serve severely handicapped individuals first is being followed and request administrative review and fair hearing.

Individualized Written Rehabilitation Plan (IWRP)

Once a person is certified as eligible for vocational rehabilitation services, the counselor and the client (and parent, advocate or representative if appropriate) get together to develop the plan for vocational rehabilitation services. This plan is called the Individual Written Rehabilitation Plan. Counselors often refer to it as the IWRP. The IWRP is central to receiving full service entitlement under the Rehabilitation Act. As one federal district court noted:

> *One of the paramount goals of the Act is to provide rehabilitation services which are tailored to each individual's needs. . . .[The IWRP] provision was added to the Act because: 'it became apparent that the individual client was not being sufficiently consulted on his own behalf in tailoring the rehabilitation program to his individual needs'". [citation ommitted]* Scott *v.* Parham *422 F. Supp. 111, 113 (1976).*

Advocates familiar with Individual Education Plans (IEP) required to guide education programs for handicapped children, will recognize much similarity

in the procedures and practices relating to the Individualized Written Rehabilitation Plan (IWRP).

IWRP Content Requirements

The federal law and regulations specify what must be contained in the IWRP.[26] It must include:

- The basis for eligibility determination
- Statement of intermediate rehabilitation objectives to attain long range goals
- Statement of specific vocational rehabilitation services to be provided
- Date of the start of each service
- Statement of how long each service will be provided
- Procedure and schedule for reviewing the progress of the rehabilitation plan
- Statement of the views of the individual or the client's advocate concerning the goals and objectives set
- Statement of client responsibilities including any financial responsibility for cost of program
- The basis for determination that the client is "rehabilitated"
- Statement of plans for post employment services
- Statement that the client has been informed of the right to challenge agency decisions and the right to seek administrative review and fair hearing
- Statement of all the terms, conditions, rights, remedies under which goods and services will be provided

IWRP - Procedural Requirements

The procedure to be followed in developing the IWRP is just as important as what is in it. In fact the procedure will in many cases determine what ends up in the IWRP and determine how useful it will be to the client. Four simple requirements must be followed:

(1) The IWRP must be in writing.
(2) The IWRP must be developed jointly in full consultation with the client, or, as appropriate, a parent, guardian or representative.
(3) The counselor must provide a copy of the IWRP to the client or, as appropriate, a parent, guardian or representative.
(4) The IWRP must be reviewed periodically (at least once a year) jointly by the counselor and client.

After the IWRP is written and agreed to by the counselor and client, the law and regulations set forth additional procedures which must be followed if services are to be terminated because the disabled person is not capable of achieving a vocational goal.[27]

A client cannot lawfully be terminated from vocational rehabilitation services (or extended evaluation services) unless:

- The agency makes a decision that the client has no vocational potential and that judgment is established "beyond a reasonable doubt."
- The agency makes the decision in full consultation and participation with the client or his representative and records the view of the client in the IWRP.
- The reasons for the decision are recorded in the IWRP.
- There is a periodic review (at least once a year) of the termination in full consultation with the client.

These requirements make it clear there is a strong presumption in favor of continuing disabled persons in rehabilitation programs. The disabled person is to be given every benefit of the doubt. Only when it is clear beyond a reasonable doubt that the person cannot meet a vocational goal is termination justified.

A Few Hints on How to Use the IWRP

The Individualized Written Rehabilitation Plan is the key to defining the disabled person's rights in the rehabilitation system and to enforcing those rights if a disagreement occurs.

It should be obvious that if the client does not have an IWRP it will be difficult if not impossible for a hearing officer or a judge to review the case and make a determination. Therefore, immediately after eligibility certification you should request that an IWRP be developed, that you participate in its development and get a copy. Do not allow the IWRP to be treated as a mere formality or extra "paperwork." Treat it as an important contract.

First, the IWRP should include all the necessary content requirements outlined above. For example, if the long range goal is "to obtain employment as a computer programmer," the IWRP should list specific intermediate objectives to reach the goal.

Second, the IWRP should be as specific and concrete as possible. Instead of "Computer programming training" the IWRP should specify "twelve month training in the Agawam Community College IBM training program to commence September 6, 1980."

Third, check the list of services and determine whether the IWRP is complete. Does it include placement? Does it specify what the agency will do to assist the client to find a job? Does it include

transportation?

If there is some disagreement on the terms of the IWRP that cannot be resolved, put your views in writing and ask that they be included in the IWRP.

Ask questions about limitations and restrictions placed on services. If the BVR is willing to provide three months training and no more ask for the basis of the limitation. Is it based on the counselor's opinion or a state policy? Is the policy in writing? Ask for it.[28]

Administrative Review - Fair Hearing and Appeal

If a person is excluded from rehabilitation services or has a disagreement as to the scope, nature or duration of services, he has a right under federal law to appeal.[29] The appeal process consists of five steps:

1. Administrative Review
2. Fair Hearing
3. Review by Commissioner of The Rehabilitation Agency
4. Review by U.S. Secretary of Health, Education and Welfare.
5. Judicial Review in State Court or Federal Court

The federal regulations provide that an applicant for or recipient of vocational rehabilitation services under the State plan who is dissatisfied with any action, with regard to the furnishing or denial of such services, may file a request for an administrative review and redetermination of that action to be made by a member or members of the supervisory staff of the State agency. The State plan shall further provide that when the individual is dissatisfied with the finding of this administrative review, he shall be granted an opportunity for a hearing before the State administrator or his designee.[30]

The regulations further provide, if the client after administrative review and fair hearing, is still dissatisfied with any determination "made under an individualized written rehabilitation program" the client or advocate or representative may request a review by the Director of the state agency. The final decision must be in writing and made by the Director. It cannot be delegated to a subordinate officer. The decision of the Director can be appealed to the U.S. Secretary of Health, Education and Welfare who makes the final administrative determination.[31] If further appeal is necessary, the client must sue in U.S. District Court, or state court.

In a number of states, vocational rehabilitation agencies have been lax in providing fair hearings to clients. In September 1979, the Pennsylvania Commonwealth Court in the case of *Cook v. Bureau of Vocational Rehabilitation*[32] found that the agency was in violation of state and federal law for its failure to conform to the correct procedure on administrative review and fair hearing. The fair hearing process should at minimum include, (1) notice of hearing and appeal rights, (2) right to representation by an advocate or attorney, (3) right to present evidence and question agency staff, (4) right to a stenographic record, (5) right to an independent hearing officer, (6) right to a final determination by the Director of the agency.

Many times disagreements between the counselor and the client may be resolved informally by revising the IWRP. If not, the first level supervisory review may resolve differences. However, in some cases, the counselor and supervisor may be sympathetic but must follow agency policies and rules which adversely affect the client. In those cases and other stalemate situations, the client must go to fair hearing. For example, in the case of *Nan Byrne*[33] both the rehabilitation counselor and district supervisor wished to provide training services to a blind student over and above the agency's monetary limit on undergraduate training ($1,800 a year), but they had to obey the Director's order that the limitation be applied in all cases. Therefore, Ms. Byrne and her attorney had to go through a fair hearing to have the policy voided and secure services necessary for rehabilitation.

Although the appeals process may seem long and complex, disabled persons who are denied services should not hesitate to appeal an adverse decision. Hearings are not popular with agency staff, and in some cases the prospect of a review of their decisions by higher authority may cause a reconsideration which will result in services being continued.

Conclusion

Evidence is gathering which suggests that we are supporting at a substantial cost adult service programs and "rehabilitation" programs which exclude or ineffectively serve severely handicapped

persons.[34] The state-federal vocational rehabilitation program is a significant part of this complex of programs, and the Congress; at least, has looked to it to play a large role in meeting the rising expectations of handicapped persons generated by rights to education, and rights to effective services under §504 and affirmative action obligations under §503.[35]

With the advent of "Independent Living Services" there is great temptation to leave the traditional VR program at rest and turn to the development of another track of services for severely disabled people. Some would even scrap the emphasis on severely handicapped within the state-federal VR Program. However, given the legal and procedural tools provided by the Congress; the knowledge about the competencies of severely handicapped persons together with the existing technologies to free those competencies and the judicial respect for the individualized entitlement to service; and client participation in the rehabilitation program, we should not continue to ignore VR but rather focus more advocacy resources on rehabilitation to secure what the Congress mandated in 1973.

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Notes

1. Philadelphia Daily News, May 5, 1980 (two star ed.) p.6.
2. Bellamy, T., Inman, D., & Yeates, J., Evaluation of a Procedure for Production Management With the Severely Retarded. *Mental Retardation*, 1978, 17 (1), 37-41; Martin, G., Pallotta, A., "Behavior Modification in Sheltered Workshops and Community Group Homes for the Retarded," in Hammerlynck, G. (Ed.), *Applied Behavior Analysis Techniques for the Developmentally Disabled*, New York, Brunner Mazel, 1979.
3. Lynch, K., "Toward a Skill-Oriented Prevocational Program for Trainable and Severely Mentally Impaired Students," in Bellamy et al., *Vocational Rehabilitation of Severely Handicapped Persons*, Univ. Park Press, Balt., Md. (1979) p. 254.
4. The references to these examples and others are gathered in Bellamy, T., Sheehan, M., Horner, R., and Boles, S., *Community Programs for Severely Handicapped Adults: An Analysis of Vocational Opportunities*, Center on Human Development, U. of Oregon, Feb. 1980, p. 10-11.
5. Bellamy, T., Inman L., and Schwarz, R., "Vocational Training and Production Supervision: A Review of Habilitation Techniques for the Severely and Profoundly Retarded," in Haring and Bricker (Eds.), *Teaching the Severely and Profoundly Handicapped*, Vol. III (Columbus) Charles E. Merrill (1978).
6. Levitan, S., & Taggart, R., *Jobs for the Disabled*, Johns Hopkins Univ. Press, Balt. 1977, p. 29, giving $1.7 billion as 1975 figure.
7. Bellamy, T., et. al., *op. cit.* n. 4 at p. 7.
8. HEW, Audit Agency, *Review of the Administration of the Vocational Rehabilitation Program in Five States*, Office of Inspector General, HEW, Wash., D.C., Audit #15-80300, 1978.
9. Urban Institute, Report of the Comprehensive Needs Study, Wash., D.C., 1975 p. 149.
10. Ross, C., "Federal Agency Studies of the Sheltered Workshop Environment: Changes in Rehabilitation Advocated," *Word from Washington*, (Wash., D.C.) UCPA, Vol. 7, no. 2, April 1978.
11. The quotations are from Polloni, et al., *Report of the Ad-Hoc Task Force on Vocational Services*, Pa. Office of Mental Retardation, Harrisburg, Pa., 1978.
12. Given the enactment of Title VII of the Rehabilitation Act providing for "severely handicapped persons, some may question whether the critique of the traditional VR program is still relevant and the focus on vocational objectives for severely handicapped still necessary. The answer to both questions is yes. Although the Independent Living Program does not focus exclusively on vocational goals, it is equally clear that individuals eligible for independent living should not be excluded from vocational rehabilitation services. In the introduction to the HEW proposed regulations on the Independent Living Program, Secretary Harris says:

    "It is expected that many severely handicapped persons who will receive independent living services will demonstrate a vocational potential and will be referred to the State's vocational rehabilitation program for eventual vocational placement. It must be pointed out that the [Independent Living Program] is not intended to replace the 'extended evaluation' provisions. Where the feasibility of providing vocational rehabilitation services, it is expected that the 'extended evaluation' procedures will continue to be followed. 44 *Fed. Reg.* 68575, Nov. 29, 1979.
13. P.L. 93-112 (1973); P.L. 93-516 (1974); P.L. 95-602 (1978).
14. 29 U.S.C. 723; 45 C.F.R. 1361.1(e).
15. 45 C.F.R. 1361.34-1361.35.
16. 45 C.F.R. 1361.33(a).
17. 45 C.F.R. 1361.33(b).
18. 45 C.F.R. 1361.1(s).
19. 45 C.F.R. 1361.1(bb).
20. 45 C.F.R. 1361.37(a)(b)(c).
21. 45 C.F.R. 1361.37(c).
22. For critiques of current vocational assessment techniques as applied to severely handicapped persons and suggested approaches to integrating assessment and training, see Schalock, R., and Koran, O., "Relevant Assessment: The Interaction Between Evaluation and Training," and Irvin, L., and Halpern, A., "A Process Model of Diagnostic Assessment" in Bellamy, G., O'Connor, G., and Koran, O., *Vocational Rehabilitation of Severely Handicapped Persons*, Univ. Park Press, Balt. (1979), Ch. 2, 3.
23. 29 U.S.C. §722(2)., See *Cook v. Pa. Bureau of Vocational Rehabilitation*, 405 Atl. 2d. §1000 (1979).
24. 29 U.S.C. §721(a)(5)(A); 45 C.F.R. 1361.31.
25. 29 U.S.C. §706(12); 45 C.F.R. 1361.1(w).
26. 29 U.S.C. §721(9), 722; 45 C.F.R. 1361.39.
27. 29 U.S.C. 722(2); 45 C.F.R. 1361. 39(3).
28. 45 C.F.R. 1361.45.
29. 29 U.S.C. §722 (as amended); P.L. 95-602, 92 Stat. 2959, 2987.
30. 45 C.F.R. 1361.46.
31. 45 C.F.R. 1361.48 (to be added as proposed in 44 *Fed. Reg.* 68589, Nov. 29, 1979.).
32. 405 Atl. 2d. 1000 (1979).
33. Pa. D.P.W. Adjudication, March 17, 1977, Dolfman, B., Hearing Examiner.
34. See, e.g., Gliedman, J., and Roth, W., *The Unexpected Minority, Handicapped Children in America*, Carnegie Council on Children, Harcourt Brace Jovanovich, N.Y. 1980, p. 487-494; Bellamy, T., Sheehan, M. Horner, R., and Boles, S., *op. cit.* n. 2.; Levitan, S., and Taggart, R., *op. cit.* no. 5a.
35. See H. Rep. 1149, 95th Cong., 2nd Sess. 11 (1978).

A Personal Perspective on the 80's

by Edward V. Roberts

Like so many other persons with disabilities, I began to dream in the sixties.

We saw buildings with steps and narrow doors and imagined ramps and wide doors. We dreamed of real mobility.

We saw school systems which segregated children with disabilities into so-called special schools, classes or programs and envisioned mainstreaming: where disability was considered no more relevant than any other physical characteristic in the placement of students. We dreamed of teaching assistants who would interpret for deaf children or read for blind children in the regular classroom setting.

We saw an economic system which consigned persons with disabilities to make work or menial jobs. We dreamed of programs which could train the most severely disabled person to work in the most demanding and lucrative jobs such as computer programming. There would be major business participation in such a program that would provide teaching personnel and meaningful job placement opportunities. We envisioned more and more the use of advanced technology to enable people with even the most severe disabilities to work. There seemed to be no limit to our dreaming.

We saw the isolation and frustration of persons with disabilities and their dependency on family and custodial institutions. We began to conceive of the concept of independent living. We dreamed of a center which would advocate for and provide the range of services that a disabled person needs in order to effectively participate day by day in society—a center which would bring together persons of various disabilities, the physically disabled, the deaf, the blind, persons with developmental special needs and others. We envisioned a center which would provide peer counseling, job training and counseling, attendant care and referral services, sex counseling, legal assistance and transportation and recreation programs.

We saw that disabled persons were all-too-often ignored as a political force. We began to talk about starting a coalition of persons of all disabilities that would grow into an effective lobbying organization with political muscle. We saw a day when we would work with federal and state officials to draft effective civil rights laws to protect the rights of persons with disabilities and to create workable programs rather than welfare programs for the disabled. We began to look forward to the day when many more people with disabilities would become elected officials, judges and, yes, even bureaucrats.

We heard the never-ending litany that it would be too costly to integrate disabled persons into society. We knew that these economic arguments were based on a series of myths and assumptions and began to dream of the day when business and government would begin to make decisions based on economic realities rather than myths. Sooner or later, our society would recognize that it is more productive and cost-effective to afford a person with a disability the opportunity to compete in the job market.

We saw and experienced the stigma of being sterotyped. We were seen as weak and helpless; we were considered asexual; our intellectual abilities were underestimated or underutilized; people were surprised when we laughed and embarrassed when we cried. They were shocked when we showed anger and bewildered when we were aggressive.

We knew that it would be possible for us to relate in different ways: that persons without disabilities would get mad at us when we were stupid or refuse to laugh when we told an inane joke; we knew that one day persons without disabilities would

stop patronizing or condescending to us. We also knew that one day employers would hire disabled persons because they were the most competent and not because of their disabilities.

We saw governmental and business officials who were satisfied with statistical complacency and officials who all too often created and perpetuated programs which looked good on paper and in reports but which in reality were dysfunctional to persons with disabilities. We began to dream of a time when leadership and imaginative and innovative approaches would produce more fruitful results.

During the 1970's persons with disabilities from all parts of the country began to share their dreams and began to build models which would prove to our society that these dreams could become a reality. We began to show our society that we were pragmatists as well as dreamers.

We initiated meetings with elected officials, building officials, architects and construction contractors and convinced them to design and build structures which would be accessible to persons with wheelchairs and with other mobility impairments. City planners responded to our concerns and curb cuts and other accessibility modifications began to appear in many communities.

We conferred with school officials and worked with the Congress and gained a national commitment to integrate children with disabilities into the mainstream of American education. The Education for All Handicapped Children Act, when implemented, will assure that children with special needs will have these needs met, that their capacity to learn will be fully recognized and that they will be educated to their potential.

In the early seventies, we began to take our lives in our own hands. In several states we joined forces with senior citizens to create in-home supportive services programs. These programs which provide attendant care and other services are one of the cornerstones of independent living and the only viable long-term alternative to dependency and institutionalization. We built these programs by convincing some of our state legislatures that in-home supportive services were far more humane and cost-effective than programs which perpetuated institutionalization.

We also developed independent living centers. The first such center, The Center of Independent Living in Berkeley, California, is now internationally known. C.I.L. has sought to provide all the services that are needed in its community so that a person with a severe disability can live independently. The need and logic for this type of center has become inescapable. Centers based on the Berkeley model are being developed throughout the United States; the services which these centers provide vary, of course, just as the communities themselves vary. In Title VII of the 1978 Amendments to the Rehabilitation Act, the United States Congress provided for the establishment of comprehensive services for independent living. When this Act is fully implemented, it will mean that millions of people with disabilities will be able to look forward to taking control of their own lives which will lead to both social and economic independence.

In looking back at the 1970's, I view it as a decade in which together we disproved myth after myth about persons with disabilities. It was a decade in which we showed that a person with a disability could perform almost any job if given the opportunity and proper training. When the decade began virtually all of my friends with disabilities were dependent on public assistance. They now hold jobs as computer programmers, lawyers, workers in the helping professions, teachers, and yes, even as heads of bureaucracies. (My lot and happily so.)

It was a decade in which persons with disabilities came out of the house. We learned that taking risks was essential to our development. We began to seek social outlets. We began to travel. We began to discover our own sexuality.

It was also a decade in which we began to flex our political muscle. We lobbied at the state and federal levels and effectively so. State after state as well as the federal government responded with strong civil rights and other legislation. Section 504 of the Federal Rehabilitation Act and the regulations to implement that act are landmarks in our historical struggle to gain independence and equality.

In the past decade, I believe we planted strong roots. In this decade we must nurture those roots and spread them.

We must strengthen our organizations. We must make sure that these organizations remain responsive to the needs of their members. We must hammer out the differences which still exist between disability organizations and achieve a consensus for a national

strategy.

We must continue to build bridges between our organizations and government; similarly, we must continue to build bridges with business and labor.

We must increase our political sophistication. We have become a force at the polls, but we can increase our strength.

We must make sure that the laws which were passed in the seventies are implemented with strong leadership, innovation and imagination.

Most importantly, we must assure that the generation of children with disabilities can look confidently toward a future in which they will have an equal opportunity to fully participate in all aspects of our society.

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Better Reevaluations of Handicapped Persons in Sheltered Workshops Could Increase Their Opportunities for Competitive Employment

The Rehabilitation Act of 1973 requires that state vocational rehabilitation agencies periodically reevaluate handicapped persons placed in sheltered workshops, and, when possible, attempt to place them in competitive employment or training. Recently, the U.S. General Accounting Office filed a report with the Secretary of HEW (March 11, 1980) in which it reviewed the Rehabilitation Service Administration's management of the annual reevaluation requirement.

The basic thrust of the report was that the reevaluations are potentially a valuable tool for assuring maximum competitive employment opportunities for handicapped persons, but that because of deficiencies in the present system that potential is not being effectively utilized. Among the problems noted were the following:

(1) States are required to report only the number of reevaluations made and not the number of persons subject to reevaluation. GAO estimated that 11,400 eligible persons simply were not reevaluated in 1977.

(2) Guidelines for the scope of reevaluations are inconsistent. Some states do not reevaluate persons placed before the requirement became effective. Others do not reevaluate persons placed in work activities centers.

(3) Even when completed, many reevaluations are not comprehensive. Few reevaluations meet all the criteria for determining the employment potential of the person. In addition, there is much confusion as to the appropriate use of limited scope reevaluations.

In response to these problems, GAO outlined a number of recommendations to the Secretary designed to improve the reevaluation process. It suggested that the RSA clarify its responsibilities for managing the programs through the state agencies. This should include monitoring of state procedures and providing assistance to guarantee effective compliance. GAO also recommended that guidelines be revised to assure that the total population envisioned by the Act are consistently reached, and that reevaluations are based on uniform and complete criteria.

Growing Out of the Seventies

by
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1981, the International Year of the Disabled, marks the *end* of a beginning. In the 60's when the institutionalization of deinstitutionalization first seemed inevitable, "they" knew us as the impaired, the defective, the deformed, etc. "We" did not know us.

The 70's were a time for learning and identification, a magic time for coming out as the 50's were for blacks. The movement became recognizable and recognized. For the first time in this country a significant number of us felt pride in ourselves as a people. Now we know who we are, and they are no longer sure.

In a generic sense the coming out of a movement and of an individual are similar experiences. Coming out is a struggle for balance. It is a struggle between accepting society's view that you are different but trying not to accept society's value judgement that what you are is bad. The struggle is typically experienced as an identity crisis, vacillating between asserting "I am bad" (social valuation) and "I am good" (group-self valuation). The present article examines this struggle, the coming out of individuals and the movement through the seventies.

Coming Out: The Next Step

Coming out is an identity crisis or conflict between asserting "I am bad" and "I am good". For many individuals the conflict is temporarily resolved by combining the two elements into one. The individual acknowledges "badness" while pointing out goodness and downplaying the "badness." This takes the form, "I am bad, I am good, I am not really that bad."

In the early 70's this typically took the form of sub-group identification. Sub-group identification to minimize "badness" may take many forms, such as intra-group ranking: I am hearing impaired, I am not deaf; I have a mental illness, I am not crazy; I am a slow learner, I am not retarded; I have had polio, I am not spinal cord injured. Regardless of the form sub-group identification takes, the underlying message to self and others is the same, "I am bad, I am good, but I am not as bad as they are."

From the movement perspective, the regional controversies over terminology in the early 70's reflected this need to assert "I am not really that bad." Depending on where you lived, or where you got your "therapy", the message was either "I am disabled, I am a person, I am not really handicapped" or "I am handicapped, I am a person, I am not really disabled"; though it might have been re-ordered to, "I am a person, I am handicapped/disabled, I am not really that different." Then again in Michigan, the message was "I am a handicapper, I am not really handicapped or disabled."

An excellent example of this regional identification came in 1973. A group of people decided to boycott the annual meeting of the President's Committee on Employment of the Handicapped. Viewing the President's Committee as historically prejudiced and tokenistic, they sought to form a more representative national coalition. After long debating and compromising on terminology the group called itself the American Coalition of Citizens with Disabilities. Regional involvement of advocates from the east and west coasts, however, prostituted the original compromise so that today the coalition uses "disabled" almost exclusively. Ironically, the President's Committee parroted this trend by renaming its official

magazine "Disabled USA."

The positive aspect of sub-group identification is to find that as an individual one is not alone. Other people are "just like me" and in fact share a set of mutual experiences. Such identification is comforting and a significant buffer to feelings of aloneness. Sub-group identity can alleviate individual alienation and place the individual in a greater position to effect social change. However, sub-group identification also has its pitfalls.

Implicit in this form of identification, whether individual or group, is condoned prejudice. Specifically, if I am not really that bad, then somebody else (some other group) must be that bad. This is not to say that a condoned prejudice form of identification cannot permit effective advocacy. The question is, advocacy at whose expense? As an example, the blind community has a reputation for powerful sub-group advocacy. (Organizations of blind individuals had their own groups of lawyers long before it was fashionable.) The condoned prejudice of their approach is illustrated by comparing the following messages from advocates for this community: (1) Separate income tax write-offs and higher social security benefits are needed (being in need implies "we are bad"); and (2) Blindness is an inconvenience (we are not really that bad), thank God we're not deaf, crippled, or mentally retarded (but *they* are that bad).

Condoned prejudice has a price. While the National Library for the Blind was an early testament of political impact, it was also an indicator of cost. Functionally, many different people benefit from access to media alternatives. Have we developed a national library for alternative media? Not yet. With growing recognition of additional potential users, the library became the National Library for the Blind and Physically Handicapped. But what about people who can see and can turn pages but just can't read, and where do children find books in their native tongue of Amslam or Bliss? If it were not for condoned prejudice, both from outside and within, we all might simply go to the same multi-media community library. Because of condoned prejudice, many sub-groups have to fight or re-fight the battle for access.

By drawing attention to a sub-group we tend, perhaps unwittingly, to do so at the expense of others like ourselves. We often miss the issues. A mother complained that her "Learning Disabled" child was treated like she was retarded. She did not seem concerned that the people classified retarded were also being treated like they were retarded, and that this is the real issue. In another example an article was recently edited to read TDD (Telecommunication Devices for the Deaf) instead of TTY (teletypwriter). Access to usable phones was narrowed to reasonable accommodations for deaf individuals. And what of the non-deaf people who find voice phones inaccessible?

Greater Identity: The Next Step

Sub-group identification is a fact of life; it will always be there. The beauty of coming out in the 70's was in also being exposed to emerging cross-group identification models. Many became aware of the possibility of greater unity. By 1976, this concept of unity was sparking a fire that resulted in the "coalition craze" of the 70's. The condoned prejudice inherent in "I am not really that bad" was being replaced by "I am not bad, and neither are they." This recognition of common bond is key in building a political powerbase for any movement.

If there is a goal to the coming out process, it is integration. All movements struggle with the paradox; you must segregate to integrate. As a people, we have had a long social history of being well integrated at what is the bottom of the hierarchy. We have had to integrate into a larger group and segregate ourselves to raise our own consciousness, and that of society, so everyone will have the opportunity to reintegrate at different levels of the hierarchy.

Individuals struggle with the same paradox of segregating to integrate. Individuals who feel they have nothing to lose by segregating do not feel the threat of social separation. For those satisfied with where they are, the coming out process can be a significant threat. If they do not come out, they risk being accused of selling out by those who have come out. If they do come out, they risk losing what they have by being identified with social malcontents and troublemakers.

The Individual Struggle

This struggle at both the individual and movement levels, is suggested in the following excerpt from a "coming out" statement that typifies those made throughout the late 60's and early 70's. It appeared in

a Midwest university newspaper in 1972.

> *"I feel a certain uneasiness when I realize that to be perceived as 'different' usually incurs preferential treatment of a demeaning nature, and to be outraged and opposed to this treatment labels one a radical. Being a 'Radical', of course, increases negative treatment for the individual and his affiliates. It becomes, then, a great moral question for any minority group to decide whether to voice their indignation and face possible increased discrimination in retribution, or to just continue with everyday indignation. I am no longer willing to accept the indignities...."*

The Coming Out of the Movement

To be a movement, a people must be hurting bad enough to be willing to hurt more in order to hurt less. A people must also have the opportunity to know that things can be better. That experience came for many during the 50's and 60's. The literature of the times reflected a growing debate over "minority" status: were we or weren't we? In 1969, "Uncle Tom and Tiny Tim"[1] bemoaned the fact that this minority could not take its issues to the streets. In the 70's, however, the proof of the pudding *was* in the streets! By the mid-70's small but intense marches and demonstrations had occured throughout the country. The most memorable was the siege on H.E.W. and Califano.

Title V of the Rehabilitation Act of 1973 was tentative recognition of the coming out of the movement. By 1976, the Bicentennial, consumer sentiment was running strong against Carter and Califano because no regulations had been established for the controversial section 504. Early in 1976 H.E.W. offices in California and Washington, D.C. were occupied as a protest against the lack of regulations.

Many observers felt that Carter and Califano avoided the largest potential consumer demonstration of its kind by having the regulations signed two weeks before the White House Conference on Handicapped Individuals was to convene in D.C. When Brock Adams announced his endorsement of accessible transportation a few days before the Conference, a different analysis of the situation emerged. Some felt Carter had been holding the regulations until the beginning of the Conference, however, the earlier publicity by the demonstrations turned what would have been a political coup for the President into a significant embarrassment. In any event, the potential political clout of the movement was clearly established. The movement was out.

Beyond Coming Out

There is a decision to be made. Is the movement strong enough to weather social reintegration and thus relinquish a portion of its political power? Although the movement has demonstrated effective political power, the coalition efforts across the country are weak in one sense. Unlike other movements, the leadership of this movement does not have a goundswell of grass root support.[2] Without significant group cohesion and support, the process of social reintegration has a very rapid effect of dissolving group identity and power. The challenge facing politically minded activists is how to generate broader support when confronted by pressure on the leadership to be absorbed by the system.

Many social observers agree that the eighties will be a period of minimal economic growth. This suggests that, without significant pressure, few new opportunities for social mobility will be available for members of the movement. Further, the increased attention to the "price tag" of access to education, housing and other cultural resources suggests a potential loss of existing opportunities. Few would disagree that there are already strong attempts by private and public sectors to minimize the legislative victories of the seventies. Some activists go so far as to suggest that a relative decline in resources could actually mean the necessary elimination of people. World history holds a frightening clue as to who is likely to go first, and it doesn't seem to matter whether one is a "cripple," a "crazy" or a "retard."[3]

A very early example of the potential backlash was "Provider" reaction to independent living. The Providers were feeling significant pressure early in the 70's. The "Agency Mentality" that being treated badly was better than not being treated at all, was being directly challenged. The situation in Berkeley, California was both symbolic and prophetic. Although some felt it was surrounded by significant hype in the early days, the Berkeley Center for Independent Living shook the foundations of the Rehabilitation Industry and Bureaucracy. "If they can really help themselves, what do they need us for?" The paranoia manifested itself in resistance to the

expansion of Rehab into "Independent Living." Gerben DeJong suggests that, in fact, Section 504 was really a compromise issue to keep independent living out of the 1973 Rehabilitation Act.

Late in 1978, the first hints of reintegration came when both consumers and providers rallied to pressure President Carter's signing of the 1978 amendments, especially Title VII, independent living. In many respects, the enemy had become the ally by the late 70's. Cooperation became the key; consumers were seen as possessing the ability to enhance budgets. Affirmative action began to look more and more like our leaders becoming rehabilitation establishment.

There is a certain amount of coopted in cooperation. As the "Berkeley Experience" got publicized, the concept caught on (if you can't beat them, join them). Duplicates began appearing all over the country, though more and more were being promoted by providers and not necessarily consumers. Rehab and related agencies are currently struggling to hold the independent living purse strings. Their first victory in this regard was when CSAVR defeated the Griffin amendment in 1978, which would have allowed consumer input as to who would implement Title VII in their respective states. The next step is probably to formally institutionalize independent living.

The 70's were a magic time for coming out. The point is that growing out of the 70's we are, as individuals and as a movement, extremely vulnerable. The threat to independent living, like earlier threats to deinstitutionalization, symbolizes this vulnerability. The optimal methods for promoting independent living are being studied, field tested, packaged and sold. Will the system define independence for us? The system is building the capacity to once again direct us so that we can direct ourselves; to help us help ourselves. Does the system have a vested interest in controlling what we help ourselves to?

The beginning, at least, is over. Where we go from here is the crucial concern. Have enough of us come out to justify going back? Are we strong enough to hold our own? The 80's will tell.

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Notes

1. "Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro," *The American Scholar*, Summer Issue 1969.
2. "The Movement for Independent Living: Origins, Ideology, and Implications for Disability Research", Occasional Paper Number 2 (1969), University Center for International Rehabilitation, Michigan State University, East Lansing, Mich.
3. Advocating the Civil Rights of the Handicapped, Gabe Kaimowitz, *Amicus*, 4, No. 4.

The Role of Advocacy in Rehabilitation Counseling: Implications and Recommendations for Training

by Adrian Chan

"The first thing we do, let's kill all the lawyers," said Dick, the butcher of Ashford in one of Shakespeare's plays within a play (King Henry VI Second Part, Act IV, Scene II). This blast of rhetoric was in what some have argued was one of Shakespeare's more revealing vignettes, a short-lived clothier's rebellion made up of the unrepresented and powerless who achieved power for a moment, only to fail for want of a doctrine distinguishing them from those against whom they were rebelling. In using the unfairness of the law to define a need for change he was unable to sustain his followers with a doctrine which insured their ability to maintain a less restrictive society.

Such is the case today. Social change has been concentrated and dynamic in the 1960's and 1970's in the United States of America. Racism, sexism, due process in the military, environmentalism, consumerism, and the right of children, the disabled, employees, tenants, mentally ill patients, and older Americans have all represented major social change movements during this period. The law affects everyone, even the most lowly, as in Shakespeare's time. Witness the current social movements which seek to utilize the law to effect change. However, even now, law books which contain changes in the commands and prohibitions representing the above are not easily accessible to those most directly affected.

Rehabilitation counselors see many clients affected by the social movements of the 60's and 70's. Vietnam veterans, ex-offenders, women, drug abusers, and the disabled all bring with them personal or interpersonal problems related to education, training, and employment, as well as multiple problems with the legal and societal institutions. A collection agency demands that an ex-offender rectify neglected financial obligations. A former prostitute complains about the constant surveillance and occasional harrassment by law enforcement officials becuase of past multiple problems with the law. Vietnam veterans complain about the slowness or outright rejection of educational benefit claims, home loan approvals, etc.. Several more clients state they have difficulty with employment agencies because they discriminate on the basis of past work history, previous offender behavior, and medical history. Disabled clients complain that public and private institutions are not responsive to their need for recreational and leisure activities.

Many of these problems are not new, for they have been with rehabilitation counselors for some time. However, all of these problems deal with institutions and the law. Rehabilitation counselors have little, if any, background to access, read and understand the law so that some form of effective counseling can be provided for their clients. There is evidence that rehabilitation counselors do an effective job with clients facing personal/interpersonal and rehabilitative problems related to education, training, and employment. However, when problems involve legal or institutional implications, the current counselor tends to proceed by helping the client to explore, clarify, and understand the problem, and, at the very most instruct the client to begin to be assertive towards the institution. Sometimes the counselor refers the client to a community legal action center, a facility which is already overloaded with cases. In

desperation, the counselor may contact the institution causing the problem on behalf of the client in an attempt to resolve the situation. All these efforts may yield results, but they are limited. More can be done to impact upon the client, as well as the institutions causing the problems. The rehabilitation counselor can serve as a bridge between those who have access and knowledge of the law and those clients who are affected by the law. Currently this is not the case.

The situation portrayed about client personal and institutional problems and the rehabilitation counselor's limited legal knowledge and skills is not only prevalent in this section of human services, it is blatant throughout society. Steven Y. Winnick's *Final Report of the Study Group on Law-Related Education*[1] points out that citizens of all age groups, from school age to adult, are ignorant about the law and its manifestations in public and private institutions. In the proposed regulations, the following are noteworthy:

> 1. *This lack impairs their ability to function effectively as citizens in a complex society and endangers our democratic system of government and our system of justice.*
> 2. *While there is a diversity of highly regarded programs and materials, particularly at the secondary school level, meaningful law-related education is provided to no more than about 10 percent of the Nation's elementary and secondary school students.*
> 3. *In most school systems law-related education is not a basic part of the regular school curriculum. Many educators are not aware of law-related education programs and the potential value of these programs... .*[2]

Given this problem, Congress has passed the Law-Related Education Act of 1978 and this is enacted as Part G of Title III of the Elementary and Secondary Education Act. This act provides the mechanism for funding discretionary grants or contracts supporting law-related education activities, and one million dollars have been appropriated for the 1980 fiscal year.

Law-related education is a modern day attempt to close the gap between those who are knowledgeable about the law and the average citizen. The concept of law-related education is basically, "education to equip nonlawyers with knowledge and skills pertaining to the law, the legal process, and the legal system and the fundamental principles and values on which these are based."[3] In many ways, such a concept comes as a blessing to those in the human service professions, since they are non-adversary or self-enhancement oriented. Law-related education means that the counselors can learn to assist clients where questions of law, due process, and therapeutic counseling are involved, without fear of being charged with practicing law without a license. In short, these activities involve the counselor in an advocacy role.

History and Current Status of Advocacy

Advocacy has a long history. The term "advocate" derives from the Latin, *advocare*; initially the term meant "friends and supporters"[4] and was used to designate even those who were potential helpers or assistants. Since that time, the term, in Western Civilization, has come to have much more formal meaning. For example, in the Dutch language, the term *advocaat* means lawyer. In England and the United States of America, the term "advocate" has come to nearly mean one who is certified to practice before the bar in a formal court of law.

Only in recent years has the concept of advocacy gained in popularity across many segments of society. Advocacy efforts can be found cutting across different groups, such as, consumer advocacy, the National Center for Child Advocacy, Disabilities Rights Center, Paralyzed Veterans of America, the Association for Retarded Citizens, Epilepsy Foundation of America, United Cerbral Palsy, Youth and Senior Advocates (Seattle, Washington), Parent Advocates for Children Today (Milwaukee, Wisconsin), and Citizen Advocacy.

All these advocacy efforts seem to emphasize a common set of activities within an intervention-service framework. They provide guidance and/or perform some instrumental or emotional service on behalf of individuals with the assumption that these individuals are physically, mentally and/or social-psychologically incapable of performing such services themselves. A general survey of selected current literature confirms the present perception of advocacy. Such writings include: 1) Adams, Berg *et al., Childrens Rights*,[6] 2) the special issue: The Right of Children, *Harvard Educational Review*,[7] 3) Wolfensberger, *Citizen Advocacy for the Handi-*

capped, Impaired & Disadvantaged: An Overview,[8]
4) Kahn, Kamerman, & McGowan, *Child Advocacy*,[9]
5) Newman, *Education for Citizen Action*,[10] and
6) U.S. Human Resources Corporation, *Advocacy in the Field of Aging*.[11] Critical examination of these and other related writings indicate little conceptual framework building and little systematic empirical research of any rigor to indicate the efficacy of these advocacy efforts.

Given the present chaotic situation, what is the role of advocacy in the training of rehabilitation counselors? What viable approaches could be taught which would supplement the current counselor's arsenal of helping tools? The answers lie in the value system of the counselor in trying to maximize the client's control over his/her life. Central to any training approach should be models which teach the clients ways of advocating for themselves, that is, self-advocacy. Other advocacy approaches selected should be seen as transitional methods in helping the client to attain this goal. At present, the advocate counseling model as developed by Michael C. Brophy and the author at the University of Wisconsin-Milwaukee appears appropriate for teaching self-advocacy, since a conceptual framework, a process and some empirical evidence exist. Advocacy approaches which complement the advocate counseling model are 1) citizen advocacy (Wolfensberger), 2) the ombudsman, and 3) lawyer advocacy. These approaches are necessary and complementary to advocate counseling because they involve decreased client control over the problem and dependence upon others for advocacy.

Advocate Counseling Model

According to Brophy, Chan & Mar[12] and Brophy, Chan & Nagel[13], the goal of the advocate counseling model is to help individuals to assert maximum control over their own lives. The process described by this counseling model is focused on helping clients develop assertive but affirmative skills which will enable them to deal more effectively with dysfunctional institutional problems. Unlike other advocacy efforts, such as citizen advocacy, an ombudsman, and lawyer advocacy, this model places primary emphasis on teaching clients to act effectively as their own advocates.

This approach views the client as a distressed person, who in interaction with the institution has not received adequate services and needs guidance to 1) organize facts to provide a coherent record of injury, 2) understand and appreciate one's feelings consistent with effective action, and 3) access the current law relevant to one's problems. The goals of these activities are a) to solve this immediate problem, short of litigation, b) to feel more in control in interaction with institutions and their personnel, and c) to learn more about institutional behaviors as well as one's own capabilities and values. This approach relies on the skillful application of accurate, up-to-date, primary source information regarding institutions and their functioning, together with elements of therapeutic counseling, such as empathy, warmth, respect, confrontation, assertive training and role playing. Using the law as the highest authority, the model teaches clients to look for discrepancies in the implementation of policies by institutional personnel and how to effectively utilize administrative procedures of due process. Much of this legal research education is performed in an action-oriented research facility containing primary and secondary source materials including statutes, relevant case law, rules & regulation, administrative memoranda, and operational rules of various institutions. Clients are taught how to 1) utilize this facility, 2) define the institutional problem, 3) recognize and organize facts, 4) construct their own exhaustive list of alternatives and consequences, 5) build and maintain a record, and 6) implement the alternative of their choice. Because these are new behaviors for most people, the model is geared to deal with conflicts and changes in thought processes, feelings, values, and other personal-social insights.

The model has been applied to a variety of client problem situations, relating to consumers in general (product, service, repair), benefits, claims and aid difficulties, employer-employee, credit, payment records/information problems, dwelling, military, selective service, veterans, pardons, among others. In addition, the model has been applied to various groups, Blacks, Hispanics, elderly, ex-offenders, and the disabled. Case studies about the application of the model with clients encountering racism and sexism with institutions have been provided by Chan, Brophy, and Fisher.[14]

Citizen Advocacy

The citizen advocate is one who provides for both the "instrumental and expressive needs" of another. The citizen advocate is "a mature, competent citizen volunteer representing, as if they were his own, the interests of another citizen who is impaired in his instrumental competency, or who has major expressive needs which are unmet and which are likely to be unmet without special intervention."[15] Citizens who become advocates think of their commitment as long term associations. In an effort to avoid "protective overkill" which often robs the person served of integrity and dignity, the citizen advocate adopts a strategy of "minimal" advocacy. The citizen advocate is a stable volunteer, with a high degree of commitment, but little training, of "good moral character," and who acts to his/her "protege" as a friend who is there, when needed. From a conceptual viewpoint, this approach involves primarily representative advocacy rather than self-advocacy. As contrasted with the advocate counseling model, this method assumes there will be many instances whereby the client will need someone to do the advocating. When this occurs, issues of choice, decision making, and client dependency are apparent and must be dealt with.

Ombudsmanry

The source of this approach comes from Linnane, *Ombudsman for Nursing Homes: Structure & Process.*[16] In the classic Scandanavian sense, an "ombudsman" is an agent of another person, seeking justice for him/her. The ombudsman's role is neutral, he/she is neither for or against the client or the institution; he/she acts as a buffer between the institution and the grieved client. The ombudsmen, in their capacity as representatives, do not have the power to make or reverse administrative actions. Their power for change lies in their ability to criticize and publicize that which is unjust. Ideally, ombudsmen are characterized by impartiality, political independence and expertise in government which might place them in a unique position as citizen representatives.

Successful ombudsman activity calls for a substantial power base inside any institutional system. Historically, the ombudsman is appointed by a high level official in government or an institution with responsibilities only to that person and authority to "cut red tape" on behalf of those who are grieved by institutional policies and procedures. The concept has been misused by some officials (notably in the business world) by calling their public relations persons ombudsmen. In other cases, the appointment of an ombudsman has been used to placate groups who have organized around a particular problem or issue. In this case, the "ombudsman" services as a buffer between issue-oriented groups and the high officials.

Lawyer Advocacy

Advocacy by lawyers is legal advocacy on behalf of an individual or class of individuals. A lawyer represents another person or persons who have been injured by some action or inaction. A lawyer may perform a number of functions requiring some knowledge of the law. Many, but not all of these functions, have to do directly with litigation. Relative to the arena of developmental disability and the handicapped, lawyer advocates are few in number, and as yet are not as well known as some other advocacy efforts. Primary among the organizations utilizing advocacy by lawyers are the Mental Health Law Project in Washington, D.C. and the National Center for Law and the Handicapped in South Bend, Indiana. Relative to the advocate counseling model, clients are referred to attorneys when other approaches which emphasize maximal client control fail to bring the desired results.
This means that other low cost methods, such as advocate counseling, citizen advocacy, and ombudsmanry, are utilized prior to referral to an attorney.

According to Milwaukee attorney Curry First,[17] many legal problems involving factual disputes including but not limited to those dealing with unemployment, immigration, consumers, senior citizens, handicapped, housing, employment and employment discrimination can be handled initially and sometimes successfully by non-lawyer approaches. Problems stemming from criminal charges, civil issues pending in court, and those in which the court system requires the presence of an attorney should be referred to an attorney immediately. Even in the case of clients being referred to an attorney, it

is recommended that the advocate counselor or citizen advocate provide transitional and follow-up help to ensure maximal client input, control and quality of service.

Implications of Advocacy for Training

Any multiple advocacy approach should have as its goal the facilitation of clients learning to gain maximal control over their lives in the least restrictive but most appropriate manner possible. In practical terms then, the first priority should be the utilization of the advocate counseling model. When the problem and circumstances do not permit its use, then citizen advocacy, ombudsmanry, and lawyer advocacy should be utilized. One must differentiate and know when to utilize self-advocacy skills and when to advocate on behalf of the clients. If an epileptic, cerebral palsied, or paraplegic individual, for example, with no severe congitive impairments were experiencing instutional problems, then measures should be taken to insure that he/she can learn how to advocate for him/herself in an assertive, affirmative manner that is least restrictive and most appropriate. However, an uneducable mentally retarded individual may not have the cognitive capability to be aware that a personal/institutional problem exists for him/her, therefore, some form of representative advocacy would be appropriate.

For general training objectives, the Winnick Study Group recommendations are very appropriate:

1. The learning of moral reasoning and ethical analysis by continued practice in reading moral decisions and justifying them.
2. Developing an appreciation of the legal process and an understanding of the functions of the law.
3. Acquiring information about the law.[18]

For more specific training objectives, the following are recommended:

1. Knowledge and skills in the use of advocate counseling, citizen advocacy, ombudsmanry, and lawyer advocacy (self and representative advocacy);
2. Knowledge about the conditions of usage for each advocacy method;
3. Knowledge about the conditions for utilizing individuals versus group advocacy strategies; and
4. Knowledge about the tradeoffs and side effects of each approach.

All seven of these objectives should be incorporated into training programs for rehabilitation counselors and other human service professionals. These advocacy approaches should be part of the rehabilitation counselor's arsenal whatever the work setting, be it a halfway house for alcoholics and drug abusers, a sheltered workshop setting, a Division of Vocational Rehabilitation (DVR) setting, hospitals, or other private rehabilitation facilities.

The latest *Personnel & Guidance Journal*[19] devoted the entire special issue on: "Counseling Handicapped Persons and Their Families," and several articles are noteworthy and disturbing in relation to advocacy and training. Hohenshil & Hume II's article, "Roles of Counseling in Ensuring the Rights of the Handicapped",[20] strongly recommends that counselors be advocates or activists and be on the forefront in recommending changes for the handicapped. While it is heartening to see other professionals espousing the need for advocacy, it is disturbing to notice that the authors are still supporting the notion of advocating on behalf of the handicapped without clearly examining the ramifications. It is very possible that many handicapped individuals could advocate for themselves if they had the tools. Hosie's article, "Preparing Counselors to Meet the Needs of the Handicapped",[21] recommends that counselors be knowledgeable and skillful in the federal and state legislation guidelines and local policies to programs and services for the handicapped. This is encouraging, however, the author stops short of suggesting that counselors know how to access, read, analyze and understand the law for themselves. Instead, Hosie recommends that counselors read secondary source materials about the law and rules and regulations, as opposed to learning how to access and understanding the law for themselves. In the special issue, there are articles which discuss programs in which the handicapped can learn to perform activities for themselves in vocational training and employment. However, none of the articles considers teaching handicapped persons to handle institutional legal problems. Human service professionals must drop the misconception that the handicapped are incapable of learning to deal with legal/institutional

problems by themselves.

Training Components For An Advocacy Role

Although there may be other training programs nationally which promote advocacy or law-related education, the course taught in the School of Education at the University of Wisconsin-Milwaukee responds to all of the training objectives recommended by the Winnick Study Group.[22] The course, housed in the Department of Educational Psychology, is a required beginning course for future counselors (school, community and rehabilitation) and provides them with theoretical and practical experiences in the use of the advocate counseling model and other advocacy methods. The following will present the content of the course and the nature of the participants and their institutional problems.

Content of Training

In general, the course is divided into two components: 1) advocate counseling training, and 2) other advocacy methods related to underserved groups. For the *first component*, advocate counseling, participants perform two lengthy exercises in legal research and institutional problem solving.

The overall purpose of the first exercise is to provide the participants with a basic overview of legal research, the law, and how it is organized, accessed, interpreted and updated. All these activities are performed in a facility called the Information Resource Center, housed in the Office of Research at the School of Education. This facility has the basic federal/state/local statutes, rules and regulations, digests, and case law, as well as other secondary source materials. The legal research exercise involves the following activities:

1. Defining common legal terms and abbreviations;
2. Accessing, reading, and summarizing federal /state/local statutes and rules and regulations;
3. Tracing in appropriate references the development of federal and state law, from conference committee reports to codification and proposed rules and regulations;
4. Knowing and using secondary source materials, such as Corpus Juris Secundum, Words & Phrases, Modern Legal Forms, and various reporters, etc.; and
5. Accessing, reading, and analyzing case law on the federal, state, and regional levels.

Through this exercise participants become familiar with such federal statutes and regulations as the Developmental Disabilities Act, the Rehabilitation Act of 1973, the Education of the Handicapped Act, the Freedom of Information Act, the Family Educational Rights and Privacy Act, and the Magnuson-Moss Warranty Federal Trade Commission Improvement Act. On the state and local levels, participants are able to discover laws including those regarding landlord/tenant issues, worker's compensation, crime victim compensation, car repairs, consumer claims, records accessibility, and housing construction and accessibility. Student counselors are encouraged to search and analyze federal, state, and regional law which correspond to their interests, such as case law related to the disabled, bilingual education, affirmative action, warranties, individual rights when arrested, desegregation, mental patient rights, and sexual assaults.

The second exercise is an attempt to provide counselors with direct experiences in self-advocacy, so that they may become more sensitive to future clients. Guidelines are provided as to the selection of the problem, the generation of alternatives, and the implementation of advocate counseling procedures to resolve the problem. Participants are taught to organize facts and to document incidents with institutions and their personnel who have caused them grief or injury. Paramount throughout all phases the emphasis is on teaching the participants to advocate for themselves in an assertive but affirmative manner. This means instructing participants to redress institutional problems in the least escalative, non-adversarial manner as possible. Specifically, this means trying to change the participants' attitudes from being negative and anti-institution to being positive and pro-institution.

The advocate counseling model teaches the participants (also called client-advocates) to begin educating the person in the institution who caused the problem, rather than immediately referring the problem to that person's superior. If resolution cannot be found at lower levels, then the client-advocate can proceed to bring the problem and the now estab-

lished record to higher levels in the institution. Throughout the entire process, participants are taught how to document and create a chronological file (referred to as a chronfile) of correspondence with the institution and their personnel in their attempt at resolution. The documentation procedures taught involve:

1. *Freezing the facts*—How to do a write-up of institutional-individual incidents—citing time, date, place of incidents, and utilizing quotes by persons present and having the write-up notarized, as well as collecting and organizing relevant documents; and
2. *Making a request*—How to construct a letter of request to the institution causing the problem regarding the incident, the injury, the facts, the affirmative format, and request.

Client-advocates are encouraged to interact with the institutions on the written level in order to provide them with greater control over the situation. Too often, participants, in their impatience to resolve "urgent" problems, become excessively confrontative and distort facts when talking with institutional personnel. The results, many times, are disastrous for the participants.

In addition to the above steps, client-advocates perform legal research on the possible consequences of the alternative solutions to their institutional problems. This research enables participants to 1) look at the discrepancies between the current behaviors of the institution and the intention of the Law, 2) look at precedents and outcomes of cases relating to their institutional problems, and 3) have a perspective and an appreciation of the litigation process. The limits of the present one-course curriculum prohibits a complete understanding of all of the complexities of the law. However, the supervised access provides client-advocates with a greater understanding of the current state of the law as it pertains to their problems solving efforts and a reasonable degree of confidence in the method by which they are pursuing a solution.

The principles of therapeutic counseling prevail. The instructor counsels each participant by providing a warm, accepting atmosphere for problem exploration and clairfication, guidance for goal setting and alternatives generation, and the use of role playing/role rehearsal, affirmative assertive training, confrontation, and other counseling techniques for participant implementation and accompanying value changes. Counseling is provided by the instructor to each participant on the parameters of the problem, the minimal and maximal goal expectations of each participant, the generation of alternatives and their legal consequences, the selection and consolidation of the alternative to be implemented, the development of an affirmative format, the implementation strategies, and accompanying value changes. At no time in the entire advocate counseling process does the instructor advise the client-advocate as an attorney might do.

Several references are important in the advocate counseling training and they are: 1) Brophy, Chan & Mar, "The Advocate Counseling Model: Part I —Conceptual Framework,"[23] 2) Brophy, Chan & Nagel, "The Advocate Counseling Model: Part II —The Process,"[24] 3) *Legal Research For The Lay Advocates*[25] or Stawtsky, *Legal Research: Writing and Analysis*,[26] and 4) Shaffer, *Legal Interviewing and Counseling*.[27] It is important to note that although the model is applicable to problems faced by individuals of different race, ethnic origin, sex, age, and socioeconomic status, it is equally applicable to institutional problems faced by the disabled. The problems of discrimination and barriers imposed by institutions upon the disabled are no different than those faced by other groups who are underserved; therefore, the advocate counseling model should prove useful.

For the *second component*, participants learn about other forms of advocacy, namely, citizen advocacy, ombudsmanry, and lawyer advocacy. Regarding citizen advocacy, participants are encouraged to read Wolfensberger's work.[28] In addition, local people utilizing other advocacy approaches in various agencies are invited to guest speak in the course. For ombudsmanry, Linnane's *Ombudsman for Nursing Homes: Structure and Process*[29] is recommended. Moreover, Patrick Linnane is a frequent speaker for this advocacy portion. Since no one book adequately exists on the theory and practice of lawyer advocacy, a local attorney is invited each semester to speak about the attorney's function and its relationship to other forms of advocacy, especially, advocate counseling. The second component also provides background reading and discussion to participants regarding groups presently

underserved by society, such as certain racial/ethnic groups, low-income groups, the disabled, older Americans, ex-offenders, grass-roots community-based organizations, and women. Two appropriate readings are: 1) Chan et al., *Developmental Disabilities Advocacy Project*,[30] which provide guidelines for the establishment of statewide advocacy programs, and 2) Brophy, Maisto, Burstein, & Chan, "Evaluation of Community Action Programs: Issues and An Alternative."[31]

Summary and Recommendations

In summary, rehabilitation counselors of the 1980's should have the following knowledges and skills in working with the disabled:

1. Training in multiple advocacy roles, one which emphasizes client self-advocacy, complemented by representative advocacy methods when appropriate;
2. Ability to access, read, understand, and impact upon those federal, state, and local statutes, rules and regulations, and administrative memoranda affecting the disabled;
3. Ability to teach and guide the disabled to access, read, understand, and impact upon the laws and policies which affect them adversely, that is, to advocate for themselves;
4. Ability to adopt and teach a non-adversary, low escalative advocacy approach for client maximal self-control;
5. Ability to facilitate client self-advocacy in eliminating architectural, application, entry, and instructional barriers to education, training, housing, and employment; and
6. Ability to utilize individual, group, and system advocacy approaches when appropriate.

The rehabilitation counselor should not plunge blindly into advocacy, like many naive activists of the late 60's and the early 70's. Times have changed. The era of the 60's and the 70's emphasized a group approach to system change, utilizing a negative anti-establishment format. The recommendations here emphasize individual client self-advocacy with an affirmative format. While it is recognized that not all individuals can advocate for themselves, this should still be the ultimate goal. Therefore, representative advocacy methods should be complementary and utilized when necessary. Hopefully, the above training recommendations and their full implementation will help close the gap between the lawyer and the average citizen, the helper and the helped, and the non-disabled and the disabled. Jack Cade's lament about the unjust social contract may be lessened:

> *Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? that parchment being scribbled o'er, should undo man? Some say the bee stings; but I say, 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since. (King Henry VI—Second Part, Act IV, Scene II)*

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Notes

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28. Wolfensberger, *supra* note 8.
29. Linnane, *supra* note 16.
30. Chan, Brophy, Garland, Linnane, & Screven, *supra* note 5.
31. Brophy, Maisto, Burstein, & Chan, Evaluation of Community Action Programs: Issues and An Alternative. In Coursey, Spector, Murrell, & Hunt (eds.), *Program Evaluation for Mental Health: Methods, Strategies & Participants*. New York: Grune & Stratton, 1977, 205-223.

An Overview of Privacy Procedures in Vocational Rehabilitation Agencies

by Lisa Frasco

The advent of computers and data banks along with the increasing tendency of government and private agencies to accumulate personal information about individuals with whom they deal has generated a rising concern for the privacy rights of the individual. In response to this very real concern, the federal government has taken steps to ensure that privacy values will be protected over the past decade. The "Privacy Act of 1974,"[1] for example, limits the right of access to the personnel folders of federal government employees and affords individual employees the opportunity to inspect, challenge and correct information in their government file.

The "Family Educational Rights and Privacy Act"[2] of 1975 imposes upon school districts, and institutions of higher learning, as a condition to receipt of federal aid, the requirement that parents (or a student who has reached the age of majority) be allowed to inspect the educational records of their children; that parents be afforded the opportunity to challenge and correct any information they believe is erroneous; and that access to educational files be strictly limited to those with a bona fide educational interest or to certain specific governmental agencies. The failure to adequately safeguard the confidentiality of records could result in the loss of federal funding.

A similar awareness of privacy values has been developing in the area of vocational rehabilitation. Vocational rehabilitation counsellors have raised questions as to what client information may be disclosed, to whom, and under what circumstances. Because of the unique nature of vocational rehabilitation services and the diverse clientele served, access to client information is determined neither by State statutes governing the confidentiality of clinical records nor the federal privacy legislation mentioned above. Guidelines are needed, not only for use by vocational rehabilitation counsellors, but also for the benefit of vocational rehabilitation clients who may be unaware of their rights.

The following is indicative of some of the factors to be conisdered when examining the confidentiality problem.

A. State Privacy Statutes

Approximately twenty-three states currently have in force state laws designed to safeguard the confidentiality of vocational rehabilitation information.[3] In six other jurisdictions state law specifically empowers the state commissioner of vocational rehabilitation to enact such rules and regulations as are needed to provide guidelines to both vocational rehabilitation counsellors and clients on the right to privacy of records.[4]

Even if a particular state does not have a statute dealing with confidentiality of vocational rehabilitation information, in most states the department of vocational rehabilitation will have formulated its own guidelines on confidentiality. Such guidelines are generally made available to clients of the agency.

Guidelines for client confidentiality are also provided by the Office of Human Development within the Department of Health, Education and Welfare.[5] These guidelines must be followed by state vocational rehabilitation plans receiving federal funds.

Generally, the regulations provide that the state agency adopt and implement regulations ensuring that client information obtained by the vocational rehabilitation agency be held confidential.

Information obtained through the participation of an individual in a vocational rehabilitation program may only be used for purposes directly connected with the provision of vocational rehabilitation services. Information may not be disclosed, for any other purpose, without the provision of vocational rehabilitation services. Information may not be disclosed, for any other purpose, without the consent of the client.

Access to the vocational rehabilitation record may be had by the client, his parent or representative if the information is needed for a particular purpose, *e.g.*, evidence in a personal injury action for damages. However, medical or psychological information likely to cause the client undue harm may be refused to the client but must be disclosed to a parent, guardian, or legal representative.

Many of the state statutes which deal with the

confidentiality of vocational rehabilitation information contain similar provisions. The Pennsylvania statute, quoted below, is fairly representative of the twenty-one statutes now in effect.

> *It shall be unlawful, except for purposes directly connected with the administration of the vocational rehabilitation program, and in accordance with regulations, for any person or persons, to solicit, disclose, receive or make use of, or authorize, knowingly permit, participate in or acquiesce in the use of any list of or names of, or any information concerning persons applying for or receiving vocational rehabilitation, directly or indirectly derived from the records, papers, files, or communications of the state or subdivisions or agencies thereof, or acquired in the course of the performance of official duties. Any officer or employee violating this provision shall be subject to discharge or suspension after due hearing.*[6]

Such a statute raises many more questions than it answers. For instance, one of the primary goals of a vocational rehabilitation program is to enable individuals who have been disabled, or who are in some way handicapped, to enter the employment market. Efforts to find employment for such individuals and to provide the best treatment program, medically or vocationally, requires the dissemination of at least some information contained within the vocational rehabilitation files.

B. Disclosure Provisions and Limitations

Since the state statutes, such as the Pennsylvania statutes quoted above, provide only very broad guidelines, it is necessary to refer to regulations promulgated under the statute to attain a clearer idea of exactly which disclosures are authorized.

Michigan, for example, does not have a statute which deals specifically with the confidentiality of vocational rehabilitation information. The Bureau of Rehabilitation, within the State Department of Education, however, has developed its own criteria for client confidentiality and disclosure of client information.

The significant provisions allow information to be released to the client himself or to the parents of a minor client if a request is made in writing. However, only information compiled by the vocational rehabilitation agency may be released.[7] The client, or his guardian, may not have access to any information that was obtained from another agency without first obtaining the permission of the originating agency. Under no circumstances may information which had been obtained from a licensed substance abuse agency, *e.g.*, a methadone clinic or alcoholics anonymous, be disclosed.

Client information, except that dealing with susbstance abuse, is available to any employee of the vocational rehabilitation agency involved in providing services to the client. Persons with an interest in the client's vocational rehabilitation program may obtain information from the client's record subject to the same conditions as the client, *i.e.*, information obtained from an outside agency may not be disclosed without the permission of the originating agency and information relating to drug or alcohol abuse may not be released.

Concern has been expressed by vocational rehabilitation counsellors about possible legal liability for failure to reveal certain information to potential employers of vocational rehabilitation clientele. The Michigan guidelines make clear that a counsellor may be held liable for withholding this information. In discussing a particular client's disability, however, the counsellor is empowered to provide only a general diagnosis. Under no circumstances may a psychiatric diagnosis or IQ score be revealed. But vocational limitations and anticipated changes in ability are within the permissible scope of disclosure.

The client's attorney has access to the vocational rehabilitation file providing he has a power of attorney. An opposing attorney, however, can obtain the file only by subpoena. Even if a subpoena is obtained the Michigan guidelines require that all material from the Veteran's Administration, the Social Security Administration or a substance abuse agency be removed.

California, in contrast to Michigan, has a statute which enables the department to formulate regulations protecting the confidentiality of vocational rehabilitation information.[8]

Regulations issued under this authority are contained in the California Administrative Code.[9] The regulations provide that all information within the case file is to be disclosed to the client, or guardian, upon request and proof of identity. If it is deemed not in the best interests of the client to view some

material contained within the file, the information may be disclosed to a physician, psychiatrist, psychologist, or other representative of the client upon written authorization.

Disclosure without the consent of the client may be made only to department employees, to various state and federal personnel entitled to see the record, (*e.g.*, the Social Security Administration, or to protect a potential victim when the vocational rehabilitation client has made threats to that person's safety),[10] and to a prospective employer. The California regulations, unlike the Michigan guidelines, do not detail the types or extent of information which may be provided to potential employers.

If information is disclosed to third parties with the consent of the client, it is subject to a prohibition on redisclosure. In other words, the recipient of the confidential information must keep that information confidential.

C. Subpoenas

A subpoena is a court order to appear at a certain time to give testimony or, in the case of a subpoena duces tecum, to produce requested documents.[11] Where a vocational rehabilitation counsellor is issued a subpoena regarding client information which has been classified as confidential, he is placed in the uncomfortable position of complying with the subpoena, thereby violating confidentiality requirements, or refusing to comply, and subjecting himself to contempt proceedings.

Certain state vocational rehabilitation offices have developed guidelines for resolving the dilemma. In South Dakota, for instance, the State Attorney General has determined that disclosure of information pursuant to a subpoena is not "unauthorized disclusure" for purposes of the statute.[12]

Michigan requires that a subpoena served upon a staff member be forwarded to the Supervisor of Casework Operations, and, ultimately, to the State Attorney General for review. If a counsellor does give testimony or releases a client's file, he is required to advise the court of the confidential nature of the material disclosed.

If the vocational program is affiliated with a school which is subject to the "Family Education Rights and Privacy Act of 1975,"[13] the counsellor may not respond to a subpoena without the written consent of the parents.

In Illinois, a counsellor must obtain the client's consent before releasing any information pursuant to a subpoena. However, a different procedure may apply if the counsellor is threatened with imminent legal action.

Perhaps the preferred procedure for dealing with this situation, however, is for the counsellor to notify the client as soon as the subpoena has been served. This allows the client, or his guardian, to give consent to the release of the information requested or to challenge the subpoena in court. This approach not only serves to remove the threat of contempt proceedings from the counsellor but also absolves him from responsibility for disclosure of confidential material.

D. Penalties for Unauthorized Disclosure

Many of the state statutes dealing with the confidentiality of vocational rehabilitation records authorize criminal penalities for their violation. Some statutes merely provide that unauthorized disclosure of confidential client information is a misdemeanor and is to be treated accordingly.[14] Other statutes provide for fines which range from twenty-five dollars per violation[15] to five thousand dollars.[16] Some statutes even provide for a prison sentence. In Massachusetts, for example, an individual may be sentenced to as much as six months in jail for unauthorized disclosure of information.[17] Other state statutes merely provide for the suspension or discharge of the guilty employee.[18]

In order to be held liable under any statute the employee must knowingly make the unauthorized release of the confidential information.

Although none of the state statutes dealing with penalties for unauthorized release of information touch upon the issue of civil liability, a vocational rehabilitation client who has suffered injury as a result of the illegal disclosure may be able to institute a legal suit under the common law tort of invasion of privacy.

Of course, failure to release certain kinds of information may also result in the legal liability of the vocational rehabilitation employee.

For instance, as noted above, in California a vocational rehabilitation counsellor must disclose

information in the case record to protect a potential victim, if the counsellor has reason to believe that the vocational rehabilitation client may harm that person. Failure to disclose such information will result in legal liability if the client actually harms the individual victim.

In addition, Michigan provides that the failure to provide employers with relevant information with respect to the vocational limitations of a client will subject the counsellor to liability if damages or injury results from that failure.

Reflection on the privacy questions involved in the provision of vocational rehabilitation services lead one to appreciate the difficulties faced by those who must make decisions on what information may be disclosed to whom. In many cases the nature of the clientele and sensitive nature of the information within the record render privacy considerations in this area as important as similar considerations in the medical and educational field. But, because the success of any vocational rehabilitation program depends upon an integrated vocational program and successful placement of clients in employment situations, some disclosure of information is required, both to employers and to the state and federal agencies involved in funding. Generally, vocational rehabilitation clients are informed of the type of information being accumulated and the necessity for disclosure to third parties in certain situations. Authorization for such routine releases are usually obtained by asking the client to sign a general consent form.

Any requests for information regarding the policies for safeguarding confidentiality of client information in vocational rehabilitation programs should be directed to the specific department of vocational rehabilitative services.

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Notes

1. 5 U.S.C. §552a.
2. 20 U.S.C. §1232g.
3. *See* ALASKA STAT. §23.15.190 (Michie Co., 1962); ARK. STAT. ANN. §80-2555 (Bobbs-Merrill, 1960); CONN. GEN. STAT. ANN. §10-108 (West, 1977); FLA. STAT. ANN. §413.34 (West, 1973); ME. REV. STAT. ANN. tit. 22, §3062 (West, 1975 Supp.); MD. EDUC. CODE ANN. §21-307 (Michie Co., 1978); MASS. ANN. LAWS Ch. 6, §84 (Michie Co., 1973); MINN. STAT. ANN. §129.705 (West, 1979); MISS. CODE ANN. §37-33-29 (1973); NEV. REV. STAT. §615.290 (1973); N.J. STAT. ANN. §34:16-33 (West, 1979 Supp.); N.Y. EDUC. LAW §1007 (McKinney, 1969); N.D. CENT. CODE §50-06-15 (Allen Smith Co., 1977 Supp.) OHIO REV. CODE ANN. §3304.21 (Page, 1972); PA. STAT. ANN. tit. 43, §681.10 (Purdon, 1964); R.I. GEN. LAWS §16-27-11 (Bobbs-Merrill, 1970); S.C. CODE §43-31-150 (Lawyers Co-op Publishing, 1977); S.D. CODIFIED LAWS ANN. §28-9-37 (Allen Smith Co., 1977); TENN. CODE ANN. §49-2814 (Bobbs-Merrill, 1977); TEX. EDUC. CODE ANN. tit. 51, §3207c (Vernon, 1978-1979 Cum Pocket Part) (the Texas vocational rehabilitation statute here deals only with the provision of services to the blind); UTAH CODE ANN. §53-17-19 (Allen Smith Co., 1970); W. VA. CODE §18-10A-10 (Michie Co., 1977); WIS. STAT. ANN. §4740 (13) (a) (West, 1979).
4. *See* CAL. WELF. & INST. CODE §19016 (West, 1972); HAWAII REV. STAT. §348-6 (1976); KAN. STAT. ANN. §72-4311 (Weeks, 1977); NEB. REV. STAT. §79-1447 (1976); OR. REV. STAT. §344.530 (1) (b) (1977); WASH. REV. CODE §28A.10.080(5) (West, 1978 Pocket Part).
5. 45 C.F.R. §1361.47 (1978).
6. PA. STAT. ANN. tit. 43, §681.10 (Purdon, 1964).
7. However, the Illinois guidelines provide that information contained in the vocational rehabilitation files regarding an individual client is the property of the agency and is not made available to the client or his family except under certain circumstances. Information may be released to a client's representative for the purpose of pursuing a legal claim if the client has consented in writing.
8. CAL. WELF. & INST. CODE §19016 (West, 1972).
9. *See* CAL. ADM. CODE, Subchapter 6 §7280 *et seq.*
10. This provision seems to be in response to the holding of the California Supreme Court in *Tarasoff v. Board of Regents of the University of California*, 118 Cal. Rptr. 129, 529 P.2d 553 (1974).
11. Black's Law Dictionary 1279 (5th Ed., 1979).
12. Opinion of Attorney General, Opinion No. 78-4.
13. *Supra*, note 2.
14. *See* FLA. STAT. ANN. §413.34 (West, 1973); TENN. CODE ANN. §49-2814 (Bobbs-Merrill, 1970); UTAH CODE ANN. §53-17-19 (Allen Smith Co., 1970), cited also in note 3 *supra*.
15. *See* CONN. GEN. STAT. ANN. §10-108 (West, 1977), *supra* note 3.
16. Guidelines issued by the Bureau of Rehabilitation in the Michigan State Department of Education in client confidentiality provide for a maximum fine of $5000.
17. Maine provides for imprisonment of up to 60 days for the knowing unauthorized disclosure of confidential information. *See*, ME. REV. STAT. ANN. §3062 (West, 1975 Supp.) The Massachusetts' statute provides for up to six months imprisonment. *See*, MASS. ANN. LAWS ch. 6, §84 (Michie Co., 1973).
18. *See*, for example, ALASKA STAT. §23.15.190 (Michie Co., 1962); NEB. REV. STAT. §79-1447 (3) (1976).

Economics Issues in Rehabilitation

By Monroe Berkowitz and Jeffrey Rubin

The Economist and the Lawyer

Economists may have a different concern with disability policy and rehabilitation than lay and legal advocates. The advocate's business is to help clients secure their constitutional and statutory rights. Advocates work through the political system to increase the availability of services and benefits and to reduce barriers to the disabled person's full participation in society.

The economist may be sympathetic with these goals but his main interest is in the evaluation of the social and economic impact of the laws and their administration. Economists seek answers to such questions as: Are the intentions of certain legislative enactments being achieved? Are society's limited resources being used so as to produce the greatest return? How do economic variables influence the behavior of the disabled?

The lawyer and the economist share a basic concern for equity. Each works with the social ethic of fairness in mind. The lawyer strives to assure that the disabled person receives what is his due under legislative mandates. The economist and the lawyer may be equally interested in whether the legislative provisions bring about an equitable result, but the economist is also quite conscious that these programs operate in a world of scarce resources.

In a democratic society the people, through their elected representatives, decide on how much of the nation's resources are allocated to a particular program. The lawyer may sometimes use his energies and talents to bring the fruits of the program to as many persons as possible, almost as if no resource constraint existed. The courts are petitioned to provide services as a matter of constitutional right and without regard for economic considerations of costs. The economist is a bit more cautious. He is likely to inquire into the amounts that are allocated to the problem and worry about whether these amounts are being spent efficiently and with due regard for equity considerations. The missionary zeal of the public advocate lawyer may be missing in the somewhat colder analysis of the economist.

However, the economist lays claim to having as much heart as the next fellow. He insists that if the program does not pay heed to resource constraints it is likely to have little long-run significance. Programs which fail to pay attention to long-range financing issues run into problems. Programs which cost more than the public is willing to pay sooner or later fail in their objectives. The paths to prison reform, criminal justice solutions, and public safety improvements are strewn with good intentioned experiments which failed because of insufficient attention to the underlying economic issues.

The economist, ever conscious of the limitation of resources, quite naturally stresses efficiency. He inquires as to whether resources are being efficiently allocated. Since we choose to spend many billions of dollars in providing services and cash assistance to the disabled, the economist asks whether these dollars are being spent in the most efficient manner and in line with the valid objectives of the program. The economist might be interested in the disincentive effect of the benefit programs and questions whether changing the type and mix of benefits would induce more program success.

Benefit-cost analysis helps the economist to arrive at efficiency solutions. At its simplest, this is an attempt to measure the cost of a project, scheme or undertaking, and to assess its quantifiable benefits. The more skilled the analyst, however, the more conscious he is of the pitfalls involved in benefit-cost analyses.

The General Rehabilitation Program

The general rehabilitation program, designed to restore the disabled to the labor market, has been part of the federal system since after the First World War. Aimed originally at the industrially injured, the program has evolved over the years as social interest and priorities have changed. At one time confined to the physically handicapped, it has been legislatively mandated to benefit new clients. Recent groups given priority include the mentally ill and the mentally retarded under President Kennedy, the culturally and socially disadvantaged under President Johnson, and more recently the severely handicapped.

Throughout all of this change in program em-

phasis, the fundamental goals of the program have remained the same. Persons who suffer from physical or mental impairments are to receive whatever services are necessary to restore their capabilities and to provide them with the training, counseling, and guidance which allow them to take their place in the competitive labor market. With the new emphasis on the severely handicapped, however, there has been a corresponding deemphasis of placement of every individual in the competitive labor market and more flexibility in what is defined as success in the rehabilitation program. Today success might include the restoration of independent living skills or placement in some sheltered employment.

Analyzing the BRP

One rehabilitation program has retained its traditional emphasis. Congress has authorized a separately financed program for the rehabilitation of persons receiving Social Security Disability Insurance benefits. This is the so-called Beneficiary Rehabilitation Program (BRP). It has been part of our declared social policy to provide adequate cash benefits under Social Security for those persons who are unable to engage in substantial gainful activity by reason of a medical or physical impairment. At the same time, it has been the declared social policy to provide rehabilitation services for those who can benefit from them. For those clients who are eligible for the program, Congress has provided 100 percent financing. Although still administered by the states, this effectively eliminates any state sharing of the costs in the Beneficiary Program. Congress has allocated as much as one and a half percent of the prior year's disability expenditures to the states for the purpose of rehabilitating those persons who are receiving DI benefits. The objective of the program is to carry out the basic social policy in which work is to be preferred to benefit status. At the same time, it is the congressional objective to save trust fund dollars and Congress has mandated that funds should be allocated for this program with the objective of producing a long-run net savings to the trust fund.[1]

It is interesting, from the point of view of an economist, to apply benefit-cost analysis to the Beneficiary Rehabilitation Program. Our examination of the problems involved will provide some overview of the state of the art of economic analysis in rehabilitation. At the same time, it will demonstrate both the value and the weaknesses of the tools of economic analysis in disability policymaking.

For the BRP, the issues are clear due to the congressional mandate to save trust fund dollars. In this case, benefits are savings to the trust fund while costs are expenses incurred by the trust fund. Although benefit-cost is well-suited in principle to the task at hand, there are difficulties in application and in use of the results.

Problems such as uncertainty of long-range effects, measurement of costs and benefits and choosing an appropriate rate of discount have been well described elsewhere.[2] Problems of how benefit-cost analysis should be used have received much less attention. Legislators are quick to seize on a benefit-cost ratio as the statistic on which to base a great variety of policy actions. Even if one could quantify all benefits and costs including such difficult to quantify items as loss of self-esteem or the pain and suffering that accompanies disability, it still may not be wise to use the benefit-cost ratio alone to alter budgets. Several items must be considered first.

A single benefit-cost ratio leaves unanswered the question of what is occurring at the "margin," or what would happen to the ratio if the last dollar spent were withdrawn from the program and used elsewhere. A program could be operating with a benefit-cost ratio greater than one but this does not necessarily imply the last dollar spent in the program would produce a dollar's worth of benefit.

One aid in our study of program performance would be better knowledge on benefits and costs by individual characteristics, including disabling condition.[3] Thus a given benefit-cost ratio, even if greater than one, does not tell us if rehabilitation resources are being used most efficiently. We have no way of knowing if a higher ratio could be achieved if the same budget were used in an alternative way.

Another problem involves the inevitable time lag between the calculation of benefits and costs and budget decisions. In the meantime, the effects of outside forces (*e.g.*, changes in the economy or changes in the availability and amount of cash transfers for the disabled) can drastically alter the rehabilitation program's actual benefit-cost ratio.

Whatever the deficiencies, the findings of benefit-cost studies have been the basis for changing budgetary policies with respect to the BRP. Initially,

legislation set the maximum allocation for the BRP at 1 percent of the past year's DI benefits. Early studies indicated a benefit-cost ratio above 2 and as a result, the ceiling was raised until by 1974 it reached 1.5 percent. Soon thereafter, new studies showed a decline in the benefit-cost ratio to somewhere in the range of 1.2. These findings led to a cut in BRP funds, keeping the allocation below the legislative maximum for the first time. Recent studies now indicate an increase in the ratio, which will probably lead to increases in BRP funding.[4]

Even a relatively simple program such as the BRP requires additional decisions besides the determination of the overall funding. Some of these decisions can be aided by economic analysis. How should a given amount of funds be allocated among the states? Prior to 1980, the allocations were based on the distribution of the DI population within the state with little attention to performance differences among the states. Under the new plan, the allocation will be based on the distribution of rehabilitations in the previous year closed at a wage above the level defined as substantial gainful activity (SGA). Given these incentives, the hope is that state DVRs and ultimately counselors will be able to increase the number of rehabilitants leaving the DI rolls.

Will such incentives work? If counselors are already doing their best to terminate clients, then there is no room for gain. But the data show that there are considerable differences in the number of rehabilitations across the states and we have reason to believe that there is room for improvement in the less productive states. We do not know if the improvement will come from serving new clients or from spending more on those clients who have the greatest chance to leave the rolls if they receive additional services.

Once rehabilitation dollars are allocated so that expected benefits to the trust funds are maximized, then it is reasonable to consider expanding program size. The magnitude of the expansion will depend on whether there are clients, who, if they received services, would add more benefits that costs to the BRP. Another possibility is to provide more services for those clients already being served so as to increase their termination rate, speed up the length of time in rehabilitation status, or increase the wage termination. Increasing termination rates or increasing wages should add an amount to benefits large enough to generate benefits greater than costs.

Our point in this extended discussion of benefit-cost and the BRP is not to raise all the possibilities involved in funding the program, but rather to caution against hasty decisions based on an inaccurate use of benefit-cost results. We believe benefit-cost studies are quite valuable if used correctly. Reading too much into the numbers can mean too few or too many resources going to a program. There are enough problems in decision-making without adding to the confusion by misuse of economic analysis.

Client Incentives and Disincentives in the BRP

The success of the BRP, whether measured by its benefit-cost ratio, by the number of clients who terminate or by some other criterion, depends not only on what counselors do for and to clients, but how the clients respond. Part of the response is determined by the purely physical and mental limits imposed on clients by their impairments. These constraints on performance must be viewed as a given, at least over the time span when medical knowledge and rehabilitation technology is unchanged.

Another part of the success or failure of rehabilitation efforts depends on choices made by clients. We recognize that the range of choices can vary among different clients. Yet for most individuals, some choice exists with respect to their decision to participate in the labor market or to seek disability status.[5] Some individuals will overcome their limitations and earn an adequate income while similar persons may choose to apply for disability benefits. The standard economic theory of labor supply predicts that for a group of individuals with a given set of preferences for work and leisure, an increase in available income without additional work will lead some proportion of workers to seek disability status. In the case of DI, the disincentive effects are compounded by the tie-in between DI eligibility and Medicare eligibility (after two years on DI rolls). The addition of other benefits and increases in cash benefits make the rehabilitation counselor's job that much more difficult. The success or failure of the BRP may depend as much on the structure of incentives facing the client as it does on the rehabilitation services offered the client.

Notes

1. For a review of the Legislative history and performance of the Beneficiary Rehabilitation Program see the U.S. Department of Health, Education and Welfare, Comptroller General of the United States, Report to the Congress, *Improvements Needed in Rehabilitating Social Security Disability Insurance Beneficiaries* (Washington, D.C.).: U.S. Government Printing Office, 1976).
2. For example, see Robert Sugden and Alan Williams, *The Principles of Practical Cost-Benefit Analysis* (Oxford: Oxford University Press, 1978).
3. An example of such analysis is found in John D. Worrall, "A Benefit-Cost Analysis of the Vocational Rehabilitation Program," *Journal of Human Resources*, Vol. XIII, No. 2 (Spring 1978):285-298.
4. A summary and critique of the Beneficiary Rehabilitation Program benefit-cost studies is found in Monroe Berkowitz, Martin Horning, Stephen McConnell, Jeffrey Rubin and John D. Worrall, "An Evaluation of the Beneficiary Rehabilitation Program," in *Alternatives in Rehabilitating the Handicapped: A Policy Analysis*, edited by Jeffrey Rubin (New York: Human Sciences Press, 1980).
5. Monroe Berkowitz, "Work Disincentives," Institute for Information Studies, 400 N. Washington Street, Suite 208, Falls Church, VA 22046, 1980.

Retention of Sheltered Workshop Income

The legislature of the State of Washington has enacted a law which provides in part that:

> *The department (of Social and Health Services) shall allow recipients in nursing homes to retain. . .wages received for work as a part of a training or rehabilitative program designed to prepare the recipient for less restrictive placement to the extent permitted under Title XIX of the federal social security act (approximately $200 per month). R.C.W. 74.08.025* §1(3).

This legislation was a response to recent proposals by the department to enforce a limit on the amount of earned income that could be retained by developmentally disabled workers who live in state-funded nursing homes. According to the department's plan earnings above the limit (originally set at $20 per month, and later increased to $65 per month) were to be contributed to the cost of care. The department contended that the program would enable such persons to "participate" in the cost of maintenance, while providing adequate income "to motivate continued participation in a work program."

These initiatives were challenged by a number of disabled persons and advocates. Attempts to prompt a reconsideration of the proposed policy by the department were unsuccessful, and thus the effort shifted to the legislative arena.

Sean R. Bleck, of Evergreen Legal Services in Seattle, testified before a House Subcommittee, articulating the problems with the proposed scheme. First, he emphasized that federal guidelines specifically allow institutionalized persons to maintain income up to a maintenance level of approximately $200 per month. With that understanding, he argued that this arbitrary cut-off would serve as a *disincentive* to the development of necessary skills which make deinstitutionalization a possibility. The wage ceilings would deadend persons earnings over the limit and deter improvements of skills for those below it. Use of income as an incentive, which is fundamental to the rehabilitation process, would be removed half-way through that process. It was noted "that experts agree that while a person who can earn over $200 may be able to move to a less restrictive setting, it is unlikely that a person earning $65 can make this step." It was also emphasized that "keeping earned income is not just an incentive to improve working skills. . . it also forms the basis for comprehending our wage economy, a part of the necessary socialization process."

Thus the regulation, if imposed, would have undermined the financial and social bases for achieving what should be the goal of each institutionalized person—a move to a less restrictive setting.

A Different Kind of Workshop

by Henry Redkey

On the long road of vocational rehabilitation traveled since the early 1920's, we have continually stressed the need to change the handicapped individual. We have sought to shape him to fit a place in the competitive world of work. Yet we have done little to adapt industry to the needs of the handicapped.

Early on we relied on training. Then as we became more sophisticated, we tested, we diagnosed, we adjusted, we evaluated—always with an eye to placement in the existing industry structure. Later, there was an increased emphasis on the professional training of counselors and other personnel. Again, the goal of such persons was to change handicapped individuals into competitive employment situations.

All of this worked remarkably well with the limited population to which it was originally applied: amputees, hemiplegics, some paraplegics, the deaf, and the blind. As programs evolved, however, more disability groups attempted to gain access to rehabilitation services. Rehabilitation counselors were reticent to recommend rehabilitation as feasible for persons with more severe disabilities. The hitch seemed to be that single criterion for success which faced the counselor: placement in competitive employment.

During the gestation period of rehabilitation services one other option existed for disabled persons —the sheltered workshop. Workshops had in fact antedated vocational rehabilitation by many years. The work done in them by handicapped people may not have been too significant, the working conditions were probably bad, and the motivation for establishing them may have been at least partly to get the handicapped off the street and out of sight. Nevertheless they persisted, eventually finding expansion and rehabilitation emphasis in salvage operations typified by Goodwill programs.

Vocational rehabilitation people, preoccupied with the criterion of competitive placement, originally looked on these workshops as dead-ends not worthy of being called rehabilitation. However, one day they took another look and realized that, since these places did provide a work environment, they might be used as a work laboratory in the rehabilitation process. The converts' zeal soon overwhelmed the workshops.

Simple institutions trying to provide work soon found themselves entitled to large federal funding. The funding was the only kind we vocational rehabilitation people in Washington knew about—namely, helping services. There was money for training, counseling, evaluation, adjustment, psychological and placement services. Workshops were therefore slowly converted into rehabilitation centers to be used as a stepping stone to placement in industry.

During that transition and the years that followed, vocational rehabilitation programs did not invest heavily in those aspects of a workshop that directly related to a good work experience. Such things as work flow, that Isadore Salkind has so often advocated, received very little attention. Plant layout, quality control, and the relation of capital investment to wages were like a foreign language to the rehabilitation people.

None would disagree with the importance of mainstreaming the handicapped into competitive employment. Yet serious questions remain unanswered concerning the persons who simply cannot "succeed" in competitive employment. What obligation does society have to those left behind?

The history of rehabilitation in the United States has been one of steady expansion of eligibility for services. We must now ask whether our ability to place members of these groups in competitive employment has kept pace as the eligibility for rehabilitation has broadened. Obiviously it has not.

There will always be examples of people in any of these groups succeeding in the industrial world, and we should make the most of it and constantly try to pry the door open wider for them; but as we well know, not all individuals in any of these groups are exceptional in the sense of their ability to put themselves forward or to adjust in a difficult environment. What about those who cannot?

It seems evident enough that it is easier for industry to adjust to an individual handicapped person if his disability is easily understood by the employer and fellow employers. It is a quite different matter when we are dealing with groups of the disabled, some of whose disabililties are not understood by the average person or seem repulsive to him. How far can industry be persuaded, or forced, to employ large numbers of these disabled people? Quite a lot more, we hope, but there are realistic limits.

As the eligibility for rehabilitation has expanded, we finally have come face to face with the fact that a large group has been left behind, whose needs are now described as independent living. The term is variously conceived, but at least in some cases has no vocational component. Others with very severe

handicaps and needing extensive help in the form of attendants and helping devices, will certainly at some point claim a right to work if—as seems likely—we continue as a nation to hold up the work ethic as a measure of goodness and self-respect. So it would appear that the number of severely disabled we will be called upon to place in industry is steadily increasing. Evidence that there is a corresponding increase in willingness to accept them in industry is not yet apparent.

Over the years there have been a variety of efforts to either force, cajole or bribe industry into hiring the handicapped. One of the oldest and most successful was and probably is the on-the-job training method used by rehabilitation counselors. An employer is paid to accept and train the client. At the end of the training period, the employer has become adjusted to the handicap and appreciates the client's worth and hires him. This is good but it works on an individual, not on a mass, basis.

Most recently in Section 504 of the Vocational Rehabilitation Act of 1973, government said, "You must not discriminate against the handicapped." That is a worthy goal but there are many elements that make up a person's employability and many different aspects of a job situation. If industry does not really want to employ the handicapped, then means may be found to justify why an applicant does not fit. The European experience with quotas suggests such a result.

Marc Gold and other have shown that mentally retarded persons can be exceptionally productive when the work is properly selected and organized. That is an important advance in our knowledge. There remains, however, the question of whether competitive industry can be persuaded to do all the selection and organization of the work necessary to give employment to large numbers of the retarded.

During World War II many employers, who steadfastly insisted the handicapped could not perform their work, suddenly found themselves in a great manpower shortage. Just as suddenly they found that one-armed men could learn welding in a few weeks and help build ships. It would seem in normal times there ought to be more open doors for handicapped, but they have not opened wide. There must be a better way than to have a war to put the severely handicapped to work.

A number of European countries have experimented with quotas, whereby each employer is required to hire a certain percentage of handicapped individuals. It is said to be reasonably successful in Britain, but on the continent employment people insist it does not work and that employers find many ways to circumvent the law. In Germany it was reported that employers were more likely to pay the fine than hire the handicapped.

In our efforts to mainstream the handicapped into regular employment, we can learn from Sweden's experience. Like the United States, that country has for 50 years or more sternly believed that the handicapped could all be placed in industry. It set up sheltered workshops on a temporary basis while many ingenious plans were explored for getting the handicapped into industry jobs. Some plans called for a subsidy of up to 40% of the wages paid. They did not work. Finally, the National Labor Board concluded that sheltered workshops could not be eliminated by placing all handicapped people in industry. The alternative was to accept the fact that workshops might serve a permanent function for some persons. If this is to be our solution we should carefully consider what kind of workshops we should have and how they relate to our rehabilitation efforts.

This does not mean that sheltered workshops should be the sole means of employing the handicapped. Strong efforts must continue to place the handicapped in competitive employment. But again, we must deal with realistic limits. In that regard we should recognize two things.

First, industry will have great difficulty in finding ways to employ many of the severely handicapped, even though each is a precious and valuable human being. Employers are not anti-human, but they operate in a hard world of economics and employee relations which we should be able to recognize. Second, the severely handicapped will want the benefits of work, but the need for a special kind of place to work increases proportionately to the severity of the handicap. Production may be marginal in may cases. Subsidy may be essential. In Sweden and Holland it is freely admitted that it costs (in 1975 dollars) from $5,000 to $8,000 per year to keep a handicapped person employed in their excellent workshops. They quickly add that it takes about $5,000 to maintain such people on welfare but that the difference is a good investment in people whom they regard as part of the work force.

If there is indeed a need to build and operate some workshops, somewhat in the European style, what kind of things must be considered?

The first and most obvious thing is that the establishling, equipping, and managing of such shops is not a job for rehabilitation workers, social workers, or psychologists. We have been found wanting for too long. Industry's management professionals, backed by industrial engineers and personnel specialists, will be needed. These specialists must also be given a special kind of sensitivity to handicaps and the people

who have them so they can focus on how each person can best function, not how we can remodel him.

A second consideration is that such employment will cost money and, as they have found in The Netherlands, it requires subsidy. In this country the subsidy will almost certainly have to come from federal sources and underscore this—it must be dependable from year to year, not on a grant basis, here today and perhaps gone tomorrow. As explained below, most of this subsidy will go into wages.

A third consideration is how to pay competitive wages. Organized labor and others have long been critical of low wages paid in workshops. The criticism arises from an ignorance of the difference between profit-making competitive industry, which pays only for what makes money for it, and the very different situation of the sheltered workshop. The workshop too often tries to change the individual as well as employ him. The poor productivity that results means lower wages. Undercapitalization of the work process prevents significant financial gains even when the individual becomes well adapted.

The workshop has thus projected an image of paying low wages which labor people do not understand. Efforts have been made to somehow coerce the workshops into paying regular wages, but they have been unsuccessful. As an alternative, a wage subsidy could be used to accomplish this. In a well capitalized and well managed special workshop, it would probably be less than might be expected, because of increased productivity under greatly improved working conditions.

To this writer it seems that the only way to achieve these results is to use the European model, where relations between workshops and organized labor are excellent. But we should always bear in mind that we are discussing what have been termed extended employment shops. They are not shops for training, adjustment, evaluation or counseling, but shops for extended employment.

A fourth consideration is that adequate capital and expertise must be available to provide excellent modern, efficient equipment.

A fifth consideration is that such shops must be managed and operated as nearly like a competitive business as possible, making only such concessions to the handicapped worker as are absolutely necessary, including perhaps transportation and a somewhat better-than-average health unit to handle emergencies. All this would be on the understanding that a great many rehabilitation services would be available elsewhere and that these shops would furnish only work.

A sixth consideration should be that, while for many workers this would be their permanent place of employment, the door must always be kept open for movement out when the worker wishes to do so.

A seventh and final consideration must be that not every handicapped person can be successfully employed even in this set-up. There must be a cut-off productivity point below which the person cannot be retained. Wage subsidy to prevailing level is not possible unless this is done.

A system of long-term workshops, expertly managed and well financed, could provide employment for a large portion of those who will not find competitive employment. It would also reduce the inevitable residue for whom employment may be impossible. These ideas need to be the basis for experimentation in an American setting, before trying to make anything mandatory.

Even in the experimentation stage, though, certain principles must be retained.

1. Such extended employment should be held to strict compliance with existing law relative to hiring and employment of the handicapped.
2. The highest safety standards should be observed. One handicap is enough.
3. The law should provide for prevailing wages through subsidy, and for collective bargaining similar to that in private industry.
4. There should be no relaxation of the requirements in private industry because of the existence of these shops.

In summary, we need some workshops that function as employers, not rehabilitators. They should meet industry standards of capitalization, equipment, and wage levels. Such shops are no panacea, but they could supply a form of intermediate employment not now available to the severely handicapped. There are models in existence that could be adapted to American needs.

Henry Redkey was for many years the Chief of Rehabilitation Facilities for HEW. In 1975, he completed a study on the rehabilitation facilities of five European countries. He now lives in the State of Washington.

Sheltered Workshops— Effective Accommodation or Exploitation?

By Claude W. Whitehead

Introduction

The decade just ended has been a period of examination and evaluation of sheltered employment for handicapped persons. Sheltered workshops are defined as:

> *"rehabilitation facilities with a controlled work environment in which handicapped persons are provided training and employment services designed to assist them in moving toward an optimum level of vocational and social functioning. Workshop programs are structured to accommodate the physical or mental impairment of the individual and to permit them to work at their own productive capacity and be paid accordingly" (DOL 1977).*

This accommodation ideally involves adapting the work station, job structure and work environment, in addition to providing training, to maximize the productive capacity and potential of the handicapped person.

The wide variety of studies of sheltered workshops by the Department of Labor (DOL 1977, 1979), Department of HEW (Greenleigh 1975), and the General Accounting Office (GAO 1977) were designed to evaluate the effectiveness of the workshops in carrying out their basic mission of providing training and employment services. The findings of these studies and a follow-up analysis of regulations, legislation and policies pertaining to sheltered employment, currently being conducted by the HEW Office of the Assistant Secretary for Planning and Evaluation, are the basis for this paper.

History and Development

Sheltered workshops had their beginning in the United States more than 100 years ago. The first known workshop, established to provide employment for blind persons, was organized in 1838 at Perkins Institute for the Blind in Massachusetts (DOL 1977). The early workshops were established and operated primarily with private funds provided through churches and quasi-religious organizations such as the St. Vincent DePaul Society, the Volunteers of America, and Goodwill Industries of America. Most of the early workshops emphasized sheltered employment for physically handicapped persons, aged persons and alcoholics. Persons with mental or emotional disabilities received very little attention until the middle sixties, stimulated by the enactment of mental health and mental retardation legislation in 1963.

The service provided in most workshops was almost exclusively limited to employment until the passage of the Vocational Rehabilitation Amendments of 1965 which included substantially expanded funding for rehabilitation services and a major program of direct assistance to sheltered workshops and other rehabilitation facilities. The decade of the sixties was a period of significant growth and development in rehabilitation services with many workshops adding evaluation, training and other rehabilitation services to their employment programs in order to serve clients of the state rehabilitation agencies. The 1973 study of sheltered workshops by the Department of Labor (DOL 1977) revealed that most workshops provided some form of training for handicapped clients. Unfortunately, the rapid growth of sheltered workshops in the sixties and the early part of the seventies exceeded the capacity of the state/federal program to support the operation of the rehabilitation services program developed by workshops. In addition, the majority of the handicapped persons served in workshops needed extended training and employment services but the state/federal rehabilitation program was restricted mostly to support of short term services.

The decade of the seventies saw a dramatic shift in financial support of sheltered employment services from primary dependence on the state rehabilitation agency to a multiple-funding structure composed mostly of other public fund sources. The most significant development was the creation of funding of long term services for severely handicapped persons through Social Security Act amendments of 1975 which included authority in Title XX for purchases of social services (including training) for recipients of Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI)—a program which provided about as much support for services to handicapped persons in sheltered employment programs as did the state rehabilitation program in 1978 (HEW Title XX 1979).

The handicapped population in workshops shifted from mostly physically handicapped persons in the first half of the century to a balance between physically handicapped and mentally impaired per

sons in the sixties. Currently, the workshops are serving mostly mentally handicapped persons; the blind make up less than five percent and other physically handicapped constitute less than six percent. This shift to services for mentally disabled individuals is generally attributed to a national deinstitutionalization movement under which thousands of mentally handicapped clients are being returned to live in their own community. The influx of formerly institutionalized persons, most of them without previous employment experience and in need of personal-social skills training as well as job training, imposed new demands on the resources of the community, especially sheltered workshops. The entry point for this new group usually was the work activities center, rather than the regular workshop. By 1978 two-thirds of the workshop clients were being served in work activities centers (compared to about one-third served in WAC programs in 1968).

Protection and Advocacy for Handicapped Persons

The first protection for handicapped persons was provided in the Fair Labor Standards Act of 1938 which established minimum wage requirements for millions of workers but exempted handicapped workers in order to prevent curtailment of employment opportunities for that group. The 1966 amendments to FLSA addressed sheltered employment specifically but required that all persons employed under authorized Department of Labor certificates (in sheltered workshops) be paid wages commensurate with their productivity compared to that of a non-handicapped worker in an idential job. Unfortunately, this requirement has been difficult to interpret and enforce, and the result has been that some handicapped are being paid lower wages than they were entitled to. The commensurate wage payment provision has created a storm of controversy evolving from findings in the DOL studies (DOL 1977, 1979) and public media articles on wage payments in sheltered workshops.

The need for protection and advocacy has been expressed clearly by the Congress in 1968 and 1978 amendments to the Developmental Disabled Assistance and Bill of Right Act (Public Law 94-103 and 95-602), and the 1973 and 1978 amendments to the Rehabilitation Act (Public Law 93-112 and 95-602). For example, Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap, in the provision of services by agencies receiving federal funds—this includes most sheltered workshops.

A civil rights movement for handicapped persons, evolving out of the 1977 White House Conference on Handicapped Individuals, is expanding through all service delivery systems (Whitehead, 1978). Handicapped persons are demanding equitable service and a voice in policy development and management decisions.

Major Issues in Sheltered Employment

The national studies of sheltered workshops and government investigations had both favorable and unfavorable findings:

1. Sheltered workshops are serving a severely impaired population, most of whom would have been considered not feasible for services a decade ago; the majority have no prior work experience and limited work production potential;
2. Funding for sheltered workshop services is often very restrictive and sporadic in supply;
3. Most handicapped persons entering the workshop stay for an extended period of time, some because there are no other job opportunities in the community, others because they cannot function in competitive employment, but others remain in the workshop because the shop is dependent on their productivity (to generate operating income);
4. Wages paid to handicapped workers are minimal, some payments less than required by the FLSA, but many handicapped workers receive supplemental income under the Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) program and are reluctant (lack incentive) to increase their earnings for fear of loss of benefits such as health care and food stamps if their monthly income exceeds the prescribed limit. Average hourly earnings have not increased over the decade in proportion to the costs of living increases;
5. Workshops serving mostly a mentally retarded population often give more attention to personal-social skills training than to development of employment skills, thus wages are a secondary consideration.

These findings led the Department of HEW to initiate a follow-up study in which major issues were identified and associated policy problems were defined. The major issues which must be addressed in the decade ahead can be summarized:

1. The most dominant issue pertains to the rights of handicapped adults to education, training—and a job. The courts have repeatedly affirmed the rights of handicapped children to education and training, and a right to live in the least restrictive environment, and Congress

confirmed this right in enacting Public Law 94-142, the Education of All Handicapped Children Act. Adults who have not been given appropriate and adequate education should be entitled as the handicapped child.

2. A related issue pertains to the right of handicapped individuals to a decent income. There is major disagreement among individuals and agencies concerned with handicapped persons as to whether the wage earnings should be subsidized directly or the income should be supplemented separately through SSI. There are those professionals who insist that the best solution is to improve the technology, *i.e.*, the industrial operation of workshops and thereby make the handicapped worker more efficient and productive. The national studies clearly showed that one cause of low age earnings was the lack of technology—and a lack of suitable work. There are some problems with the wage subsidy proposed because many workshops are serving persons with very little productive potential, even with the best technology—some examples of which will be cited in a later section of this series. It will be important to set minimum levels of acceptable productivity.

3. A major debate is continuing regarding the desirability of sheltered workshops. Many advocates insist that private business and industry could and should be given the responsibility for providing jobs for all handicapped persons who have a minimum level of productive skill and that other gainful activity should be provided to those for whom a job has only limited feasibility. In this arrangement the workshop would provide evaluation, personal-social skills and job readiness training but would depend on the regular labor market for employment. This concept has been tried in some European countries with mixed success.

4. Recent articles in the national and local news media have deplored the lack of accountability for the operation of sheltered workshops. The news stories have revealed that the voluntary board of directors, generally responsible for an oversight role with the nonprofit corporations that operate sheltered employment programs, frequently delegate this responsibility to the paid administrator and then fail to monitor the performance, sometimes lacking the knowledge necessary for proper evaluation. Existing accreditation programs are also faulted in assuring quality performance.

Summary and Conclusions

The decade ahead has promise and hope but also contains many challenges. The merging of special education services for handicapped children with rehabilitation services for handicapped adults in the new Department of Education holds promise of providing a continuum of care for handicapped persons, but the state/federal rehabilitation services program is coming under increasing criticism for failing to effectively serve the severely disabled population. That group is more likely to be served by the private rehabilitation sector, *e.g.*, sheltered workshops and work activities centers, with funding from Title XX Social Services or with local or state funds. Some states are moving to extend educational services to adult handicapped persons not previously served to public education; funding is provided for these programs from Career, Adult and Vocational Education (federal) sources and local millage dollars. Under the new authority/mandate provided in 1978 amendments to the Comprehensive Employment and Training Act (CETA), funds are being directed toward services for handicapped persons. This supplemental program will have special importance in the next year or so because of the no-growth budget in the rehabilitation appropriation.

The challenge of the decade will be in terms of competing with other social service programs for a restricted supply of federal dollars; growth in one area will have to come at the expense of cutting other programs. With Title XX funds capped the only other resource will be Title XIX through the Intermediate Care for the Mentally Retarded (ICFMR) authority, but that resource is being scrutinized closely. The final solution may be to attempt to secure targeting of federal and state funds for training and employment services—a dubious possibility.

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References listed on inside back cover.

Summary of Major Findings of the U.S. Department of Labor SHELTERED WORKSHOP STUDY

The study was divided into two major parts:

VOLUME I (DOL 1977): WORKSHOP SURVEY

This survey gathered data from more than three-fourths of all known sheltered workshops. A total of 2,530 workshop programs operating in 1,786 establishments reported on operations, policies, and services.

VOLUME II (DOL 1979): STUDY OF HANDICAPPED CLIENTS IN SHELTERED WORKSHOPS

This part of the study examined the relationship between the workshops and the physically or mentally disabled persons being served in 1976. The study involved on-site interviews with a sample of workshop clients during which opinions regarding services, programs, and wage payments were solicited. Interview response data were supplemented by additional information about the clients, including demographic characteristics, income sources, living arrangements, and types of disability. Together, this information permitted and assessment of the clients' abilities to earn a wage and live independently in the community.

SOME OF THE MAJOR FINDINGS **(F)** AND RECOMMENDATIONS **(R)** OF THE STUDY ARE SUMMARIZED BELOW:

Population

F: The average daily client attendance in sheltered workshops in 1976 was 145,016. That represented an increase of almost two-thirds since 1973. About three-fifths of the persons worked in work activities centers (*i.e.*, programs for persons whose productive capacity is "inconsequential").

Clients with developmental disabilities comprised the major part of the workshop population. Nearly two-thirds of all clients were mentally retarded. Physically disabled persons constituted less than one-fifth of the total.

R: Changes must be made in the workshop system to respond to the dramatic increase in the number of persons served and the general decrease in functioning levels.

Compensation and Benefits

F: Client earnings increased very little during the period covered by the study. They did not keep pace with the 44 percent increase in the FLSA statutory minimum wage from $1.60 to $2.30 per hour. Earnings of work activities center clients increased from 34 cents an hour in 1973 to 43 cents an hour in 1976 (26 percent), while regular client earnings rose from $1.40 in 1973 to $1.54 in 1076 (10 percent).

Three-fifths of the clients providing income data reported receiving some form of supplemental income. However, most of the clients in the workshop did not receive the fringe benefits usually provided to employees in the competitive labor market.

R: A series of pilot demonstration projects should be conducted to explore the feasibility of providing wage supplements for those handicapped workers who are unable to earn a minimum wage because of the severity of their disability.

Worker's compensation and Old Age, Survivors and Disability Insurance (OASDI) should be extended to all workshop employee/clients.

Program Funding

F: The size of the operating budget in many workshops, especially those serving mentally retarded clients, was inadequate to support the necessary programs. Because of the funding limitations, existing facilities were substantially underutilized.

R: The use of various federal funds to finance the provision of training and other rehabilitation services in sheltered workshops should be reviewed by the funding agencies to evaluate their effectiveness. All workshops receiving federal funds should be required to comply with the provisions of the FLSA, the Service Contract Act, and the Public Contract Act.

The federal government should financially assist those workshops serving long-range clients, the level and continuation of such assistance being contingent on a showing of progress by the handicapped workers.

Work

F: Lack of suitable work was also a major problem for workshop programs. Subcontract work was the most common type of work in all workshops. Only a small portion of the clients were involved in manufacturing or service occupations.

Most clients performed two or three different jobs a month. Many worked a relatively short work week or had interruptions during the year. Lack of work was a major factor in this restriction.

R: The Department is proposing that the regulations be changed so that subcontracting to sheltered workshops can be considered a part of a company's affirmative action program.

A nationally coordinated program to develop and expand industrial markets for the products and services of sheltered workshops will be developed with the joint funding of the Departments of HEW and Labor.

A demonstration program should be developed to assist, with a subsidy, workshops to bid on contracts which might otherwise go to firms outside the United States.

Placement

F: Clients were moved from the workshop into competitive employment in the community at a rate of 12 percent of the total clients served annually. The rate of placement for work activities center clients was 7 percent.

R: The Department should require companies, in their affirmative action programs, to include plans to seek out and hire the severely handicapped who can perform in private industry. Workshops should also be assisted in educating employers to the value of hiring persons who emerge from the workshop environment, helping such persons bridge the gap between sheltered and competitive employment, and following up on the progress of such persons outside the sheltered environment.

Redefining The Purpose of Sheltered Workshops

by Kevin L. Lilly

The sheltered workshop system, originally developed to provide a "work opportunity" for disabled persons, changed dramatically during the past decade.[1] The number of programs increased markedly, from 1,128 in 1968 to 4,418 in 1976. The workshop population grew from 39,525 to 145,442 persons.[2] There were also shifts of emphasis in the types of persons served and the type of programs offered. Over 60% of all persons presently in sheltered workshops are mentally retarded.[3] The number of "work activity centers" (programs for inconsequential producers) increased from 468 to 2,252, compared with an increase in regular workshop programs of only 667.[4] Counseling and other collateral (nonproductive) services were greatly expanded.[5]

Total program expenditures also increased. Within that growth, though, there was a significant redistribution of spending. In 1967 expenditures were allocated as follows: staff costs (22%), client wages (35%), materials and supplies (24%), and overhead (19%). As of 1974 those cost distributions had shifted to: staff costs (39%), client wages (17%), materials and supplies (21%), and overhead (23%). This breaks down to an increase in the average aggregate expense for each dollar of client wages from $2 in 1967 to $6 in 1974.[6]

There were also areas in which a lack of change was significant. The average wage rate only increased from $.76 per hour in 1968 to $.81 per hour in 1976. Subcontract work, the core of the productive component of the shops, was not significantly expanded. Only about ⅓ of all clients received some kind of formal work training. The rate of placement in outside competitive employment decreased from 17% in 1967 to 12% in 1976.[7]

Faced with these conflicting patterns of development, there seems to be a need to reexamine the purpose of sheltered workshops in order to clarify the direction in which future energies should be expended. This paper will attempt such an inquiry.

Purpose

The "purpose" of sheltered workshops has been articulated in a number of contexts. The first to be examined here is the legislative formulation. As previously mentioned, the average wage rate in sheltered workshops is well below the standard minimum wage. This is possible because of a provision for "special minimum wages" incorporated in the Fair Labor Standards Amendments of 1966.[8] The justification for the wage exemption is that it is necessary to "prevent curtailment of opportunities for employment" for the total population served in these facilities.[9]

The exemption is translated into practice by the issuance of special certificates, authorizing reduced wage rates, to workshop programs which qualify according to their level of productivity. Regular program certificates provide a minimum wage of 50% of the standard statutory rate. Work activity center certificates contain no minimum wage level. All workshops are to pay wages "commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, qualify, and quantity of work."[10] The findings as to productivity are based on factors including the "present and previous earnings" of the workers.[11]

The regulations that explicate the application of these special wage rates define each of the component programs specifically in terms of purpose.

"Sheltered workshops" (regular programs) are institutions conducted "for the purpose of carrying out a recognized program of rehabilitation for handicapped workers, and/or providing such individuals with remunerative employment or other occupational rehabilitating activity of an educational or therapeutic nature."[12] This definition indicates that providing "remunerative employment" is not the primary focus. Rather, the goal is to provide a rehabilitation program of which remunerative employment may be but one of a number of equally weighted considerations. Work or production is viewed as a medium for the achievement of a broader purpose.

The definition of "work activity centers" carries this orientation one step further. Such programs are to be "designed exclusively to provide therapeutic activities for handicapped workers whose physical or mental impairment is so severe as to make their productive capacity inconsequential."[13] This regulation clearly states that "work or production is not the main purpose" of a therapeutic activity.

A second context in which the question of the

purpose of sheltered workshops has arisen is in attempts to organize handicapped workers within those facilities for collective bargaining purposes. In *Goodwill Industries of Southern California*, 231 N.L.R.B. No. 49 (1977), such an attempt was found to be invalid. The delineation of purpose was developed in three stages. First, it was recognized that such workers are "employees in the generic sense," since (1) they work a set number of hours a day, (2) they perform functions of economic value, and (3) they are paid for those functions. In contrast, however, it was noted that there are a number of significant differences in this environment from normal employment: (1) the focus is on rehabilitation and not on producing a product for profit, (2) these persons are "hired" on the basis of handicap, (3) wages are uniform for all clients, and (4) clients are counseled rather than disciplined for poor work performance. Weighing these competing considerations, it was decided that the workshop would most appropriately be characterized "as a vocational clinic rather than a viable entrepreneurial concern."

The primacy of rehabilitation that is distilled from these examples is not surprising nor does it appear inappropriate. Turning to a clinical definition of "purpose," however, we are faced with a distinction which raises an important question as to the adequacy of that result.

In "Work and Rehabilitation," Dr. Walter Neff compared the purpose of "sheltered workshops" and "rehabilitative workshops".[14] He noted that the "prime objective" of the latter "is to bring about a basic change in the client's ability to work . . ." Such programs are "designed as transitional and temporally limited service, as a vestibule to ordinary, unprotected work." In contrast, "the essential function" of sheltered workshops "is to provide some minimal levels of remunerated and productive employment for handicapped persons who, it is believed, cannot compete for jobs in the open, unprotected labor market . . ." He concluded that "the true sheltered workshop can be regarded as a *maintenance program*".[15]

This view of purpose is decidedly different from the legal formulations. Programs which perform what Neff terms true "rehabilitative functions" are limited to specifically transitional contexts, which would at best include only a portion of regular program workshops. All other programs are not perceived as primarily performing "rehabilitative functions," but are seen as serving a maintenance function.

The recent changes in the sheltered workshop system tend to support Dr. Neff's characterization. Much of the problem has resulted from attempting to provide programs which are apparently "work-oriented" but which are actually directed at the "non-productive" aspects of a person's development.[16] This has caused an increase of the financial burden to the point that it has become inhibitive. It has also left the focus of actual programming largely undefined. Workshops cannot continue to move along this course and remain viable institutions. Programs that are supposedly offering a total spectrum of services, including an employment opportunity, are in danger of deteriorating into programs that serve solely a maintenance function. A reappraisal of the system in necessary.

An Alternative

One potential response to this dilemma is premised on the belief that the key to the development of these persons in this vital component of their lives is that *work should be the norm*. It should not merely be a medium for "rehabilitation" or "therapy," it should be an end in itself. A move in that direction would involve shifting "some of the energies presently used for maintenance (or therapy) of this population . . . directly toward training the retarded to somehow effectively compete."[17]

Expectancy and Ability

The initial and most troublesome barrier to the development of a model based primarily on work is the assumption that "the retarded are incapable of a quantity and quality of work which would necessitate paying them a normal wage."

There has historically been a low level of performance by mentally retarded individuals since they are forced to work in poorly structured environments and they do not have access to training in the skills and attitudes necessary for increased performance. Such performance nurtures an equally low "expectancy level," which has two confounding effects. It "promotes a reliance on screening out individuals who are difficult to train instead of developing training procedures with sufficient power to meet the needs of these persons." It also grounds a system in which low levels of performance are seen as adequate, thus reinforcing the misconceived expectations.[19]

Contrary to this pattern, recent studies have shown that retarded persons in properly structured and supervised work situations can perform at levels completely inconsistent with previous expectations.[20] There have also been indications of handicapped persons' abilities to perform at significantly higher rates than expected even in the present system. The DOL study (1977) reported that 7% of persons in WAC's were placed directly into competitive work settings.

Since the supposed criterion for participation in such programs is "inconsequentiality" of work ability, and the total placement percentage for all workshops was only 12%, these placements highlight the inappropriateness of placing a "ceiling" on any person's ability.

Training

The fact that a potential for higher levels of performance has been demonstrated by individuals within this class will not alone prompt the shift to work-intensive programs. The real key to that reorientation is the incorporation of effective training techniques into the existing system. As indicated above, researchers have designed specific programs which have proven successful with individual workers. They have also taken great strides in expanding these techniques into a technology of training which is applicable on a generalized scale.[21] Underlying that work has been the practical challenge of tailoring programs to the limited resources which are available. Several components of the response to that challenge have been identified.:

(1) Service agencies and research agencies must establish ongoing relationships. This includes the need to train persons as "middle-road" researchers, capable of introducing the techniques into ongoing programs.

(2) Research must be designed with the specific purpose of practical application in mind. It must result in procedures which yield demonstrable useful information.

(3) Training procedures and objectives must be clearly defined.

(4) Procedures must be developed that can be implemented without sophisticated equipment, large sums of money, and highly trained front-line personnel.

(5) Attention must be paid to job enlargement and reinforcement systems.

Work

The existence of a system of training will not of itself exhaust the need for a shifting of "energies." The nature of the work utilized within the system must also be reexamined. The recommendations of DOL (1979) noted that "a continuous, adequate supply of suitable work resulted in better training, higher wage earnings, and more effective placement of trained workers in jobs in competitive employment outside the workshop."

The predominant type of work currently utilized in workshops is subcontract work. Rather than shifting to other types of work, it has been suggested that an increased emphasis be placed on this work since it can provide a favorable setting for an increase in effective training procedures. However, such work must be chosen on the basis of its "habilitation value." Work contracts should: (1) require skills that must be taught rather than skills which the person already has, (2) provide sufficient lead time to allow for consideration of training implications while setting up production, (3) be labor-oriented, (4) allow for a variety of job stations, and (5) be profitable for both the workshop and the person.[23]

The underlying characteristic of such contracts (and of all "suitable" work) is that they provide an opportunity for development of skills which will shift these persons out of a context in which they are seen as only ancillary to the normal work force. This orientation is directly tied to the overriding philosophy of "normalization."

In addition, there must also be a continuous and adequate supply of work. This shifts the analysis from "internal" training to "external" market development.

In its study (1979), the DOL repeatedly spoke to this problem. (1) It proposed "that the regulations be changed so that subcontracting to sheltered workshops can be considsered a part of a company's affirmative action program." This would stimulate the allocation of work by private industry to sheltered workshops, and reinforce that allocation by counting it as fulfillment of a responsibility. (2) It proposed "a nationally coordinated program to develop and expand industrial markets for the products and services of sheltered workshops . . ." (3) It noted that "consideration will be given to the development of annual agreements between workshops, and purchasers of services, where state law permits, in an effort to improve service dealing." (4) It recommended that "a demonstration program should be developed to assist, with a subsidy, sheltered workshops to bid on contracts which might otherwise go to firms outside the U.S."

Expanded "training" would contribute to this effort. By increasing the availability and effectiveness of training procedures, the potential for performance of a wider range of tasks within the workshop is increased. With that "potential" in hand, professional contract procurement agents or sales managers should be able to explore previously untapped markets. Thus, by concentrating on training, the traditional "expectancy cycle" could be inverted into an expanding spiral of increased competence and increased possibility.

Accountability

A shift to work-intensive programming would also require a reorientation of the administrative

focus within workshops. Programs can be evaluated from a variety of perspectives, among them: (1) effect of rehabilitation services, (2) cost efficiency, and (3) production efficiency.[24] In a workshop which provides "therapy" the emphasis is necessarily on rehabilitation. The traditional indicia of success is number of competitive work placements. The cost factor is answered primarily in terms of the number of services provided per person, rather than in terms of a "return" on the expenditure. Since production is treated as only the "medium" for rehabilitation (or maintenance), production and income levels are sacrificed in favor of a more diversified program of services.

In contrast, in a work-intensive program, a much greater emphasis would be placed on cost and production efficiencies. The workshop would be evaluated on "how well (it) utilizes and adheres to generally accepted industry standards of programming and administration" in delivery of its service.[25] "If clients are producing with at least the same quality as nonhandicapped workers, and are paid a wage commensurate with nonhandicapped workers, labor rate should *not* be the factor reduced to allow for competitive bidding. Production efficiency, client training, material handling, and service to the customer should be the main parameters manipulated to effect competitive bidding."[26]

The concept of "competitive placement" would not be abandoned, but it would be expanded to include permanent and competitive placements even within a sheltered environment.

Implications for the Legal Perspective

A transition to the type of program described above would contribute to a resolution of the inconsistencies which mark the "legal" conceptions of a workshop's purpose.

The basic problem with the existing statutory framework is that the criteria for the existence of workshop programs are defined in terms of *productivity*, yet the purpose of the workshops appears to inhibit the maximization of that capacity. This problem is compounded because previous "earnings" are used to qualify for continuance of the wage exemption. The regulations do incorporate the general language that wage formulae must yield returns "commensurate" with those of nonhandicapped workers. However, such an approach does not guarantee an opportunity equal to nonhandicapped workers. Persons are not presently placed in situations most conducive to work. Rather, persons are paid a "commensurate" rate only within the limited environment in which they are in fact placed.

A recognition that the primary purpose of workshop programs should be to provide an *opportunity for work* could have several effects. First, it could force a reformulation of the statutory scheme so that workshops could no longer qualify for the wage exemption unless that met certain minimum standards of *potential production capacity* apart from the performance levels of their workers. Workshops would have to demonstrate that they are viable employment situations.

In addition, with a shift of emphasis to production, there would be an increased reliance on specific training techniques and industrial accountability techniques. Both of these would provide more consistent bases for reporting and verifying performance.

Finally, as production did increase, the efficacy of a general "shop-wide" exemption to minimum wage standards might be lost. This would necessitate either a total abolishment of the exemption, or a requirement that applications be made on behalf of specific individuals, with more exact performance data required.

A shift to work-intensive programming could also ground a reevaluation of the appraisal of workshop's function delineated in *Goodwill Industries*. According to that analysis, the *sine qua non* of employee status is defined in terms of (1) number of hours worked, (2) productive function, and (3) compensation. The first of these could be met by a large portion of the handicapped population. Since the third flows directly from the second, the performance of a function of economic value emerges as the key issue. In that case it was found that other considerations overshadowed the level of productivity of the workers. If, however, productivity was increased to much higher levels, it could be argued that persons would be "employees" regardless of ancillary differences in the structure and administration of the programs in which they work.

Beyond any *results* that a general increase in competence of handicapped workers could have on legal institutions, there is a more important point. Beginning to restructure the legal perspective at this time would, in itself, effectively contribute to a change in the growth pattern of the workshop system away from the danger of becoming one of "maintenance" to which it is currently susceptible. This would make the legal "purpose" a more meaningful one, and could serve as the basis of a system with sufficient power to provide a truly "equitable" opportunity for these persons.

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Notes

1. See Redkey, *supra*.
2. U.S. Department of Labor, *Sheltered Workshop Study: Workshop Survey* 34,35 (1977).
3. U.S. Department of Labor, *Sheltered Workshop Study: Study of Handicapped Clients in Workshops* A-5 (1979).
4. DOL 34 (1977).
5. DOL 39 (1979).
6. Levitan and Taggart, Jobs For The Disabled 67 (1977).
7. DOL 73, 74, 106, 111, 112 (1979).
8. 29 U.S.C. §214(c) (1976).
9. *Id.*
10. *Id.*
11. 29 C.F.R. §525.7 (1979).
12. *Id.* at §525.2.
13. *Id.*
14. Neff. *Work and Rehabilitation,* 36 J. Rehab. 16 (1970).
15. *Id.* at 21 (emphasis added).
16. DOL 15 (1979).
17. Gold, *Vocational Training*, in Mental Retardation and Developmental Disabilities 245 (J. Wortes ed. 1975).
18. *Id.* at 225.
19. *Id.* at 259.
20. *Id.* at 256 nn 22, 28, 42, 54; Tombinson and Whelan, *Acquisition and performance difference between normal and mentally handicapped adults on a complex assembly task*, 69 Brit. J. Psych. 385 (1978).
21. See, for example, Gold, "Try Another Way:" Training Manual.
22. Gold, *Research on The Vocational Habilitation of the Retarded: The Present, the Future*, in International Review of Research in Mental Retardation 97, 140 (N.R. Ellis ed. 1973).
23. *Id.* at 104.
24. Selby, *Accountability: Why and How*, 47 J. Rehab. 25 (1977).
25. *Id.*
26. Gold, *supra* note 22, at 104.

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