U.S. Department of Justice
Office of Justice Programs
Office of Juvenile Justice and Delinquency Prevention

OJJDP

Report

Beyond the WALLS

Improving Conditions of Confinement for Youth in Custody

Office of Juvenile Justice and Delinquency Prevention

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) was established by the President and Congress through the Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974, Public Law 93–415, as amended. Located within the Office of Justice Programs of the U.S. Department of Justice, OJJDP's goal is to provide national leadership in addressing the issues of juvenile delinquency and improving juvenile justice.

OJJDP sponsors a broad array of research, program, and training initiatives to improve the juvenile justice system as a whole, as well as to benefit individual youth-serving agencies. These initiatives are carried out by seven components within OJJDP, described below.

Research and Program Development Division develops knowledge on national trends in juvenile delinquency; supports a program for data collection and information sharing that incorporates elements of statistical and systems development; identifies how delinquency develops and the best methods for its prevention, intervention, and treatment; and analyzes practices and trends in the juvenile justice system.

Training and Technical Assistance Division provides juvenile justice training and technical assistance to Federal, State, and local governments; law enforcement, judiciary, and corrections personnel; and private agencies, educational institutions, and community organizations.

Special Emphasis Division provides discretionary funds to public and private agencies, organizations, and individuals to replicate tested approaches to delinquency prevention, treatment, and control in such pertinent areas as chronic juvenile offenders, community-based sanctions, and the disproportionate representation of minorities in the juvenile justice system.

State Relations and Assistance Division supports collaborative efforts by States to carry out the mandates of the JJDP Act by providing formula grant funds to States; furnishing technical assistance to States, local governments, and private agencies; and monitoring State compliance with the JJDP Act.

Information Dissemination Unit informs individuals and organizations of OJJDP initiatives; disseminates information on juvenile justice, delinquency prevention, and missing children; and coordinates program planning efforts within OJJDP. The unit's activities include publishing research and statistical reports, bulletins, and other documents, as well as overseeing the operations of the Juvenile Justice Clearinghouse.

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The mission of OJJDP is to provide national leadership, coordination, and resources to prevent juvenile victimization and respond appropriately to juvenile delinquency. This is accomplished through developing and implementing prevention programs and a juvenile justice system that protects the public safety, holds juvenile offenders accountable, and provides treatment and rehabilitative services based on the needs of each individual juvenile.

Beyond the Walls:

Improving Conditions of Confinement for Youth in Custody

Report

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Points of viewpoints or opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of OJJDP or the U.S. Department of Justice.

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This report is time dated and does not reflect cases, investigations, laws, and amendments beyond January 1, 1997; however, chapter 1 is updated through November 1997.

The Office of Juvenile Justice and Delinquency Prevention is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the National Institute of Justice, and the Office for Victims of Crime.

Foreword

Drafted under the direction of the Juvenile Justice Center of the American Bar Association, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody* is a fitting response to Attorney General Janet Reno's counsel:

> America must not only take better care of its children before they get into trouble, but also not abandon them when they get into trouble.

This Report is a virtual toolbox for community advocates and program administrators committed to enhancing conditions of juvenile confinement. Some of the Report's tools may be used to help a young person obtain needed education or treatment; others may empower those working to protect children from abuse and maltreatment.

Additional tools, like the Civil Rights of Institutionalized Persons Act, can be used by advocates to enlist the Justice Department's aid in protecting the rights of children in custody. Others, like the Individuals with Disabilities Education Act, address special education needs.

While some tools in *Beyond the Walls* will be familiar and others new, all recognize the lasting benefits of attaining constructive change in juvenile offenders and the inherent risks of criminalizing, warehousing, and abandoning them. I trust we will use these tools effectively as we work together to meet the worthy goal set forth by the Attorney General.

Shay Bilchik
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Office of Juvenile Justice and Delinquency Prevention

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Finally, but not least, this handbook could not have been possible without the encouragement and support of Shay Bilchik, Administrator of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) and John J. Wilson, Deputy Administrator of OJJDP. We also extend a very special thanks to Barbara Allen-Hagen at OJJDP for her ongoing advocacy and commitment to this initiative.

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Introduction

On New Year's Day, 1996, the American Bar Association (ABA) Juvenile Justice Center released a report entitled *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. The report revealed significant deficiencies in both the access to and quality of representation juveniles receive as they move through the juvenile court process. The report identified some major "sore spots" where the absence or ineffectiveness of attorneys was particularly acute. Two areas of significant concern centered around detention advocacy (at the front part of the juvenile court system) and postcommitment advocacy (at the end of the system). Building upon the findings in *A Call for Justice*, the Juvenile Justice Center, in partnership with many advocates and colleagues, has prepared this handbook of ideas to stimulate discussion about ways juvenile justice professionals can improve conditions of confinement for detained and incarcerated youth.

Forty-seven of the fifty States and the District of Columbia have substantially changed their juvenile justice laws in recent years to include more transfers of youth to adult court, more mandatory minimum sentences, and more incarceration, all of which have exacerbated the unlawful conditions found in many facilities where youth are held. These increasingly overcrowded and significantly deficient facilities hold disproportionate numbers of nonwhite youth for nonviolent property and drug crimes. It is imperative that juvenile justice advocates explore new and underutilized approaches to safeguarding the rights of children in secure detention.

Juvenile justice advocates need to hold facilities accountable for operating in a lawful and humane manner that balances public safety with the equally compelling need for treatment and rehabilitation of young offenders. Subjecting youth to abusive and unlawful conditions of confinement serves only to increase rates of violence and recidivism and to propel children into the adult criminal justice system. Well-documented deficiencies in living space, security, control of suicidal behavior, health care, education and treatment services, emergency preparedness, and access to legal counsel threaten not only the well-being of youth, but the community that will receive them after their release.

A substantial body of case law and several relevant Federal statutes specify the minimum environmental conditions that juvenile institutions must meet. Under these laws detained youth have a right to protection from violent inmates, abusive staff, unsanitary living quarters, excessive isolation, and unreasonable restraints. They must also receive adequate medical and mental health care, education (including special education for youth with disabilities), access to legal counsel, and access to family communication, recreation, exercise, and other programs.

Current methods to improve conditions, such as accreditation of facilities and litigation aimed at correcting monumental deficiencies, are often expensive and time consuming and sometimes allow for only minimal monitoring of existing conditions. This manual sets forth six ideas for improving conditions of confinement that may be used by attorneys, parents, child advocates, and others interested in improving the quality of care received by juveniles in training schools and detention centers across the country. These materials are designed to supplement, not supplant, the need for litigation which, under certain circumstances, is absolutely essential. The following six ideas should be considered as methods of improving oversight, monitoring, and services for detained and committed youth:

- **Civil Rights of Institutionalized Persons Act (CRIPA):** CRIPA, which protects the civil rights of all institutionalized persons, could be a useful tool in eliminating widespread civil rights abuses in juvenile facilities.
- **Ombudsman Programs:** Ombudsman programs address individual or citizen complaints of corrupt or unlawful acts by public officials. Creation of these programs would provide a forum for monitoring and improving the conditions in juvenile facilities.
- **Individuals with Disabilities Education Act (IDEA):** IDEA entitles disabled students up to age 22 to receive free appropriate education in the least restrictive environment possible. The Act does not exclude detained and confined youth.
- **Protection and Advocacy Systems (P&A's):** P&A's monitor the services provided to persons (juveniles and adults) with mental health and other disabilities and set up a State-based network to advocate on their behalf.
- **Administrative Procedure Act (APA):** The Federal Administrative Procedure Act and the Model State Administrative Procedure Act govern the administrative procedures, regulations, and behavior of Federal and State agencies where these statutes have been enacted. Challenging agency procedure or behavior may provide another avenue to address deficiencies.
- **Self-Assessment:** Self-assessment can be used as an internal process initiated by an agency to evaluate the quality of care provided for youth in its custody. This process can be encouraged through documentation of inadequate conditions or other systemic deficiencies that could potentially lead to litigation. Self-assessment might postpone or suspend the need for legal action if there is a good-faith effort to remedy deficiencies.

Each of these areas is further defined, described, and discussed below. Readers are encouraged to find ways in which to use these tools to improve the conditions of youth in custody. The American Bar Association (202–662–1515) can provide more information, answer questions, or connect readers with other individuals who have expertise in these areas.

Civil Rights of Institutionalized Persons Act in Juvenile Correctional Facilities

The Civil Rights of Institutionalized Persons Act (CRIPA) can help eliminate unlawful conditions of confinement for detained and incarcerated youth.[1] Through express authority granted to the Attorney General, CRIPA gives the Civil Rights Division of the U.S. Department of Justice (DOJ) the power to bring actions against State or local governments for violating the civil rights of persons institutionalized in publicly operated facilities.[2] Congress enacted CRIPA in 1980 to provide DOJ with the statutory authority to bring cases to protect institutionalized persons.[3] CRIPA does not authorize DOJ to represent individuals; it only allows DOJ to take action to remedy systemic problems. In addition, CRIPA does not create any new substantive rights; it simply confers power on the Attorney General to bring litigation grounded in previously established constitutional or statutory rights of institutionalized persons.

A substantial body of law establishes the rights of detained and incarcerated youth and protects them from dangerous conditions and practices of confinement.[4] CRIPA is an underutilized method of ensuring that these laws are not violated in juvenile facilities. CRIPA's statutory language explicitly includes State or local facilities in which youth are detained or confined (for any purpose other than education) and enables DOJ to file a complaint against the State or local government when there are systemic violations of the rights of youth.[5]

The Civil Rights Division of DOJ is the agency responsible for enforcing CRIPA. As of November 1997, the Civil Rights Division had investigated 300 institutions under CRIPA. Seventy-three of these institutions—or approximately 25 percent—were juvenile detention and correctional facilities.[6] Although the Division investigated very few juvenile facilities during the 1980's, it dramatically increased its investigations of juvenile detention and correctional facilities during the 1990's.

Under CRIPA, the Civil Rights Division must protect the rights of individuals not only in juvenile facilities, but in many other institutions, including prisons, jails, nursing homes, psychiatric hospitals, and mental retardation facilities. The Civil Rights Division, therefore, allocates its limited resources to a wide variety of publicly operated facilities throughout the United States and its territories. In light of a number of glaring cases of institutional abuses, however, the Civil Rights Division has an increased interest in pursuing violations in juvenile facilities.

CRIPA is an important tool in eliminating systemic violations of juveniles' statutory and constitutional rights in detention or correctional facilities.

In order to initiate investigations of particular institutions, the Division relies on information it receives from within DOJ and other government agencies (such as the Department of Education, the Department of Health and Human Services, and the Civil Rights Commission) and from external sources.[7] Advocates and parents should be aware of the important role that they can play in bringing information about harmful or unlawful conditions of detention or incarceration to the attention of the Civil Rights Division. Requesting the Division to take action, by writing and calling, can be the impetus needed to improve conditions for youth in custody.

In addition to the authority to bring original suits, CRIPA expressly grants the Attorney General the

right to intervene in ongoing civil rights litigation.[8] The intervention authority, however, is limited in several respects.[9] The Attorney General may not file a motion to intervene before 90 days after commencement of the action.[10] The Attorney General must also certify that written notice was given to the Governor, State attorney general, and the director of the institution at least 15 days prior to the motion and that intervention is in the national public interest.[11] Intervention power is seldom used, but may be a useful resource to strengthen a case in which the constitutional or statutory rights of juveniles are being violated in a facility.

Advocates and parents should be aware of the important role that they can play in bringing information about harmful or unlawful conditions to the attention of DOJ and calling for action when it is needed.

Accessing CRIPA

The Role of Advocates

A CRIPA action begins with DOJ's discovery of possible civil rights violations at an institution. DOJ receives information and allegations through informal means such as news reports, letters from prisoners or families, and information from former and current employees of institutions. At times, DOJ may also encounter an allegedly offending facility in the course of another investigation. Only occasionally does DOJ receive complaints from juvenile advocacy groups. This type of information exchange does not happen as often as it should. Advocacy groups and others may have hesitated to file complaints under CRIPA in the past because of a perceived failure of DOJ to truly represent the rights and interests of the institutionalized.[12] CRIPA, however, can be a powerful tool to redress unlawful conditions of confinement, and advocates must realize how critical it is to bring evidence of systemic institutional violations to the attention of DOJ.

DOJ's Decision To Investigate

After receiving information about unlawful conditions, the Civil Rights Division must determine that it has the authority to conduct the investigation and that the investigation is warranted. Because CRIPA authorizes the Attorney General to initiate action where the State or local government is violating the rights of persons residing in public institutions, the first question is whether the facility is in fact a public institution.

Before commencing an investigation, the Civil Rights Division must determine that it has the authority to conduct the investigation and that the investigation is warranted.

In order to qualify as a public institution, a facility must satisfy two requirements. First, it must be one "which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State."[13] For example, if a private facility enters into a contract with a State, city, or county to house juveniles adjudicated delinquent, the facility likely would be an institution covered by the statute, even where the contractor maintains full control of the facility. Second, in addition to having adequate governmental involvement, a facility must be one of the five types of facilities described in the statute.[14] Most juvenile detention and correctional facilities are plainly encompassed by the statute, including facilities where juveniles are:

- Held awaiting trial.
- Residing for purposes of receiving care or treatment.
- Residing for any State purpose (other than solely for educational purposes).

After it has been determined that a facility meets the requirements of a public institution, the Civil Rights Division then reviews all of the complaints to ascertain whether the allegations are serious enough to warrant further investigation. The Attorney General has delegated to the Assistant Attorney General for

Civil Rights the final decision about whether an investigation is warranted. In general, allegations against publicly operated facilities result in an investigation when the Division has received sufficient evidence of potential systemic violations of Federal rights, such as physical abuse, neglect, or lack of adequate medical or mental health care or education.

Conducting the Investigation

Once DOJ has decided to investigate an institution, the Attorney General must give the State or municipality at least 1 week's notice of the impending investigation. Following the notice letter, DOJ contacts the State or local government parties and arranges for a tour of the facility or facilities under investigation and may also request that the parties produce certain facility documents. If an investigation does not uncover a pattern or practice of civil rights violations, DOJ notifies the jurisdiction and closes the investigation.

If DOJ does uncover a pattern or practice of civil rights violations, the Assistant Attorney General for Civil Rights sends the jurisdiction a formal "findings letter." This letter sets forth the alleged violations, the evidence supporting the alleged violations, and the minimum steps necessary to correct the violations. Civil Rights Division attorneys then meet with the relevant State or local officials to discuss how best to resolve the violations.[15]

Attorneys for the Civil Rights Division review all of the complaints to ascertain whether the allegations are serious enough to warrant further investigation.

Settlement and Litigation

When enacting CRIPA, Congress recognized that while it is not an ideal solution, litigation is "the single most effective method for redressing systematic deprivations of institutionalized persons' constitutional and Federal statutory rights."[16] Aware of the tensions of federalism, however, Congress built in a window of negotiations to give States the opportunity to avoid undue involvement of the Federal judicial system. Congress believed that States should have the opportunity to remedy conditions through a voluntary and informal process.[17] Consequently, CRIPA requires that before filing suit, DOJ wait 49 days after issuing a findings letter. In the interim, DOJ must make a good faith effort to consult and negotiate with the facility and ensure it has had reasonable time to take corrective action. CRIPA's notification and waiting period ensures that every effort is made to resolve the problem before filing the complaint.[18] While Congress did not intend for the Attorney General to wait months or years to file suit,[19] it placed no ceiling on the amount of time DOJ could negotiate before filing suit. Consequently, investigations and negotiations sometimes continue for years.[20]

Given CRIPA's emphasis on negotiation, the vast majority of all CRIPA actions result in settlement of one form or another without ever going to trial. Sometimes the parties reach an informal resolution during the investigatory period. Informal resolution generally occurs when States are cooperative, take the initiative to correct problems voluntarily, and demonstrate that conditions have improved to a constitutionally acceptable level.

Many of the investigations, however, culminate in court-endorsed agreements between the parties that have the effect of a court order, called consent decrees. As of November 1997, DOJ had entered 61 CRIPA consent decrees requiring State and local jurisdictions to take corrective actions in 108 facilities.[21] These consent decrees are frequently filed with the court simultaneously with a CRIPA complaint. In other situations, they are entered into after a CRIPA complaint has been filed and the case has proceeded to various stages of litigation.

Before DOJ can file a CRIPA complaint, CRIPA requires that there be:

- Reasonable cause to believe that the State is engaged in a pattern or practice of violating the civil rights of individuals residing in an institution.
- Egregious or flagrant conditions that violate the constitutional or statutory rights of individuals residing in an institution that cause grievous harm to the residents.[22]

In addition, the Attorney General must certify that she has met CRIPA's procedural requirements of notification and conciliation and that a CRIPA action is in the public interest.[23]

The only remedy permitted under CRIPA is equitable relief. The Attorney General may seek the minimum corrective measures necessary to guarantee the civil rights of the institutionalized.[24] Congress recognized that traditional equitable remedies, such as injunctions against certain practices, affirmative orders to upgrade facilities, and orders to increase staff size, were adequate remedies to achieve the minimum corrective measures in CRIPA settlements.[25]

In summary, when DOJ first hears about violations from external sources, it must determine if the facility has adequate governmental involvement and falls within the facility types described in the statute. If the facility qualifies as a publicly operated facility, DOJ must then decide if the allegations warrant an investigation. Choosing to pursue an investigation, DOJ then observes whether there is an established pattern or practice that causes grievous harm and then decides whether a complaint is warranted. DOJ must comply with the notification and waiting period requirements prior to investigating or filing a complaint. Finally, DOJ can seek only the minimum corrective measures needed to protect the civil rights of the institutionalized. Residents and advocates may wish to pursue reaching further relief by means other than CRIPA.

During the course of an investigation, DOJ determines whether there is an established pattern or practice that causes grievous harm to residents of a public institution.

Residents and advocacy groups have rarely attempted to intervene in CRIPA actions on behalf of residents. Yet, one Ninth Circuit case held that residents could intervene if their interests were not adequately protected by the government.[26] Even if intervention is not ultimately permitted, seeking it may be beneficial because DOJ may need to demonstrate to the court that it is adequately protecting the rights of the residents.

Monitoring Consent Decrees

Once a consent decree is ordered by the court, DOJ monitors the facility's compliance with the requirements of the decree through onsite inspections by expert consultants and reviews of periodic status reports. Throughout the past decade, DOJ has requested the appointment of special monitors or panels to assist with implementing and evaluating compliance with CRIPA consent decrees. All of the CRIPA consent decrees involving juvenile facilities currently have this type of independent oversight.

If the facility does not comply with the consent decree requirements or other court orders, DOJ will return to court, when appropriate, to seek enforcement of the decree or further relief. For instance, when a juvenile detention facility in New Jersey failed repeatedly to comply with significant requirements in a CRIPA consent decree, DOJ filed a contempt action. The contempt motion alleged staff brutality (juveniles being hit with metal keys and being punched in the stomach and head), filthy conditions (cockroaches crawling over juveniles forced to sleep on ratty mattresses on the floor), and lack of basic necessities, such as underwear and towels. The county failed to contest the contempt motion and the court appointed a Special Master to oversee needed remedial measures at the facility. Since then, DOJ has also entered into five additional stipulations with the county that outline further steps that the county has agreed to take to correct serious problems in staffing, medical care, food, clothing, and sanitation at the facility.

CRIPA and Institutions for Juveniles

In the 17 years since Congress enacted CRIPA, there have been investigations into 73 juvenile correctional institutions. Seventeen of the investigations were closed before any litigation ensued, because DOJ concluded that a pattern or practice of unlawful conditions did not exist or because the facility closed its doors.[27] There are presently 22 ongoing juvenile detention and treatment center investigations under CRIPA.[28] The Division is also monitoring conditions in 34 juvenile correctional facilities through consent decrees in Kentucky, New Jersey, and Puerto Rico. The consent decree filed in Kentucky includes

all 13 juvenile treatment facilities in the State.[29] The consent decree in New Jersey is with one facility and in Puerto Rico with 20 facilities.[30]

Recent CRIPA consent decrees covering juvenile detention, correctional, and treatment facilities are comprehensive and address a broad range of conditions. For example, in November 1995, a Federal court in Kentucky ordered a CRIPA consent decree that was negotiated between DOJ and State officials to remedy serious deficiencies in Kentucky's 13 juvenile treatment facilities. The decree required the State to take a number of steps to protect juveniles from abuse, mistreatment, and injury; to ensure adequate medical and mental health care; and to provide adequate educational, vocational, and aftercare services. Another CRIPA consent decree, ordered by a Federal court in Puerto Rico in October 1994, addressed life-threatening conditions at eight juvenile detention and correctional facilities. These dire conditions included juveniles committing and attempting suicide without staff intervention or treatment, widespread infection control problems caused by rats and other vermin, and defective plumbing that forced juveniles to drink from their toilet bowls.

Dire conditions in eight facilities in Puerto Rico included juveniles committing and attempting suicide without staff intervention or treatment, widespread infection control problems caused by rats and other vermin, and defective plumbing that forced juveniles to drink from their toilet bowls.

CRIPA is an underutilized tool for improving conditions in juvenile correctional institutions. Although the statute was designed to address unconstitutional and illegal conditions in publicly operated institutions, and specifically mentions juvenile facilities, until recently little activity has occurred in this area. The Division should devote even more resources to CRIPA investigations of juvenile institutions and should continue to use CRIPA to address the mental health and disability needs of young people in State custody as well. Almost half of the juveniles who are incarcerated have identifiable mental health disabilities, including mental retardation, learning disabilities, and emotional and behavioral disorders.[31] The civil rights of disabled youth in custody can be upheld by using CRIPA.

Although CRIPA was designed to address unconstitutional and illegal conditions in publicly operated institutions, and specifically mentions juvenile facilities, until recently little activity has occurred in this area.

The Division does not receive many complaints from detained or incarcerated juveniles or families of juveniles in State custody. This is not because problems do not exist in juvenile institutions, but because there is a lack of awareness about CRIPA. Advocates and practitioners need to take the lead in understanding and utilizing CRIPA and alerting DOJ to possible patterns of unconstitutional conditions in juvenile facilities. Informing advocacy groups and families about the effectiveness of CRIPA can be the first step to safer conditions for youth in custody.

Using CRIPA To Improve Conditions

Advocates and parents alike should bring evidence of unlawful systemic conditions and abuses at juvenile detention and correctional facilities to the attention of the Special Litigation Section, Civil Rights Division, DOJ. Simply bringing this information to the Division can have a tremendous impact. In one instance, a single advocate acting on behalf of his young client set in motion a process that led to statewide, broad-based reforms in the juvenile detention and correctional facilities.

On January 4, 1994, a 17-year-old boy was picked up on a burglary warrant and abruptly removed from a hospital where he was being treated. The next day the attorney appointed to represent the boy discovered that his client could not be guilty because he was in the State's care at a secure residential center at the time of the crime. The charge was dismissed and

the social worker indicated that the boy would be returned to the treating hospital. Instead, after waiting 2 hours, the boy was inadvertently loaded into a van in shackles and handcuffs and taken to a maximum security facility.

The boy's attorney wrote a letter to the State agency responsible for his care protesting his client's treatment and demanding a more appropriate placement. The local newspaper also ran an article about the boy's story. These pieces of information sparked an internal agency investigation and immediate action by the commissioner of social services to find a more suitable placement for the boy. The boy was then removed from maximum security.

Advocates and parents need to bring evidence of unacceptable systemic problems at juvenile detention and correctional facilities to the attention of DOJ at the Special Litigation Section, Civil Rights Division, U.S. Department of Justice.

A few months later, in April 1994, a report of the internal agency investigation revealed that there was reason to believe some residents at the maximum security facility had been abused by staff, that complaints of mistreatment were intentionally suppressed, and that some staff members behaved in a racially biased manner. The team of investigators recommended corrective actions such as having an independent group make unannounced visits to all residential centers, doubling efforts to make sure residents understand their rights and the proper way to file complaints, training all staff members in cultural diversity, and constructing a new juvenile center for serious offenders to replace the antiquated maximum security facility.

Despite State efforts to overhaul the system, the newspaper continued to reveal allegations of abuse and outbreaks of violence at juvenile facilities in the State. In February 1995, after receiving complaints from advocacy groups and seeing news reports of abuse at five juvenile facilities, DOJ launched its own investigation under the authority of CRIPA and the Violent Crime Control and Law Enforcement Act of 1994 to determine the veracity of alleged civil rights violations at the facilities.[32] Many State officials and child advocates welcomed the Federal investigation. The agency administrators, who had ordered the initial independent investigation of the facility, wrote to the Assistant Attorney General of the Civil Rights Division pledging the agency's full cooperation and sent a memo to the facility directing staff to cooperate.

On November 13, 1995, under the authority granted by CRIPA, U.S. Attorney General Janet Reno and the Governor of the State signed an agreement to improve conditions at the State's juvenile treatment facilities. The agreement is anticipated to cost the State $17 million over 2 years.

According to the agreement, allegations of abuse will now be investigated by the Special Investigations Division in the State Office of the Inspector General. The State will provide more treatment and aftercare services, and each child will have an up-to-date treatment plan. Juveniles who are taking medication for mental illness will be seen by psychiatrists, and psychiatric services will be provided onsite each week. The State will offer special educational and vocational treatment. Juveniles will not be placed in isolation for punishment or staff convenience, juveniles in isolation will be monitored, and all isolation decisions will be reviewed to determine their appropriateness.

The State has submitted status reports, and a monitor has been appointed to oversee compliance with the agreement. All of these improvements in this State's facilities for juveniles were sparked by the advocacy and information sharing efforts of a single advocate. This is just one example of the work that can be done with CRIPA.

Conclusion

Youth detained in detention and correctional facilities have specific rights that protect them from dangerous conditions and practices of confinement. CRIPA can be a useful tool in eliminating these unlawful conditions of confinement, as it was enacted by Congress to provide the Civil Rights Division of DOJ with the authority to protect the rights

of institutionalized youth in publicly operated facilities. Although CRIPA ensures that laws establishing the rights of confined youth are not violated by juvenile facilities, it is underutilized. CRIPA can be used to uphold civil rights and address the mental health and disability needs of youth in State custody; almost half of the juveniles who are incarcerated have identifiable mental health disabilities, such as mental retardation, learning disabilities, and emotional and behavioral disorders.

Informing advocacy groups and families about the effectiveness of CRIPA is the first step to achieving safer conditions. Parents, advocates, and juvenile justice practitioners need to play a key role in bringing information about harmful or unlawful conditions to the attention of DOJ by calling or writing to urge the Civil Rights Division to take action. By bringing this information forward, DOJ's review and investigative processes may be set in motion to determine if Federal rights are being violated. Community awareness of unlawful conditions can be raised by contacting local media, civic organizations, and child advocacy agencies.

Readers are invited to contact the American Bar Association Juvenile Justice Center to get more ideas about advocacy strategies under CRIPA. Immediate concerns regarding hazardous conditions and practices of detention and confinement should be directed, preferably in writing, to:

Special Litigation Section, Civil Rights Division
U.S. Department of Justice
P.O. Box 66400
Washington, DC 20035–6400
202–514–6255

Checklist for Legal Reform and Using CRIPA

If you are interested in helping to correct unlawful conditions of confinement in juvenile facilities, you can:

- ✓ Refer to case law and statutes to determine if the condition is unlawful.
- ✓ Ascertain the degree of violation and whether it constitutes a systemic problem by:
  - ✓ Talking to facility residents and staff.
  - ✓ Gathering testimony.
  - ✓ Reviewing accessible records.
- ✓ Bring this information to the attention of the facility administrator(s) and advocate for improved conditions.
- ✓ Inform the facility administrators of the possibility that a successful lawsuit can be brought against them if the facility is not willing to make the necessary changes.
- ✓ Inform DOJ and other child advocates of the facility violations and the information you have gathered. Lobby for an investigation. (See DOJ checklist on page 8 for their procedures.)
- ✓ Raise community awareness of the unlawful conditions by contacting representatives of the media and local child advocates and agencies. Push for local coverage.
- ✓ Generate community support. Write to civic organizations, churches, and others who may be concerned about youth in custody. Send letters to your local and State representatives.
- ✓ Follow up with DOJ and the facility to ensure progress.

Summary of CRIPA Requirements and Typical Department of Justice Procedures

Once DOJ has knowledge of allegations of conditions that appear to constitute a systemic problem in juvenile facilities, it typically engages in the following process:

- ✓ DOJ must determine that it has the authority to conduct an investigation by assessing whether the juvenile facility is a public institution that:
  - ✓ Has sufficient governmental involvement.
  - ✓ Is one of five facility types described in the statute.
- ✓ DOJ must decide whether an investigation is warranted by reviewing all of the complaints and allegations. To facilitate this review, advocates should provide DOJ with all pertinent information and documents.
- ✓ If DOJ decides that an investigation is warranted, then:
  - ✓ DOJ must give the State or municipality at least 1 week's notice of the impending investigation.
  - ✓ DOJ usually arranges for a tour following the notice letter.
  - ✓ DOJ may request the production of certain documents.
- ✓ If DOJ does not uncover severe and systemic civil rights deprivations, then the Department notifies the jurisdiction and closes the investigation. If DOJ does uncover civil rights deprivations, then DOJ attempts to work out an agreement to pursue needed remedies.
- ✓ If a decision to pursue litigation is made, the Attorney General must certify that:
  - ✓ Notice was given to appropriate officials at least 7 days prior to commencing an investigation.
  - ✓ Notice was given as to the alleged violations, supporting facts, and minimum remedial measures at least 49 days prior to filing the complaint.
  - ✓ The Division made a good-faith effort to resolve the problem with the institution.
  - ✓ Litigation is in the national public interest.

Use of Ombudsman Programs in Juvenile Corrections

Establishing ombudsman programs to oversee juvenile correctional institutions can help protect the rights of youth in custody. An "ombudsman," a Swedish word meaning "representative," is a person or body that protects citizens against governmental abuses.[33] Originating in Sweden, ombudsman programs are designed to help resolve citizen complaints against public officials sympathetically and informally. An ombudsman cuts through red tape to investigate allegations and find remedies when citizens' rights have been violated. Nations such as Sweden and Australia appoint an ombudsman to receive and investigate complaints made by individuals against abuses or corrupt acts of public officials.

Although a nationwide ombudsman has not been established in the United States, narrowly tailored ombudsman programs have been created to monitor specific areas of government service such as child welfare, corrections, long-term care, and workers' compensation. Within the juvenile corrections context, ombudsmen can provide a voice for children who are detained in public facilities. Ombudsmen can monitor conditions and service delivery systems, investigate complaints, report findings, propose changes, advocate for improvements, access appropriate care, and help to expose and reduce unlawful deficiencies in juvenile detention and correctional facilities. In addition to addressing unlawful conditions or practices, a juvenile corrections ombudsman could serve as an important link between the court, the community, and the correctional facility.

Setting Up an Ombudsman Program for Incarcerated Juveniles

A growing number of States have established ombudsman offices to address problems confronting children in out-of-home care. Many of these children have limited access to attorneys and advocates who might help them resolve disputes, conduct investigations regarding unlawful practices, or help obtain services to which children are statutorily entitled. Ombudsman programs can educate the public about unlawful conditions, leading to fewer abuses.

Ombudsmen can monitor conditions, service delivery systems, investigate complaints, report findings, propose changes, advocate for improvements, access appropriate care, and help to expose and reduce unlawful deficiencies in juvenile detention and correctional facilities.

The effectiveness of ombudsman programs depends on their method of enactment, degree of autonomy, staffing, funding, statutory authority, and functions. Ombudsman programs can be enacted through legislative, executive, or judicial authorization. Each method has its pros and cons and provides a different level of autonomy. Legislative enactment usually provides the ombudsman with independence from executive and agency control and can facilitate a working relationship with the legislature, but may also invoke less agency cooperation. An executive authorization that establishes the program within the agency invites greater agency cooperation and access to information, but may also subject the ombudsman to undesirable executive and agency control. A judicial authorization can quickly establish an ombudsman program that retains independence from agency and legislative agendas; however, this method may fail to retain the vital support (fiscal and otherwise) of the legislature or the agency.

The method of enactment determines the ombudsman program's dependence on or independence from the legislature, the agency, and the judiciary. The independence of the ombudsman from the agency is especially important in the juvenile corrections context where the interests of the juvenile corrections agency often conflict with the interests of the detained or confined youth. To ensure a relatively autonomous ombudsman program, the decision of which method of enactment to use should be made in light of the existing relationships between correctional facilities, service providers, defense attorneys, legislatures, advocates, and the judiciary. One way to facilitate the independence of an ombudsman program is to authorize the appointment of the ombudsman by the Governor with confirmation by the legislature. This structure provides both executive and legislative branch involvement in the appointment and governance of the office, while diminishing the ability of one branch to control all aspects of the program.

Other factors to consider when developing an ombudsman program include staff qualifications and fiscal resources. An ombudsman program should be structured around a staff qualified to address the diverse range of issues that arise in the context of juvenile corrections. Staff with legal expertise can address allegations of rights violations, assess whether allegations are substantiated, and decide whether formal legal action is necessary to remedy violations. Similarly, staff with social work and educational expertise are needed to monitor and make recommendations about the adequacy of treatment and education programs.

With a qualified staff, an appropriately funded program can establish a central office that coordinates all major assessments and investigations and delegates day-to-day monitoring to satellite offices at each juvenile facility. The satellite office can maintain a presence at the institution, handle minor complaints, investigate allegations, and serve as a funnel to refer complaints to the central office. This structure enables the ombudsman program to handle daily concerns of the residents while allowing for the more thorough assessment and planning needed to initiate long-term procedural and substantive reforms in facilities.

Once an ombudsman program has been enacted with sufficient autonomy, staffing, and funding, the ability of the ombudsman to effectively monitor agency activities depends upon the ombudsman's statutory authority and functions. To provide a voice for detained and confined juveniles, an ombudsman program must have sufficient authority to carry out investigations and enforce, by some means, proposed improvements. Carrying out investigations requires that the ombudsman have access to youth, documents, records, and witnesses and subpoena power in case necessary information is not forthcoming. After completing an investigation, the ombudsman must deliver recommendations and formal complaints to juvenile justice administrators and, in some cases, the legislature. To enforce solutions, the ombudsman must have the power to initiate formal proceedings when other less formal measures do not adequately address substantiated complaints. With the authority to investigate and enforce, the ombudsman can initiate changes through informal agreements with agency administrators or can enter into more formal challenges through litigation.

To provide an effective voice for detained and confined juveniles, an ombudsman program must have sufficient authority to carry out investigations and enforce, by some means, proposed resolutions.

Ombudsman programs can serve a variety of functions, including investigating allegations, monitoring facilities, conducting research, educating the community, providing recommendations for improvements, and, if necessary, bringing litigation. Investigating complaints includes talking to residents and witnesses, reviewing records and files, and visiting sites mentioned in complaints. The complaints can range from allegations of physical abuse and inadequate conditions to a simple lack of communication between residents and staff. The ombudsman should first try to resolve substantiated allegations informally through negotiations. Sometimes litigation can be avoided by providing an opportunity for the facility administrators and staff to collaborate with advocates, attorneys, mental health

professionals, parents, and others interested in creating a lawful and safe environment for detained and committed youth. However, if informal proceedings do not lead to satisfactory results, then formal measures must be taken to remedy the violations. An ombudsman with the authority to bring litigation has a much better chance of negotiating an informal agreement with the facility.

Playing an active role in the legislative and public education processes is also an important function of ombudsman programs. Reviewing legislation, testifying on legislative proposals affecting children, publishing reports, convening public hearings, and participating on community boards and commissions enable the ombudsman to affect and oversee government and community actions that impact youth in custody.

Sometimes litigation can be avoided by providing an opportunity for the facility administrators and staff to collaborate with advocates, attorneys, mental health professionals, parents, and others interested in creating a lawful and humane environment for detained and committed youth.

Finally, since budget constraints impact the quality of an ombudsman program, it is important to maximize all available resources. Existing programs and persons interested in setting up new ombudsman programs should stay abreast of funding opportunities that may be available through Federal and State appropriations or foundation grants. For example, in fiscal year 1995, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) offered States "Challenge Grant" money that was earmarked for 10 specific activities, 1 of which included:

> "Establishing and operating . . . a State ombudsman office for children, youth, and families to investigate and resolve complaints relating to action, inaction, or decisions of providers of out-of-home care to children and youth (including secure detention and correctional facilities, residential care facilities, public agencies, and social service agencies) that may adversely affect the health, safety, welfare, or rights of resident children and youth."[34]

Tennessee and Maryland were awarded this funding in the spring of 1996 and established ombudsman programs in their States that oversee juvenile detention and correctional facilities.

Using interns and law clerks from local law schools and universities can also be an effective way of enhancing an ombudsman program. With proper training and supervision, students can be placed at facilities, conduct investigations, address minor complaints, provide information, and refer appropriate complaints to the central office.

Different models of ombudsman programs, with varying autonomy, staffing, authority, functions, and funding, currently exist in the United States. Some of these ombudsman programs are tailored to distinct areas of service and may only act within their specific authorizations. Their methods of operation, however, are illustrative of the type and scope of programs that can be made available to address infractions within detention and correctional facilities for youth.

Child Welfare Ombudsman Programs

More than 25 child welfare ombudsman programs exist in the United States today. These ombudsman programs oversee child welfare agencies to ensure responsive, effective delivery of care and to monitor improvements in deficient areas. "Ombudswork," as it is sometimes called in the child welfare system, includes educating the public about various child welfare activities and the rights and needs of children.

As described above, these programs have been enacted either through the legislative process, executive order, or judicial decree. Despite the pros and cons that exist for each method of enactment, most programs report that they have had a tremendously positive impact on the way services are provided to youth in State care. The Office of the Child Advocate (OCA) in Rhode Island, for example, is an independent State agency and one of the few ombudsman programs that has the authority to oversee child welfare and juvenile justice out-of-home placements.[35] The Rhode Island statute has been interpreted to mean that OCA has the power

to do whatever is necessary to protect the rights of children. The office was originally established in 1980 to oversee the care of children who became involved with the State's Department of Children, Youth, and Families (DCYF). Because of unmet needs in securing quality care for all youth in Rhode Island, the powers and work of the office expanded.

Appointed by the Governor with consent of the State legislature, OCA's primary duty is to ensure that children in protective custody or care are afforded their legal rights. OCA reviews both the procedures used by the agencies and the implementation of these procedures in individual cases. Other functions of the office include receiving and processing complaints regarding the delivery of DCYF services; investigating and inspecting agency records and facilities; and subpoenaing testimony, evidence, and witnesses. The office also conducts reviews in response to allegations of institutional abuse or neglect.

Investigations have occurred at the Rhode Island juvenile correctional facility in response to the public defender bringing allegations of abuse to OCA's attention. The most powerful tool of OCA is the ability to bring legal action to safeguard the rights of children. OCA brought a successful suit against the juvenile correctional facility in 1989 for the practice of putting children on waiting lists for special education services. As of 1995, both monitoring of and compliance with the court orders continued.[36]

The most powerful tool of an ombudsman program is the ability to bring legal action to safeguard the rights of children. The ombudsman program in Rhode Island brought a successful suit against a juvenile facility for the practice of putting children on wait lists for special education services.

Adult Correctional Ombudsman Programs

Ombudsman programs have also been successful at improving conditions in adult correctional institutions by monitoring the relationship between inmates and prison officials. Programs are designed to protect the rights of inmates and staff and to ensure safe and humane conditions. Correctional ombudsman's duties include addressing complaints from staff and inmates, seeking corrective measures, providing recommendations, and submitting reports to the Governor and legislature when requested.

The success of adult correctional ombudsman programs depends upon the ombudsman's authority to pursue remedies and ability to manage the competing interests of prisoners and officials. If inmates do not feel that the ombudsman has the ability to address their complaints adequately, they will be reluctant to be cooperative. Additionally, if prison officials feel that the ombudsman is unreasonable, they will be unwilling to implement recommendations and may provide further obstacles to safeguarding prisoners' rights. Statutory authority must be exercised carefully in order to maintain balanced relationships among correctional administrators, staff, and inmates. This "balancing act" between service providers and receivers is evident throughout all ombudsman programs.

An adult correctional ombudsman program in Minnesota is an example of the positive achievement that can result from creating a program in correctional facilities. The ombudsman offers inmates an outlet for complaints about prison conditions and treatment and clarifies procedures and regulations, thereby reducing the tension within the prison facility. Standard functions of the ombudsman include conducting investigations, making recommendations, submitting an annual report to the Governor, and providing information to the legislature as requested. The ombudsman is appointed by the commissioner of corrections, but the office of the ombudsman remains independent of the Department of Corrections (DOC). The success of the program stems from its ability to respond quickly and effectively to complaints or requests. Most issues are handled informally, because of the effective working relationship that exists between the ombudsman and DOC. Recommendations made by the ombudsman about various prison policies have resulted in several positive policy changes. As a result of its ability to work effectively with inmates and with DOC, the Minnesota correctional ombudsman program has produced a more secure and humane prison environment while reducing costly lawsuits.[37]

Ombudsman Programs in Juvenile Justice

Well-documented deficiencies in conditions of detention and confinement for youth can be exposed and addressed through juvenile justice ombudsman programs. The Director of the New York Division of Youth appointed an ombudsman to serve residents of juvenile facilities. Visiting facilities and hearing complaints and grievances from residents has enabled the ombudsman to determine when an investigation is warranted and then act as an investigator, youth advocate, and reporter. Although the ombudsman does not have the authority to initiate disciplinary proceedings against the facilities, the ombudsman can issue a report with recommendations about how to improve conditions.

Other duties of the juvenile justice ombudsman include monitoring the implementation of policies and regulations and providing information to youth on their rights. The ombudsman has access to all Division of Youth records and information and must be apprised of any and all critical incidents occurring at the facilities. The ombudsman also takes steps to ensure that youth are provided with adequate legal counsel when appropriate. Although the ombudsman acts within the Division of Youth and lacks the authority to bring formal complaints, the ombudsman has fostered communication and initiated systemic accountability.

Juvenile justice ombudsman programs can expose and address well-documented deficiencies in conditions of confinement for youth.

Another juvenile justice ombudsman program, called the Juvenile Services Program (JSP), is operated by the Public Defender Service of the District of Columbia. JSP assigns an attorney to monitor the conditions and treatment of residents in juvenile detention and correctional institutions. JSP's functions include referring complaints to appropriate sources, representing residents in institutional disciplinary hearings, advocating for the rights of residents, providing information to residents, assisting residents and their attorneys during the placement and aftercare process, and ensuring that residents have contact with their attorneys. Investigation is a limited function of the program because JSP does not have the authority to compel cooperation with its efforts.

Conclusion

Widespread use of juvenile justice ombudsman programs would allow monitoring of institutions to ensure that conditions are safe, lawful, and humane; that rehabilitative services are being delivered; and that the rights and needs of juveniles are protected. Additionally, a juvenile justice ombudsman could provide an ongoing independent assessment of facility deficiencies and an avenue of public accountability.

All ombudsman programs must do a balancing act between the competing interests of clients and service providers.

Ombudsman programs in juvenile detention and corrections can:

- Address complaints from institutionalized juveniles.
- Furnish information about placement alternatives.
- Conduct investigations.
- Ensure careful aftercare service planning and postrelease implementation.
- Provide a mechanism of coordination between placement alternatives.
- Provide recommendations and research on improvements for institutions.
- Create accountability for officials in the system.
- Educate the public, legislators, and policymakers about the rights and needs of institutionalized juveniles.
- Litigate to protect children's legal rights.

Apart from these formal functions, an ombudsman program would also provide compassion and sensitivity to the issues faced by youth in custody. Many problems in institutions are not serious violations,

but are extremely important to incarcerated youth. Issues that may seem simple, such as obtaining an extra blanket, arranging a unit transfer, remaining in a specific institution or treatment program, receiving assistance in a disciplinary hearing, or obtaining contact with an attorney or family member, can have far-reaching ramifications for youth in custody. Having a mechanism to address these less blatant problems provides an avenue for responding to problems and issues before they escalate and become more widespread or serious.

When creating juvenile ombudsman programs, it remains important that they have sufficient autonomy and appropriate staffing, funding, authority, and functions. A well-established program can have a tremendously positive impact on the services received by detained and incarcerated youth.

Checklist for Creating an Ombudsman Program

- ✓ Examine the different models of ombudsman programs to determine which might work best in your community.
- ✓ Locate supportive community agencies and groups.
- ✓ Influence the political bodies necessary to establish the program.
- ✓ Stay apprised of the authority and functions given to the program and lobby for all the authority necessary to adequately monitor the juvenile justice system:
  - ✓ Access to juveniles.
  - ✓ Access to records.
- ✓ Access to facilities.
- ✓ Subpoena power.
- ✓ Litigation authority.
- ✓ Emphasize the need for appropriately qualified staff and adequate funds.
- ✓ Develop relationships with law schools and universities.
- ✓ Work to establish cooperative relationships between the facilities and the ombudsman program.
- ✓ Participate in community outreach activities.
- ✓ Look for long-term funding options.

Educational Advocacy for Youth With Disabilities

The Individuals with Disabilities Education Act (IDEA) mandates that States provide a free and appropriate public education for all students with disabilities if the State receives Federal support for educating students with disabilities. IDEA gives enforcement authority not only to the Federal and State Departments of Education, but also to individuals.[38] Therefore, if a parent, youth advocate, or department of education worker finds that a detained or confined youth is not receiving adequate educational services, IDEA can be used to secure appropriate education for this youth. Previous studies emanating from litigation and professional literature in this area document the inadequate educational services received by youth in custody.[39] IDEA serves as an ideal tool to access educational services for youth with disabilities because it requires public schools and State-operated programs, such as juvenile correctional facilities, to provide each eligible child with adequate special education and related services.

The Individuals With Disabilities Education Act

Although nearly all States have compulsory education laws and provide educational services through local school districts, Congress recognized the special needs of students with disabilities when it passed IDEA in 1975. IDEA mandates that all eligible students receive a free and appropriate education in the least restrictive setting possible.[40] Any State receiving Federal funds for educating students with disabilities must take affirmative steps to identify and evaluate all students who they suspect are eligible for special education services.[41] The identification process used by the State or education program must be racially and culturally nondiscriminatory.[42] Under IDEA, identification of any of the following disabilities entitles a student to free appropriate special education and related services: mental retardation, deafness, hearing impairment, speech or language impairment, visual impairment, serious emotional disturbance, orthopedic impairment, other health impairment, blindness, specific learning disability, autism, traumatic brain injury, or multiple disabilities.[43]

Studies emanating from litigation and professional literature in special education document that juvenile detention and correctional institutions tend to provide inadequate educational services to youth with disabilities.[39]

Once a youth has been identified as eligible for special education and related services, an Individualized Education Program (IEP) must be developed before services commence.[44] To ensure that each child's special needs are addressed, the IEP must be produced at a meeting with the student's teacher, parent(s), and a representative of the educational program.[45] The IEP must specifically identify the educational needs of the individual student and provide a plan for meeting those needs. IDEA regulations outline the specific areas to be addressed in the IEP and discuss the student's level of functioning, long- and short-term educational goals, and all related services that must be provided to help the child reach those goals.[46] The services may include individual tutoring, counseling, and any other educational assistance needed by the student. If the education program that is established for the child does not provide all of the services outlined in the IEP, then it has violated IDEA and the rights of the child with the disability.[47]

In addition to securing adequate special education services, IDEA is a landmark statute because it gives parents of a child with disabilities, or a child suspected of having disabilities, the ability to monitor the assessment, identification, and education of the child through IDEA's grant of certain procedural and substantive rights. IDEA regulations require that parents be notified of and give permission for the initial evaluation of their child.[48] Once their child has been identified as being eligible for special education services, IDEA also gives parents the opportunity to contribute to decisions concerning the development of the IEP. If the parents find that the evaluation of their child or the implementation of the child's educational program is unsatisfactory, they can use the complaint and hearing procedures provided by IDEA.[49] Parents or advocates filing administrative complaints or invoking due process hearings trigger the primary mechanisms through which IDEA ensures delivery of mandated educational services.

IDEA serves as an ideal tool to access educational services for detained and incarcerated youth with disabilities because it requires public schools and State-operated programs, such as juvenile correctional facilities, to provide each eligible child with adequate special education and related services.

The scope and specificity of IDEA represent unprecedented Federal involvement in State and local education by providing statutory educational guarantees to all children ages 5 to 21 with disabilities.[50] Since the passage of IDEA, parents and advocates no longer have to rely on constitutional due process or equal protection claims in order to secure educational opportunities for their children. When schools fail to provide appropriate services to children with disabilities, including schools in juvenile detention and correctional facilities, IDEA enables parents to file complaints or invoke hearings in order to access appropriate educational services. IDEA gives parents and advocates both the mechanisms to appeal the educational decisions of school districts and the opportunity to seek redress in court.

Reauthorizations of IDEA have broadened the eligibility to children from 3 to 22 years of age in most States. In 1986, the passage of the Handicapped Children's Protection Act guaranteed reimbursement of attorneys' fees to parents who prevail in litigation brought under IDEA.[51] Recent reauthorizations have placed increased emphasis on the transition of youth from special programs to the community. Transitional services may be especially important for youth in custody. Youth released from detention facilities need transitional services to reintegrate successfully into the community, and the special education system often has resources that the juvenile justice system does not.

Future reauthorizations of IDEA may seek to limit the scope of the educational services provided and the eligibility of youth for these services.[52] Advocates should make certain that their congressional representatives are aware of the importance of IDEA and the consequences of denying disabled students an appropriate education. Accessing special educational services can provide many detained and incarcerated youth with programs that enhance their abilities to reintegrate into the community and to succeed in their education.

IDEA and Juvenile Justice

Although a few studies have attempted to determine the prevalence of disabilities among youth in correctional institutions, methodological problems and varying definitions of disabilities have made it difficult to come up with reliable figures. Completed studies have estimated that the percentage of detained and incarcerated youth with disabilities ranges from 42 percent of all juvenile offenders in Arizona to 60 percent of all juvenile offenders in Florida and Maine.[53] In an attempt to assemble cogent data, Casey and Keilitz conducted a meta-analysis of all of the predominant studies of disabled juvenile offenders.[54] They estimated that 35.6 percent of juvenile offenders have learning disabilities and an additional 12.6 percent have mental retardation. Casey and Keilitz also reported that they could not conduct a meta-analysis of youth in juvenile corrections with emotional disturbances due to insufficient quality and numbers of studies. A recent analysis of studies on the prevalence of mental disorders among youth

in the juvenile justice system, however, estimates that approximately 22 percent of those incarcerated have significant mental health problems.[55]

Whether 30 percent, 60 percent, or a higher percentage is a reliable estimate for the prevalence of disabilities among youth in juvenile corrections is beyond the focus of the current discussion. What we do know is that the percentage of youth in juvenile correctional facilities who were previously identified and served in special education programs prior to their incarceration is at least three to five times the percentage of the public school population identified as disabled.[56] With this proportion of detained and incarcerated youth entitled to special education, IDEA provides the vehicle to access these services.

An estimated 35.6 percent of juvenile offenders have learning disabilities, and an additional 12.6 percent have mental retardation.

Litigation Under IDEA

Prior to the passage of IDEA in 1975, many advocates initiated litigation to secure the right to education and related services for children with disabilities. In subsequent years, much of the litigation has sought to define and clarify the nature of that right.[57] While most cases involving claims under IDEA have been heard by U.S. district courts and U.S. circuit courts of appeal, a few cases have reached the U.S. Supreme Court. Among other things, the Supreme Court has addressed issues such as the meaning of "appropriate education,"[58] whether specific services are medical or educational and are covered under IDEA,[59] the payment of attorneys' fees and costs when parents prevail in disputes with local school districts concerning services,[60] whether children with communicable diseases can be classified as disabled for educational purposes,[61] and disciplinary exclusion of students with emotional or behavioral disorders.[62]

Although the provisions of IDEA have applied to all States receiving Federal financial assistance under part B of this legislation, many States have been slow to provide special education services to incarcerated youth with disabilities.[63] During the past few years, advocates have challenged the quality and availability of education for youth with disabilities in juvenile correctional facilities. Although many of these cases are currently being litigated, some suits have been settled.

The percentage of youth in juvenile corrections with special education needs is at least three to five times the percentage in public schools.[56]

Advocates have used IDEA to litigate on behalf of incarcerated youth with disabilities in a number of States. Since 1975, more than 20 class action lawsuits involving special education services in juvenile corrections have been filed. With few exceptions, the cases that were initiated have never gone to trial, and very few published judicial opinions exist. Most often these suits have been settled through consent decrees or settlement agreements that responded to nearly all of the claims made by plaintiffs, typically after years of procedural delays.

Table of Cases

Table 1 displays cases involving special education claims in juvenile corrections litigation. All of the cases are class action lawsuits brought on behalf of residents in juvenile facilities who were entitled to special education services. The fact that 15 of the 25 cases listed were filed in the 1990's shows the heightened awareness of special education issues and the strength of IDEA. A quick review of the table reveals that the cases emanated from many different regions of the United States, clearly illustrating that the inadequacy of special education services in juvenile correctional facilities is a nationwide concern. Most of the complaints involved special education issues in isolation. However, a few have involved constitutional issues as well. The length of time between initial complaint and settlement ranged from about 2 to 7 years for those suits that have been closed.

A review of three cases illustrates some of the problems associated with educational services in juvenile corrections.

Table 1. Recent Class Action Litigation Involving Educational Claims for Students With Disabilities in Juvenile Correctional Facilities

Case Name, Case Number, and Court of Origin	Date Filed	Status	Type of Institution	General Conditions Claims	IDEA[1]/ 504[2] Claims
A.C. v. *McDonnell* No. 95 WY 1838 (D. Colo.)	7/21/95	Pending	Detention center		IDEA
Alexander S. v. *Boyd* 3:90–3062–17 (D.S.C.)	12/28/90	Trial 1994; court ruling 1/25/95	Training school	X	Both
Andre H. v. *Sobol* 84 Cir. 3114 (DNE) (S.D.N.Y.)	5/3/84	Stipulation and order of settlement 9/90	Detention center		Both
Anthony C. v. *Pima County* No. CIV–82–501–TUC–ACM (D. Ariz.)	8/10/82	Stipulation and agreement 1/20/85	Detention center	X	Both
Bobby M. v. *Chiles* No. TCA–83–7003 (N.D. Fla.)	1/5/83	Settlement agreement 5/7/87; order (terminating consent decree) 11/6/96	Training school	X	Both
D.B. v. *Casey* No. 91–6463 (E.D. Pa.)	10/16/91	Stipulation of settlement 4/9/93	Training school	X	Both
Doe v. *Foti* No. 93–1227 (E.D. La.)	4/13/93	Partial settlement on education issues 3/95	Detention center	X	Both
Doe v. *Napper* No. 1–93–CV–642–JEC (N.D. Ga.)	3/26/93	Pending	Detention center	X	IDEA
Doe v. *Younger* No. 91–187 (E.D. Ky.)	11/21/91	Pending	Detention center	X	Both
E.R. v. *McDonnell* No. 94–N–2816 (D. Colo.)	12/8/94	Settlement agreement and order 5/9/97	Detention center	X	IDEA
Earl P. v. *Hornbeck* No. N–85–2973 (D. Md.)	7/12/85	Consent decree 10/19/87	Training school		IDEA
G.C. v. *Coler* No. 87–6220 (S.D. Fla.)	3/30/87	Court order of dismissal on education issues; consent decree on balance of issues 12/15/88	Detention center	X	Both
Gary H. v. *Hegstrom* No. 77–1039–BU (D. Or.)	12/23/77	Stipulated dismissal 7/20/89[3]	Training school	X	Both
Horton v. *Williams* No. C94–5428 RJB (W.D. Wash.)	8/17/94	Partial settlement 7/26/95	Training school	X	IDEA
James v. *Jones* No. C–89–0139–P (H) (W.D. Ky.)	1/7/93	Pending	Detention center	X	See note.[4]

Table 1. Recent Class Action Litigation Involving Educational Claims for Students With Disabilities in Juvenile Correctional Facilities

Case Name, Case Number, and Court of Origin	Date Filed	Status	Type of Institution	General Conditions Claims	IDEA[1]/ 504[2] Claims
Jerry M. v. *District of Columbia* No. 1519–85 (IFP) (D.C. Super. Ct.)	3/85	Consent decree 7/24/86	Detention center; training school	X	IDEA
John A. v. *Castle* No. 90–200–RRM (D. Del.)	5/1/90	Settlement agreement 3/25/94	Detention center; training school	X	Both
Johnson v. *Upchurch* No. 86–195 TUC RMB (D. Ariz.)	4/6/86	Consent decree 5/6/93	Training school	X	IDEA
Nick O. v. *Terhune* No. S–89–0755 RAR–JFM (E.D. Cal.)	5/25/89	Stipulation and order 2/16/90	Training school		Both
Shaw v. *San Francisco* No. 915763 (Cal. Super. Ct., City of San Francisco)	2/8/90	Agreement 10/4/93	Detention	X	IDEA
Smith v. *Wheaton* No. H–87–190 (PCD) (D. Conn.)	3/4/87	Pending	Training school		Both
T.I. v. *Delia* No. 90–2–16125–1 (Wash. Super. Ct., King County)	8/10/90	Partial settlement 11/26/90; stipulation and consent judgment 10/27/93	Detention center	X	See note.[5]
T.Y. v. *Shawnee County* No. 94–079–DES (D. Kan.)	5/19/94	Settlement agreement and consent decree 7/28/95	Detention center	X	IDEA
United States v. *Puerto Rico* No. 94–2080 (CC) (D.P.R.)	8/10/94	Consent order 10/6/94; final agreement pending	Detention center; training school	X	IDEA
W.C. v. *Debruyn* No. IP 90–40–C (S.D. Ind.)	1/16/90	Stipulation to enter consent decree 9/29/91	Training school	X	IDEA

[1] Individuals With Disabilities Education Act.

[2] Section 504 of the Vocational Rehabilitation Act of 1973 is civil rights law for persons with disabilities. It prohibits discrimination against persons with disabilities by programs receiving Federal financial assistance. Although Sections 504 defines handicaps or disabilities more broadly than IDEA, education regulations implementing Section 504 [34 CFR 104 et seq.] are very similar to those for IDEA.

[3] The Ninth Circuit in 831 F.2d 1430 (1987) affirmed the 1984 district court ruling that conditions in the isolation unit violated constitutional rights of juveniles but reversed the remedial order. Special education issues were not addressed in the court rulings or the dismissal order.

[4] Educational claims based on 8th and 14th amendments of the U.S. Constitution.

[5] Educational claims based on due process clause of 14th amendment of the U.S. Constitution.

Andre H.* v. *Sobol. *Andre H.* v. *Sobol,* initiated in the U.S. District Court of the Southern District of New York in May 1984, was brought on behalf of juveniles eligible for special education services at New York City's Spofford Juvenile Detention Center. Plaintiffs' attorneys claimed that Spofford, a detention and holding facility, conducted no screening activities to identify youth who may have disabling conditions, convened no multidisciplinary team meetings to determine eligibility and plan appropriate educational services, and made no attempt to obtain records from schools previously attended by the youth. As a result of these and other practices, no special education services were provided to detained youth at Spofford.

Many States have been slow to provide special education services to incarcerated youth with disabilities and to extend procedural rights required by law.

In January 1991, 7 years after the initiation of the suit, a stipulation and order of settlement was signed by attorneys for the plaintiffs and the defendants, the New York City Department of Juvenile Justice, and the New York City Board of Education. The settlement required Spofford to develop a multidisciplinary team at the detention center and fully implement the provisions of IDEA. The agreement also required that the parties jointly appoint a monitor who would visit the facility semiannually for 3 years and determine the extent of compliance with the agreement. At the conclusion of the monitoring period, Spofford was found in compliance with the settlement agreement.

***Johnson* v. *Upchurch*.** In contrast to *Andre H.* v. *Sobol*, which focused only on special education, *Johnson* v. *Upchurch* addressed a broad range of issues in juvenile corrections. In 1986, Matthew Johnson, a youth confined to Catalina Mountain Juvenile Institution near Tucson, filed a complaint on his own behalf concerning his treatment at the juvenile correctional facility. A subsequent class action lawsuit filed in the U.S. District Court for the District of Arizona claimed that the Arizona Department of Corrections failed to provide special education services to youth in custody. Additionally, plaintiffs maintained that the conditions of confinement were unsanitary, hazardous, and punitive.

In spring 1988, during a time when there were no special education services at the facility, the plaintiffs requested an injunction requiring the Arizona Department of Corrections to fill a vacant teaching position and provide appropriate services. The court subsequently appointed a Special Master to assist in the resolution of education complaints and to evaluate special education services. After protracted negotiations, *Johnson* v. *Upchurch* was settled in May 1993 through a consent decree that required broad reforms in juvenile corrections throughout the State of Arizona. The consent decree also specified that a committee of consultants should oversee and monitor the implementation of the agreement.[64] At the time of this writing, the Arizona Department of Juvenile Corrections is in compliance with all educational components and with most other provisions of the consent decree except population limitations.[65]

***Smith* v. *Wheaton*.** *Smith* v. *Wheaton*, filed in U.S. District Court for the District of Connecticut in 1987, has not been settled yet. Like *Andre H.* v. *Sobol*, the complaint in *Smith* v. *Wheaton* focused only on the educational needs of incarcerated youth with disabilities. Unlike the plaintiffs in *Andre H.* v. *Sobol*, those in *Smith* v. *Wheaton* were in a long-term facility rather than in temporary detention.

The plaintiffs in *Smith* v. *Wheaton* complained that the Long Lane School, a juvenile correctional facility operated by the Connecticut Department of Children and Youth Services, failed to meet minimum timelines for evaluation of youth and for provision of special education services to those deemed eligible. Plaintiffs also alleged that parents were not involved in educational decisionmaking for their children with disabling conditions, that no related services such as counseling or occupational therapy were available, that Long Lane School failed to develop IEP's as required by IDEA, and that adequate transition plans were not developed for youth leaving the facility. Although plaintiffs and defendants in *Smith* v. *Wheaton* have engaged in settlement discussions during the past 5 years, as of this writing the case is unresolved.

These three cases are somewhat representative of the litigation under IDEA and the problems associated with educational services in juvenile corrections in many jurisdictions. In each case, plaintiffs alleged violation of IDEA. In the two cases that were settled, the defendants responded by providing a level of educational service that met the requirements of the law and was comparable to services available in the public schools. Beyond the educational costs accrued from providing inadequate services or no services for a period of time, the defendants were required to pay the costs of the litigation. In Arizona, the State paid more than $1.8 million in plaintiffs' attorneys' fees and more than $180,000 to two named plaintiffs; the cost of private attorneys defending the State added to the total cost of this litigation.

Implications

Litigation raises a number of issues for administrators, policymakers, and advocates. First, litigation in several jurisdictions has been a tool, albeit an expensive one, used to reform juvenile correctional education programs.[66] In some instances, litigation has led to the establishment of special education services that did not previously exist in spite of the plain, inclusive language of Federal statutes and corresponding State regulations. In Arizona, litigation enabled advocates to work with legislative leaders to create the Department of Youth Treatment and Rehabilitation, which separates juvenile corrections from the adult correctional system and creates a school board for the new department. Prior to the current reforms, the educational programs in Arizona's juvenile confinement facilities did not meet Arizona State guidelines for minimum amounts of instruction each week. Among other things, the *Johnson* v. *Upchurch* consent decree required the State to pay teachers in juvenile correctional facilities salaries comparable to those paid to their public school counterparts and to obtain North Central Association of Colleges and Secondary Schools accreditation for correctional facility schools in the State.

A second and related litigation issue involves the role of State departments of education in providing oversight and consultation to juvenile correctional programs. While each department of education guarantees that all schools and State-operated programs will provide special education and related services to eligible youth as a condition for the receipt of Federal funds, in reality, the U.S. Department of Education has never withheld any money from States that failed to provide appropriate special education services in juvenile corrections. Until monitors at the U.S. Department of Education and their counterparts in State departments of education enforce their mandates to ensure that all youth with disabilities receive appropriate educational services, advocates and parents appear to have no other recourse than litigation. Presumably, incarcerated youth with disabilities and their parents have the same due process protections in education as their public school counterparts. Any number of familial factors, the distance of youth from their home communities and schools, and the lack of administrative mechanisms in some juvenile justice systems make it unlikely that parents and their children will have access to those legal protections in the absence of oversight by State departments of education.

Litigation under IDEA has raised a number of issues, including the ability to reform juvenile correctional education programs, the role of State departments of education in providing oversight and consultation, and the competing interests of rehabilitation and punishment in juvenile facilities.

A third issue raised by litigation involves the competing purposes of juvenile corrections. While rehabilitation is often cited as one of the purposes of juvenile corrections, incapacitation and punishment are frequently higher priorities. In many facilities and State agencies, the organization and administrative structure do not support rehabilitation as an outcome for juvenile clients. Limited fiscal resources often make education compete with security, maintenance of the physical plant, and new construction needs. In Arizona, for instance, prior to the reforms associated with *Johnson* v. *Upchurch*, other than for teachers' salaries, there was no annual budget for education. Educational program managers had to go "hat in hand" to the superintendent of their facility

to obtain books, pencils, paper, and other consumable materials associated with operating a school.

Alternatives to Litigation

Although positive results can occur from litigation, this does not mean that litigation should be the primary use of IDEA. Rather, IDEA establishes a framework within which parents and advocates can present their special education concerns to correctional facilities in the interest of avoiding litigation. The mandates of IDEA require educational facilities to meet the special education needs of all students. Providing special education services to youth with disabilities in juvenile corrections facilities, however, is inextricably intertwined with the general quality of educational services for youth in custody. Educational services in juvenile corrections, whether operated by the juvenile corrections agency, the State department of education, or a local school district, are typically a low priority for many correctional administrators. All educational programs in juvenile facilities must begin to meet the minimum standards associated with public schools in order to provide educational services for youth with disabilities.

Under current arrangements, the infrastructures needed to support quality juvenile correctional education programs are missing in many jurisdictions. Correctional education programs, with some exceptions, do not have the autonomy, administrative structure, or fiscal resources necessary to provide quality education for incarcerated youth, much less to meet the needs of disabled youth.

The Nation's youth do not have a statutory or constitutional right to good or even adequate education. Some improvements arguably necessary under IDEA, however, can be used to improve the general level of schooling for all incarcerated youth. Strengthening educational programs and ensuring that eligible youth receive special education services require that correctional education programs develop stronger ties to public school programs, gain fiscal and administrative autonomy from the correctional agency, meet standards associated with public school programs, and implement the requirements of IDEA in their facilities.

Stronger ties between public school programs and correctional programs could ameliorate the delay that occurs when correctional education programs try to obtain prior school records for their students. Correctional education programs often wait months to receive grades, test scores, IEP's, and other information that would help educators in juvenile corrections evaluate and place students and provide appropriate services. The information in school records routinely passed between public school districts is often delayed when the request for records originates in a correctional facility. Compounding matters is the fact that many incarcerated youth have had mobile school careers and in some instances have been truant or expelled from school for a period of time prior to their incarceration. Even in those States where special school districts for correctional education have been established, such as Connecticut and South Carolina, obtaining prior school records is still a problem.

Strengthening education programs and ensuring that eligible youth receive special education services require that correctional education programs develop stronger ties to public school programs, gain fiscal and administrative autonomy from the correctional agency, meet standards associated with public school programs, and implement the requirements of IDEA in their facilities.

Creating stronger links between correctional programs and the public school system can be accomplished by having local school districts operate educational programs for juvenile corrections. In Florida, a local school district operates the educational program in the State's two secure confinement facilities for juveniles. At the very least, advocates could help convene meetings between juvenile corrections and State and local school representatives to agree on a method for efficient, mutual exchange of confidential school records of juveniles. Opening the channels of communication between public schools and correctional education programs is an important first step in providing an appropriate education in juvenile facilities.

Strengthening correctional education programs also requires establishing administrative and fiscal autonomy that enables educational rather than institutional concerns to steer decisions about the use of resources, the assignment of staff, and the curriculum. Focusing on the educational needs of youth in facilities will not occur unless the administration of the correctional education program is autonomous. While educational administrators in juvenile correctional settings need to work cooperatively with institutional and agency administrators and staff, decisions about educational programs must be driven by professional standards, State guidelines for public school programs, and youth needs. In the absence of administrative and fiscal autonomy, educational administrators cannot develop long-range plans, infuse the curriculum with new instructional technology, or respond to the demands of the changing job market that youth will face.

Opening the channels of communication between public schools and correctional education programs is an important first step in providing appropriate education in juvenile facilities.

Fiscal autonomy can be achieved through establishing a cost per pupil that is set aside in the annual budget based on the average number of students residing or detained in the facility. Education should have an independent category in the correctional budget. Another means of ensuring fiscal autonomy is by contracting with local school districts for services and charging the correctional agency a minimum cost per pupil based on the average quarterly count of students in the correctional education program. Alternatively, juvenile corrections could assess average costs per pupil for each student and bill local school districts for the time that youth are in custody or confinement. While this remedy would certainly be unpopular with local education agencies, this arrangement, in addition to promoting the exchange of student information, would create incentives for local school districts to proactively serve those youth who are at risk for dropping out, failing school, and/or being suspended and expelled.

Meeting professional education standards associated with public school programs can also enhance the development of more effective correctional education programs and appropriate educational services to youth with disabilities. The Correctional Education Association has developed and disseminated standards for correctional education programs in juvenile and adult facilities, but these standards are broad and have not been widely adopted.[67] Several correctional programs have sought accreditation from professional associations of schools and colleges—a promising avenue for improving services.

Los Angeles County Court and Community Schools, serving more than 5,000 juveniles adjudicated in community-based and correctional facilities, achieved accreditation during the 1980's. The accreditation process has resulted in the creation of basic minimum standards for correctional school programs including adequate space, an articulated curriculum, professional development, and adequate compensation for staff. Accreditation can help avoid costly litigation such as that which occurred in Arizona, which ultimately required accreditation of the educational program in each of the three secure facilities operated by the Arizona Department of Juvenile Corrections.

The process of accreditation has served a number of programs well by requiring basic minimum standards for correctional education, including adequate space, articulated curriculum, professional development, and adequate compensation for staff.

Improving correctional education programs by meeting professional standards, creating stronger ties to public schools, and gaining administrative and fiscal autonomy can lead the way to implementing the requirements of IDEA. Administrators, educators, and advocates would be prompted to be more attuned to the needs of the high percentage of disabled students in juvenile facilities. Once the local school provides the student's record, youth with previously diagnosed disabilities can receive appropriate services. Those students who have not been identified as disabled, but appear to have difficulties,

can be evaluated for undiagnosed disabilities. Advocates should encourage correctional schools to use IDEA for accessing the resources to offer services to juveniles with disabilities. The Federal funding available under IDEA provides a major incentive for facilities to identify and maintain services for disabled youth in detention and correctional facilities.

Educational programs in juvenile corrections should promote the academic and social competence of their students and ensure that they reenter their communities better prepared to assume roles as students, workers, and citizens.

Conclusion

Youth with disabilities have specific rights to educational services. IDEA mandates that the special education needs of all youth be met, including youth in custody. In light of the overrepresentation of youth with disabilities in juvenile corrections, recent class action litigation with educational claims for juveniles with disabilities offers hope for improving special education services. The implications of litigation and alternative ways to improve educational programs in facilities for juveniles also support the notion that appropriate special education services can be provided to youth in custody.

The record suggests that advocates for incarcerated youth can be successful in using IDEA to obtain appropriate educational services. Class action lawsuits are one means of obtaining services and improving the conditions of confinement for youth in juvenile corrections.

Parents, guardians, advocates, and others concerned about the educational welfare of incarcerated youth can also press correctional institutions for appropriate services for youth on an individual basis. This process can begin with a careful examination of a youth's prior school history. A record of school failure, unexcused absences, chronic disciplinary problems, and grade retention may be associated with a disabling condition that has not been detected. Vision or auditory problems, learning disabilities, and emotional disorders can contribute to poor school performance and school failure. Family mobility, other family concerns, and economic instability can also result in serious learning problems being overlooked by the schools. A parent, guardian, or advocate who suspects that a disability may be contributing to the poor educational performance of a child or adolescent should make a referral for an evaluation.

The Juvenile Law Clinic at the District of Columbia Law School runs an education advocacy project that attempts to assist juveniles in delinquency proceedings by training law students and local attorneys to use special education law proactively and to suggest special education alternatives to confinement.[68]

Educational programs in juvenile corrections facilities should promote the academic and social competence of their students and ensure that they reenter their communities better prepared to assume roles as students, workers, and citizens. IDEA is one vehicle that ensures that educational programs for detained and committed youth meet the needs of incarcerated juveniles.

Checklist for Using IDEA

If you have knowledge of a youth in custody who has disabilities and is not receiving appropriate educational services, you can:

- ✓ Verify if the youth has been identified as having a disability either before or after incarceration.
- ✓ Find out about the status of the youth's IEP if the youth has been identified as having a disability.
- ✓ Monitor signs of a disability by a youth who has not been identified as disabled and share your findings with an authority who has the ability to do an initial screening and obtain a more thorough evaluation.
- ✓ Discuss the need for appropriate services at the facility with:
  - ✓ Teachers and tutors at the facility.
  - ✓ A facility administrator.
  - ✓ A special education attorney in the area or a law school clinical program.
  - ✓ A professor of education.
  - ✓ Parents.
- ✓ Obtain the Correctional Education Association standards on correctional education programs.
- ✓ Review the facility's educational standards.
- ✓ Establish a committee of educators, advocates, and administrators to:
  - ✓ Ensure that IEP's are conducted in a timely fashion by qualified personnel.
  - ✓ Revise the educational standards of the facility.
  - ✓ Simplify the eligibility determination for special education services.
  - ✓ Ensure that the facility has qualified teachers.
- ✓ Involve local advocacy groups that support children and persons with disabilities.
- ✓ Contact an attorney who can assist you in bringing litigation against the facility if education services do not improve.

Protection and Advocacy Systems in Juvenile Corrections

Another underutilized resource for improving the services received by disabled youth in detention and correctional facilities is the protection and advocacy (P&A) systems. P&A's are federally funded and administered by the States. Designed to provide legal assistance and advocacy on behalf of persons with disabilities, P&A's render a variety of services, including information and referral, training and education, negotiations, legal services, investigation, and monitoring. However, P&A's spend the vast majority of their time and resources on direct client representation.

P&A's exist in all 50 States and the territories through Federal grants. Each of the three main Federal programs in the P&A system targets a specific client group. First, Congress established the Protection and Advocacy System for Persons with Developmental Disabilities (PADD) as part of the Developmental Disabilities Assistance and Bill of Rights Act of 1975 (DD Act).[69] The DD Act conditioned a State's receipt of Federal funds under the program on the existence of "a system to protect and advocate the rights of individuals with developmental disabilities."[70] Next, using PADD as a model, Congress established the Protection and Advocacy System for Individuals with Mental Illness (PAIMI) in 1986.[71] The U.S. Department of Health and Human Services administers both PADD and PAIMI. Finally, the Protection and Advocacy System for Individual Rights (PAIR) was created as a catchall program for individuals with severe or other disabilities who are not eligible for services under either PADD or PAIMI.[72] The Rehabilitation Services Administration of the U.S. Department of Education administers PAIR because the program was enacted as part of the Rehabilitation Act. Each P&A has the authority to pursue legal, administrative, and other remedies on behalf of its clients; provide information and referral services to residential and nonresidential programs;[73] investigate abuse or neglect of its clients;[74] educate policymakers on decisions relevant to advocacy clientele;[75] and have access to clients and their records.

P&A's can offer assistance to incarcerated juveniles with disabilities when their disability-related rights have been violated or unmet. Disabilities are often ignored or mishandled within the delinquency context when, in fact, the cause of delinquent behavior may be directly related to a child's disability. Special education issues for persons with disabilities represent the largest category of cases handled by P&A's, and some of this litigation is on behalf of incarcerated juveniles.[76] P&A's also represent children with mental health problems, including those youth who reside in juvenile correctional institutions. Some P&A's act as advocates for juveniles during the dispositional phase of a delinquency or abuse/neglect proceeding and make recommendations to the court about appropriate placements.

Each P&A has the authority to:

- ***Pursue legal, administrative, and other remedies on behalf of its clients.***
- ***Provide information and referral services to residential and nonresidential programs.[73]***
- ***Investigate abuse or neglect of its clients.[74]***
- ***Educate policymakers on decisions relevant to advocacy clientele.[75]***
- ***Have access to clients and their records.***

A fourth grant-funded program called the Client Assistance Program (CAP) provides information and assistance to individuals seeking or receiving services under the Rehabilitation Act.[77] (This chapter will not

focus on CAP because of CAP's limited scope, applicability, and various restrictions, such as its prohibition against class action lawsuits.) P&A's may be used to help those incarcerated juveniles who fall within the client base of the P&A system and who need assistance with services related to disabilities.[78] While the P&A statutes do not establish one central agency to supervise and control the State systems, the National Association of Protection & Advocacy Systems, Inc., exists as a voluntary membership organization to provide training, technical support, and legislative advocacy for its members and consumers.[79]

The Statutory Programs

Collectively, P&A's provide the largest source of legally based advocacy for persons with disabilities in the United States.[80] Following the principles that persons with disabilities are equal citizens under the law and that they are entitled to the same opportunities as all members of society, the P&A's strength lies in their ability to ensure enforcement of rights under the existing statutory entitlement programs (see table 2).

PADD

The DD Act serves two major purposes. First, it sets out a bill of rights for the developmentally disabled.[81] Many of these rights are directly relevant to incarcerated individuals, such as the right to appropriate treatment and rehabilitation services, the right to receive those services in the least restrictive environment, the right to programs that maximize the individual's developmental potential, the right of those in residential treatment to be in facilities that meet their needs, and the right of residents to receive humane and sanitary care. The U.S. Supreme Court held in *Pennhurst State School & Hospital* v. *Halderman* that this listing of rights bestows no substantive, enforceable right on individuals with developmental disabilities.[82] These rights, therefore, cannot be asserted through litigation. This bill of rights can be used, however, as persuasive authority in advocating for a client and arguing that certain services should be provided in a specific way.

Second, the DD Act provides funding. It offers financial assistance for States to carry out programs designed to improve services and assistance

Table 2. Summary of the Statutory Programs

The Statutory Programs	Enacting Statute	Clientele Served	Administering Agency	Funding
PADD Protection and Advocacy System for Persons with Developmental Disabilities	Developmental Disabilities Assistance and Bill of Rights Act of 1975	Persons with developmental disabilities that fall within the statutory definition	U.S. Department of Health and Human Services	Appropriations through the Developmental Disabilities Assistance and Bill of Rights Act of 1975
PAIMI Protection and Advocacy System for Individuals with Mental Illness	Protection and Advocacy for Mentally Ill Individuals Act of 1986	Persons with a mental illness who fall within the statutory definition	U.S. Department of Health and Human Services	Appropriations through PAIMI, but designated for PADD systems to carry out
PAIR Protection and Advocacy System for Individual Rights	Rehabilitation Act Amendments of 1978	Persons with disabilities who are not eligible under either PADD or PAIMI	Rehabilitation Services Administration of the U.S. Department of Education	Appropriations through the Rehabilitation Act

to individuals with developmental disabilities, and it funds a comprehensive nationwide network of protection and advocacy organizations.[83] States receiving funding under the DD Act are required to establish an agency or office responsible for assisting and protecting individuals with developmental disabilities.[84] The availability of this funding for advocates for the developmentally disabled encourages States to provide services in line with the bill of rights set out in the DD Act.

The Federal law requires that the State P&A agency or office be independent of public and private service providers in the State.[85] The DD Act requires this in anticipation of the tension between P&A's and States or agencies that often provide inadequate or inaccessible services. The P&A's must also have certain powers to carry out their mandate to protect and advocate for their clients.[86] Congress requires that each year the P&A's develop a statement of objectives and priorities to guide their activities. Each P&A must select a governing board to oversee its activities that includes, in part, "individuals with developmental disabilities who are eligible for services" or who have received services, family members, guardians, or advocates.[87]

Collectively, the Pe3A's provide the largest source of legally based advocacy for people with disabilities in the United States.[80]

PAIMI

Unlike the other P&A systems, PAIMI was not established as part of a broader act but was the result of a specific piece of legislation, the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (MI Act).[88] This act provided exclusively for the creation of a P&A system to serve only institutionalized or formerly institutionalized individuals with mental illness.[89] However, the statutory scheme merged PAIMI into the existing P&A systems by designating only PADD systems as eligible for funding under the MI Act.[90] Although PADD served as the basic model for PAIMI, there are some differences between the two statutes.

Both programs have narrow definitions of the clientele eligible for services. The DD Act's definition of developmental disability categorizes many people as either underqualified or overqualified to receive services.[91] Similarly, PAIMI clients must have a significant mental illness that has been diagnosed by a State-licensed mental health professional.[92] While PADD serves any individual who satisfies the definition, regardless of his or her living situation, the MI Act's mandate is further limited to residents, or those discharged within the past 90 days, of a care or treatment facility.[93] The MI Act's statutory definition says that facilities "need not be limited to" those listed and specifically includes jails and prisons.[94] Presumably, juvenile detention and correctional facilities are included in this language.

PAIR

The PAIR program was Congress' response to the gap left by the narrow clientele definitions of PADD and PAIMI. The program was originally enacted under the Rehabilitation Act Amendments of 1978 as a discretionary program.[95] PAIR lay dormant for 10 years because no funds were appropriated. Each year since 1989, however, some money has been designated for the program. In 1992, Congress amended the PAIR program to cover all individuals with disabilities not eligible for services under any of the other P&A programs.[96] In its current version, the PAIR program is similar in form and content to the PADD and PAIMI programs.

A Survey of the P&A Systems

To learn more about the P&A systems, the ABA Juvenile Justice Center conducted an informal survey of P&A providers and asked questions about ways in which their services could be applied to incarcerated juveniles. The survey confirmed that the P&A system can be an effective mechanism to oversee the provision of services to disabled youth in custody.

Although P&A's are federally funded, each State is responsible for establishing its own P&A system. The structure and functions of the systems vary from State to State. Within the requirements of the statutes, the P&A systems have the discretion to design programs that reflect their own needs and resources. Some generalizations, however, can be made about the structures of the P&A systems in many States.[97]

Currently, all P&A's are eligible for funding under all three P&A programs. Most of the States have designated private nonprofit groups to serve as the P&A service provider, but some have designated State agencies. In New York, for example, the State Commission on Quality of Care for the Mentally Disabled, created in 1978, has been the P&A since 1980 when it replaced a private agency that had performed unsatisfactorily. The commission contracts out for services with different agencies in the State. Most States have private agencies, frequently legal services agencies, that serve as the P&A provider. Most P&A's receive a blend of Federal, State, and foundation funding.

To learn more about the Pe3A systems, the ABA Juvenile Justice Center conducted an informal survey of Pe3A providers and asked questions about ways in which their services could be applied to incarcerated juveniles.

P&A staff generally consist of attorneys and advocates with experience in disability issues from diverse backgrounds such as social work, special education, nursing, public health, and administration. Advocates can be very helpful in nonlitigious approaches to problem solving and are often very knowledgeable about available resources.

The division of responsibilities between attorneys and advocates is different from State to State. In New Jersey, all cases are coassigned to an attorney and an advocate, but attorneys have to review and sign off on all case resolutions. Virginia has a similar system, with attorneys assuming primary responsibility for all administrative hearings and litigation. In California, attorneys handle all kinds of legal representation, from formal negotiations to class action lawsuits, while advocates handle less formal proceedings, such as interviews and investigations. Attorneys in Wisconsin have primary responsibility for litigation and supervision, and advocates handle negotiations, investigations, and monitoring. Nevada employs no legal staff and contracts out for all of its legal services. Maryland, with a total of 18 staff members in 3 offices, has a legal staff consisting of approximately 7 attorneys, who undertake more litigation than most other P&A's. Often, States have only one attorney.

Many States reported that much of their client representation involves administrative hearings in the areas of special education, social security benefits, medicaid, and claims under the Americans with Disabilities Act. Several States noted that special education claims constitute the largest percentage of their caseload. In New Hampshire, as much as 30 percent of the cases involve special education issues with children. South Carolina considers children's issues, mostly special education, to be a priority.

Litigation in individual cases, rather than class action lawsuits, is sometimes a last resort and may be seen as an unwise use of precious resources. P&A's utilize litigation primarily for "impact litigation," or class action lawsuits. A majority of class action lawsuits filed by P&A's concern large-scale institutional violations. In two States surveyed, the P&A's joined forces with private law firms to bring major institutional litigation on behalf of juveniles. The South Carolina P&A has teamed up with a large law firm and a civil rights attorney on a conditions of confinement case.[98] In New Hampshire, the P&A represented a subclass of disabled juveniles in an action involving all juveniles placed by the juvenile courts.[99] These are the type of partnerships that advocates for juveniles should be aware of; a resource-rich partner teaming up with a P&A can make all the difference in litigation.

Several States noted that special education claims constitute the largest percentage of their caseload. For example, in New Hampshire, as much as 30 percent of the cases involve children with special education issues.

Another area of emphasis, particularly on the PAIMI side of the system, is investigation and monitoring of abuse and neglect in residential care and treatment facilities. In Wisconsin, the P&A PAIMI component has two priorities: (1) reducing institutional abuse and neglect, particularly through the use of seclusion and restraints, and (2) advocating for the release of

Using the P&A System To Improve Conditions for Juveniles With Disabilities

A defense lawyer representing a delinquent youth found him increasingly quiet, tearful, and isolated from other juveniles during his weeks in detention. The lawyer called the mental health unit at the institution where his client was committed to say that, in his opinion, what initially seemed to be a bad case of homesickness might be serious depression. A psychiatric evaluation was arranged and antidepressant medication prescribed. The youth's mother called the attorney to say that her son seemed worse on the medication, that other juveniles were taunting him, and that he was hearing voices. Institutional staff were getting impatient with the boy's refusal to get out of bed and his unwillingness to shower.

The lawyer and mother met with a P&A lawyer. Although this P&A lawyer had not previously assisted an incarcerated juvenile, the lawyer was able to move quickly to arrange an evaluation in the mental health system. The P&A lawyer was able to have this youth treated for major depression in a short-term inpatient unit and released to a day treatment program with close supervision by a community-based delinquency project. Different medication controlled his psychotic symptoms. The P&A lawyer also assisted the boy's mother in setting up an IEP meeting so that her son's special education needs would be met while he was in the day treatment program and when he moved back to his junior high school.

The P&A lawyer, meanwhile, had become aware of the great number of incarcerated youth with serious mental health problems. He also learned that many youth deteriorate emotionally as a result of the conditions under which they are confined, particularly when they are locked in their own rooms or in an isolation cell. The lawyer worked to devise the following two-part strategy:

1. Parents and institutional staff were encouraged to call the local P&A to request assistance in arranging mental health services for incarcerated youth with disabilities.

2. The P&A began a series of meetings to enhance the mental health treatment in the juvenile institution. The P&A pointed out that the staff psychologists and psychiatrists spent most of their time conducting court-ordered evaluations, which did not lead to needed services in the institution. The court agreed to ask another mental health agency to conduct many of these evaluations so some of the clinicians' time could be available to treat emotionally disturbed incarcerated youth.

clients from institutions to less restrictive settings. To carry out these priorities, the P&A engages in much investigative and monitoring work. While the statute provides that all P&A's must have authority to investigate and monitor, some P&A's have had to sue just to gain access to clients and their records.

If an investigation reveals serious rights violations, P&A's usually prepare a report of their findings, present them to the responsible officials, and recommend remedial action. Some States also issue reports to the public to raise awareness and garner support. P&A's attempt to work with the institution initially, both to avoid costly litigation and to foster cooperation. If the institution does not take appropriate action, sanctions may result. Most P&A's report that investigations rarely escalate to litigation. Because of limited resources and the costs of litigation, when individual damages actions based on abuse or neglect claims arise, P&A's usually refer these cases to private attorneys.

In addition to the detained and committed juveniles in correctional facilities with identified disabilities, many juveniles who would otherwise be eligible for services have disabilities that remain unidentified. According to the South Carolina P&A, psychological studies have shown that disabilities in children worsen in juvenile correctional facilities. P&A staff are concerned that mental health problems, particularly depression and suicidal tendencies, are exacerbated during an extended period of confinement. Similarly, issues related to seclusion, restraints, treatment, discharge planning, and transition services are potentially ripe for advocacy by a P&A.

Using a P&A as an ongoing system of oversight of juvenile programs in a State can shed enough light on service deficiencies so that litigation can often be avoided. Advocates in each State can access the existing P&A system to help monitor the services received by youth in custody. P&A's have the authority to investigate abuses, access records, and pursue administrative remedies on behalf of persons with disabilities. The P&A system in each State can help ensure that the rights of disabled youth in custody are not violated.

A majority of class action lawsuits filed by P&A's concern large-scale institutional violations.

Conclusion

Seeking assistance from a P&A requires defining problems or issues so that they fit within the P&A's area of authority. Given the paucity of their resources, advocates must be ready to promote issues or potential clients to the P&A. Furthermore, advocates should examine what type of help is most needed from the P&A. Even if a P&A cannot seize the area of concern, it may be able to assist with problem solving.

Not all incarcerated youth fit the narrow definition of disabilities under PADD, PAIMI, or PAIR, but for those who do, P&A's can be valuable resources in individual cases and can help obtain services systemically without litigation. On behalf of a distinct and disadvantaged client group, P&A's act as individual and group advocates and monitors as they pursue remedies to institutional abuses. Incarcerated juveniles can fit into this scheme. Advocates for juveniles must be creative and should contemplate using the current P&A system in their State to access evaluations and services for young offenders with disabilities.

Checklist for Using P&A's

If you know of a juvenile in a detention or correctional facility who has disabilities and is not receiving appropriate care or services, you should:

- ✓ Contact your State P&A office (see listing in appendix G) and convince the office that this youth needs its help and will benefit from its advocacy services.
- ✓ Determine which statute applies to the juvenile by:
  - ✓ Seeing if the juvenile's disability falls within the statutory definition for developmental disability; if it does, then PADD applies.
  - ✓ Looking at whether the juvenile has a mental disability that qualifies him or her for assistance under PAIMI.
  - ✓ Determining whether the juvenile has a severe disability that is not covered by the two other programs, thereby qualifying him or her under PAIR.
- ✓ Inform parents, advocates, lawyers, and young people that P&A's can assist them with accessing appropriate services for detained and confined youth with disabilities.

The Administrative Procedure Act in Juvenile Corrections

Federal and State administrative procedure statutes can serve as a means to raise safe and lawful conditions of confinement issues for detained and incarcerated youth. The Federal Administrative Procedure Act (APA) and corresponding State administrative procedure statutes set out the process that agencies must adhere to both when making broad policy decisions (rulemaking) and when applying those policies to individual circumstances (adjudicating). Administrative procedure statutes regulate executive agency behavior through the rulemaking and adjudication processes. Executive agencies include agencies involved with administering detention and correctional facilities, among other juvenile justice services. These administrative procedure statutes can be effective tools to address unjust procedures within facilities for juveniles.

The Federal Administrative Procedure Act (APA) and corresponding State administrative procedure statutes set out the process that agencies must adhere to both when making broad policy decisions (rulemaking) and when applying those policies to individual circumstances (adjudicating).

The breadth of administrative procedure statutes allows parties affected by the procedures of an institution to intervene when an institution makes rules or adjudicates. Juvenile justice institutions are replete with instances of rulemaking and adjudication. Each disciplinary code, behavioral regulation, and process for determining privileges and violations is a rule. The application of each of these rules to an individual's particular circumstances is an adjudication. Therefore, in some instances, administrative procedure statutes may allow for substantial oversight of institutional activities in States where statutes have been enacted.

About two-thirds of the States have implemented administrative procedure statutes to govern State agency conduct. More than half of the States consulted and followed the Model State Administrative Procedure Act (Model State APA) when constructing their statutes. The other States modeled their statutes after the Federal APA. Since the Model State APA and the Federal APA differ, advocates must examine the specific provisions of their State statutes carefully.

Distinction Between Rulemaking and Adjudication

Notwithstanding the specific differences in each State's statutes, all statutes distinguish between rulemaking and adjudication procedures because these have different effects upon the rights of individuals.[100] To satisfy due process concerns, an action determined to be rulemaking must allow for public participation in the formulation of the rule. Alternatively, an action determined to be an adjudication entitles an individual to some level of hearing.

Public participation in rulemaking helps to keep the political process of making rules in check. In a juvenile correctional facility, for example, there may be a desire to implement a specific mental health plan. Implementing a mental health plan is a broad policy decision because factors such as budget, space, personnel, and the number of youth are general to the entire facility population. The creation of this plan would be considered rulemaking. The required public participation in the process of creating the mental health plan will protect the residents' rights.

Applying the mental health plan to an individual resident, however, is an adjudication. If the mental health plan, for example, requires that any youth who attempts suicide be placed in isolation, then the application of that rule to an individual compels some level of hearing. The level of hearings varies from formal to informal and depends on the applicable administrative procedure statute, constitutional due process, and facility regulations and practices.

When applying administrative procedure statutes to juvenile correctional systems, it is important to determine whether the agency is acting in its rulemaking or adjudicatory capacity. The distinction between the two is based on the nature of the decision facing the agency. Actions pursuant to generalized facts do not require an individual hearing and can be taken according to procedures applicable to rulemaking. Actions pursuant to individualized facts require some level of hearing and are classified as an adjudication. The classification of the action as rulemaking or adjudication provides the basis for what procedures the agency must follow.

The classification of an action as rulemaking or adjudication provides the basis for what procedures the agency must follow.

Rulemaking

Under the Federal APA, rules are defined as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ."[101] Rulemaking is defined as the "agency process for formulating, amending, or repealing a rule."[102] An agency action pursuant to common or generalized facts and applicable to a group of persons is termed "rulemaking" and must be carried out in accordance with statutory regulations. All agencies subject to the authority of an APA must follow its specific rulemaking procedures.[103]

In theory, these procedures allow advocates to intervene in the rulemaking process before the rules become effective. For example, a juvenile justice agency may want to implement a rule that it will not allow youth, family members, or attorneys to participate in the placement decision. The agency wants to allow only a social worker's report on the youth, a treatment team summary, and a written statement by the youth to be considered. The agency may only implement the proposed rule following proper procedures. The agency must provide proper notice, allow for comment by all interested parties, consider all points of view, issue a concise general statement about the basis and purpose of the rule, and publish it at least 30 days in advance. Thus, during the notice and comment period, advocates can provide arguments and documentation demonstrating that both the facility and the youth would be better served by a rule that allowed for full participation by the youth and others in the placement decision process. Through this effort, advocates can stop the implementation of proposed rules or at least gather support to have them publicized or modified before they are enacted.

In order to promulgate a rule, an agency subject to the authority of an APA must provide proper notice, allow for comment by all interested parties, consider all points of view, issue a concise general statement about the basis and purpose of the rule, and publish it at least 30 days in advance.

Under both the Federal APA and the Model State APA, basic rulemaking procedures include:

- Publishing notice of the proposed rule in the *Federal Register*[104] under the Federal APA or a State publication under the Model State APA. The notice must contain:
  - ◇ Statement of time, place, and nature of public rulemaking procedures.
  - ◇ Reference to the legal authority under which the rule is proposed.
  - ◇ Either the terms or the substance of the proposed rule or a description of the subjects and issues involved.[105]
- The agency must give interested persons the opportunity to participate in the rulemaking

through the submission of data, views, arguments, and positions, with or without the opportunity for oral presentation.[106] (Although this does not assure oral participation, a statute or regulation may guarantee a right to oral participation.)

- All relevant matters must be considered.
- The agency shall promulgate rules with a concise general statement of their basis and purpose.[107]
- The rule must then be published at least 30 days before it becomes effective.[108]

Rulemaking Differences Between the Model State APA and the Federal APA. The 1981 Model State APA differs somewhat from the Federal APA. One significant difference is the way in which each defines a rule. Under the Federal APA, a rule can have "general or particular applicability." The 1981 Model State APA requires that a rule have only "general applicability."[109] Therefore, under the 1981 Model State APA, an action applicable to a group, but affecting only an individual, would be an adjudication and would require a hearing. The same action, however, would be considered rulemaking under the Federal APA and would only require adequate public participation in the process. For example, a rule that affects all residents with learning disabilities where only one resident has a learning disability would entitle that resident to a hearing under the Model State APA. Under the Federal APA, the action would still be considered rulemaking and the resident would be entitled to intervene only as permitted through the rulemaking process.

Another difference that exists between the Model State APA and the Federal APA is the amount of alteration permitted between the proposed rule and the adopted rule. Under the 1981 Model State APA, the adopted rule may not be "substantially different" from the proposed rule.[110] Under the Federal APA, as long as the adopted rule is a "logical outgrowth" of the proposed rule, the adopted rule has been properly promulgated.[111] The Model State APA allows for less alteration of a rule during the rulemaking process than the Federal APA. However, the basic procedures for rulemaking under the Model State APA and the Federal APA remain fundamentally similar and provide advocates with an opportunity to intervene in the rulemaking process within agencies that run juvenile detention and correctional facilities.[112]

Adjudication

The application of rules to an individual's particular circumstances results in the issuance of orders. The process for issuing an order is an adjudication.[113] An order is defined under the Federal APA as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory, in form, of an agency in a matter other than rulemaking but including licensing."[114]

Adjudications require some level of hearing ranging from formal proceedings to informal proceedings. These hearings may even be held before an administrative law judge. Formal hearings afford an individual certain rights, which may include the right to have counsel present, the right to cross-examine witnesses, the right to present evidence, and the right to a record of the proceedings. Informal proceedings may merely provide the opportunity to be heard and the right to a written explanation of the factfinder's decision. The formality of a hearing depends upon the requirements of the due process clause of the Constitution, or a statute, or an agency's regulations or practice. Hearings, however, are not automatic, and unless the affected individual asserts the right to a hearing, the right may be waived.

The formality of a hearing depends upon the requirements of the due process clause of the Constitution, a statute, or an agency's regulations or practice. Hearings, however, are not automatic and unless the affected individual asserts the right to a hearing, the right may be waived.

If an individual's constitutionally protected property or liberty interest will be affected by the adjudication, then the formality of the hearing depends on a due process analysis. This analysis balances the individual's property or liberty interest against the State's interest in restricting that property or liberty

interest. The type of hearing required depends on the three factors outlined by the Supreme Court in *Matthews* v. *Eldridge*:[115]

1. The nature of the private interest affected.
2. The risk to that interest posed by the challenged procedure and the likelihood that a different procedure would better protect that interest.
3. The burden upon the government in imposing a different procedure.

This balancing test yields the appropriate level of protection that should be afforded an individual before a property or liberty interest may be infringed upon in an adjudication.

In one case, for example, an administrator wanted to transfer an incarcerated juvenile from a juvenile correctional facility to a mental hospital. Because this is an action applicable to an individual, it is an adjudication and requires some level of hearing. Treatment and social consequences in admission to a hospital are much different than in placement in a juvenile facility, and the transfer would therefore affect the juvenile's liberty interest. The *Matthews* v. *Eldridge* balancing test was applied to determine the appropriate level of hearing. The liberty interest of the juvenile and the risk imposed on that interest were weighed against the government's interest in the transfer. It was determined that a formal trial-type hearing needed to be held before the transfer could be made because admission to a mental institution posed a substantial risk to the liberty interests of the juvenile.[116]

If an individual's statutory rights will be affected by an adjudication, the type of hearing will depend on the statute and APA in question. The Model State APA requires a formal hearing in every case of adjudication, whether or not a statute expressly requires it.[117] The formal hearing protection of the Model State APA applies to every adjudication.

The Federal APA takes a different approach to determining the level of hearing necessary. The protection of the Federal APA applies "in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing."[118] This means that the Federal APA's formal protections apply to hearings required to be on the record by a statute. A statute merely requiring a hearing, or one that does not speak to the matter, does not trigger the Federal APA requirement of a formal hearing.[119]

When a statute does not call for a hearing on the record, it is termed an "informal adjudication" (informal hearings only occur under the Federal APA). The Federal APA requires very few procedural protections for informal adjudications. It does provide for the right to appear personally before an agency and to be represented by counsel.[120] It provides that subpoenas and reports be enforced only as authorized by law.[121] It also provides that the agency must give prompt notice and explanation of its decision.[122] Without these protections, agencies have substantial discretion over how to structure informal adjudications.

Jurisdictions that follow the Federal APA have fewer formal hearings than those that follow the Model State APA.[123] This significant difference can be easily illustrated. After a youth threatened a staff member at an institution, the administration placed her in administrative segregation. The applicable administrative procedure statute called for a hearing before she could be segregated. The resident and staff were questioned and the administrator found that the resident had made the threats, but no formal hearing was conducted. Under the Model State APA, the resident was entitled to a hearing that met formal procedures because every adjudication requires a formal hearing.[124] Because the institution did not conduct a formal hearing and was in a Model State APA jurisdiction, the resident had to be released from segregation, and a formal hearing had to be held. Under the Federal APA, however, the resident did not have a right to a more formal hearing because the statute did not call for a hearing on the record. The agency's regulations or past practices could also have required more substantial protections under the Federal APA.

Agency regulations or past practices can trigger formal protections similar to those of the APA's. If an agency regulation provides certain procedural formalities for a hearing, the agency is bound to follow those formalities in the case of every adjudication. An agency cannot arbitrarily choose which protections to provide for hearings if its own regulations call for specific procedures. Also, if an agency

has established certain procedures for particular hearings, that agency may be bound to apply those procedures to every similar hearing. An agency may be required, based on established practice, to apply certain procedures and formalities to particular hearings.

Suppose a delinquent committed to an agency is eligible for release. Because problems exist between the youth and superintendent, the superintendent wants to deny the request. Neither due process nor the applicable administrative procedure statute requires a hearing for the juvenile. The agency regulation, however, requires that a youth's treatment team and social worker issue reports taking a position on release. If the reports favor the release, a formal hearing is required before the youth can be denied release. An advocate may request the release reports from the treatment team and social worker. If the reports favor release, the youth must be released or a formal hearing must be held. The agency is bound to follow its own regulations, and the superintendent cannot circumvent these regulations in individual cases.

In juvenile corrections, decisions are often made at the discretion of an administrator or staff member. If a staff member was required to follow specific procedures but failed to do so, although his or her discretionary decision cannot be challenged, the procedures for reaching the decision may be challenged. Suppose a staff member decides to punish a youth by requiring her to clean the unit's bathroom for a week. If the disciplinary code requires a hearing before any punishment greater than a reprimand may be imposed, the administrative procedure statute can be used to invalidate the staff member's discretionary decision because the action was an adjudication without a hearing. In this way, the statute limits the discretion that individual juvenile corrections staff members may exercise. Of course, after a hearing, the youth may be ordered to clean the bathroom. Yet that juvenile will have had the protections of a hearing, such as notice of the alleged violations and an opportunity to respond, before the increased sanction is imposed.

Using the Administrative Procedure Acts To Improve Conditions of Confinement

APA's can play a significant role in juvenile corrections reform because they govern the actions of the agencies charged with the administration of juvenile detention and correctional facilities, unless excepted by a specific statute. When these agencies promulgate rules, issue orders, implement programs, or deliver services, they must follow the procedures outlined in the State administrative procedure statutes. These procedures are intended to limit the discretion of the agency and provide for a fair use of the agency's power.

The State statutes can be used by juvenile advocates in a variety of different ways. The statutes suggest that an agency provide a youth with a hearing when the agency makes decisions about that particular youth. Although a hearing may be provided for by statute, it must be demanded or an agency may deem it waived and then make important decisions without any input from the youth. The State statutes also provide procedural protections for hearings. This prevents the agency from arbitrarily deciding the procedures to apply at a hearing.

When agencies charged with the administration of juvenile detention and correctional facilities promulgate rules, issue orders, implement programs, or deliver services, they must follow the procedures outlined in the State APA.

If an advocate observes unlawful or inhumane conditions of confinement and wants to use an APA to improve the care of juveniles adjudicated delinquent, the first step is to track down the applicable Federal or Model State APA and study it carefully. Then an action or lack of action by the juvenile justice agency that could be challenged must be identified. Next, the advocate must decide whether the action is rulemaking (broadly applicable based on generalized facts) or adjudication (applicable to an individual and based on facts particular to that individual).

Agencies often violate APA procedures by making decisions internally or by not fully adhering to the requirements set forth in the APA. When that occurs, these decisions can sometimes be challenged. It is important to remember that APA's govern the process of formulating and enforcing policy rather than the substance of those decisions. Nevertheless, these regulations can have input in the formulation of the policies in a juvenile institution and ensure that the policies are correctly applied to the residents.

From the perspective of a juvenile advocate using APA's, the focus should be on the promulgation of rules and the application of those rules to individuals through the issuance of orders. It is in these two areas that advocates can most likely participate in or challenge agency action.

Conclusion

Federal and State APA's can be an effective tool for addressing unjust procedures within juvenile correction facilities. Advocates can use APA's to participate in the regulatory process and address unlawful conditions of confinement for incarcerated youth. Under the breadth of APA's, any party negatively affected by an institution's procedures may be able to challenge them through the rulemaking or adjudicatory process.

From the perspective of a juvenile advocate using the APA, the focus should be on the promulgation of rules and the application of those rules to individuals through the issuance of orders. It is in these two areas that advocates can participate in, or challenge, agency action.

The Model State APA and the Federal APA are effective models that should be consulted for APA construction, but advocates need to be aware of the differences. For example, jurisdictions that follow the Federal APA may have fewer formal hearings than those that follow the Model State APA. Readers are urged to closely examine their State statutes for differences that will affect the rights of individuals when hazardous conditions are observed.

Checklist for the Rulemaking Process

If an agency is acting pursuant to generalized facts and is following a procedure implemented as a rule:

- ✓ Closely examine your State statutes and the agency regulations.
- ✓ Determine whether the agency has followed applicable rulemaking procedures in adopting the rule. The basic rulemaking procedures under both the Model State APA and the Federal APA include:
  - ✓ Appropriate published notice of the proposed rule.
  - ✓ Opportunity for interested parties to comment and participate in the rulemaking process.
  - ✓ Consideration of relevant material before promulgating the rule.
  - ✓ Publication of the rule at least 30 days before it becomes effective.
- ✓ Determine whether statutes provide more procedural protection.
- ✓ Participate in the rulemaking procedure if the opportunity becomes available. This can be accomplished individually or by joining forces with attorneys or advocacy groups. An agency is required to assess all relevant information it receives during the process, and the submission of data can have an effect on the final rule.
- ✓ Consider the validity of the final rule if it is substantially different from the proposed rule and therefore invalid under the Model State APA.

Checklist for the Adjudicatory Process

If the agency is following a procedure implemented as an adjudication:

- ✓ Closely examine your State statutes and the agency regulations.
- ✓ Consider the level of hearing necessary by determining whether it is required by due process, a statute, or an agency regulation or past practice.
  - ✓ If a hearing is required by due process rights, then weigh the juvenile's liberty interest against the government's interest in restricting that liberty interest by applying the three factors outlined in *Matthews* v. *Eldridge*:
    - ✓ The nature of the interest affected.
    - ✓ The risk the government action poses to the interest and the likelihood that a different action would better protect that interest.
    - ✓ The burden on the government in imposing a different action.
  - ✓ If a hearing is required by an administrative procedure statute, then determine whether it calls for formal hearings only in on-the-record proceedings (following the Federal APA) or whether it always requires formal hearing procedures (following the Model State APA). Whether a hearing is formal or informal, become familiar with the hearing procedures that are required by the statute.
  - ✓ If neither due process nor a statute apply, investigate agency regulations and past practices that may require a formal hearing and procedures.
- ✓ Examine each way a hearing is invoked—due process, an administrative procedure statute, or agency regulation—to determine if additional protections are available.
- ✓ Monitor the agency to see if it is following the required procedures. Read the applicable administrative procedure statute again at each step to ensure that the juvenile is provided with all available procedural protection.

Self-Assessment in Juvenile Corrections

Administrators of facilities and advocates for juveniles should consider using a self-assessment process to improve conditions of confinement for detained and committed youth. Self-assessment may be a valuable tool when juvenile justice administrators and agency officials wish to avoid imminent, costly, and time-consuming litigation that would force them to defend inadequate conditions or practices in a confrontational process. Self-assessment may be encouraged through documenting constitutional and statutory violations that are likely to lead to a successful suit against a facility. Advocates for juveniles and representatives from juvenile facilities can collaborate to improve the conditions of confinement without litigation by creating implementation plans that outline remedies for existing violations. This process can only work if the juvenile justice authorities recognize that the conditions in their juvenile facilities present problems that must be corrected.

The Self-Assessment Process

This chapter presents two models for self-assessment: the consultant and the working group models. The consultant model uses an external consultant or organization as the central assessment team and organizer to work with facility administrators to identify deficiencies and plan improvements. The working group model uses facility administrators and agency representatives as the leaders to do their own facility assessment and work with advocates to devise an implementation strategy. Whether using the consultant model or the working group model, self-assessment should follow a four-step process of investigation, documentation, planning, and implementation.

Conducting an investigation and assembling documentation are fundamental to the process of self-assessment, both to demonstrate that facilities are vulnerable to lawsuits and to establish a basis for identifying the areas in need of reform. Documenting constitutional and statutory violations also encourages cooperation by local juvenile courts and agencies responsible for operating the facilities. An advocate, administrator, or consultant could gather information about unlawful, unsafe, and inhumane conditions of confinement. Sometimes pro bono assistance may be available from law firms. Media coverage or grand jury investigations may also help with documentation of rights violations. Advocates for juveniles must be mindful not to jeopardize cooperative solutions at the documentation stage by antagonizing juvenile authorities and fostering entrenchment instead of collaboration. Advocates should try to elicit assistance from the juvenile justice authorities and emphasize that participation in information gathering may encourage collaborative problem solving instead of hostile litigation.

Advocates for juveniles and representatives from juvenile facilities can collaborate to improve the conditions of confinement without litigation through creating implementation plans that outline remedies for existing violations.

Entering into the planning stage requires agreement by all participants that the constitutional and statutory violations need to be addressed through systemic change. Reform often requires major changes in funding and policy, and both administrators and advocates must be willing to find creative ways to reach agreement on some issues. The self-assessment process will not lead to successful systemic reform if potential defendants and plaintiffs cannot rise above their positions and collaborate genuinely.

Pro bono assistance from law firms or meetings called by well-prepared civic organizations can facilitate the planning and development of solutions. Advocates need to recognize that facility administrators may feel powerless to effect needed change and may, in fact, be unable to change conditions without the cooperation of outside agency officials. Facility administrators, representatives from key agencies, and advocates must take time out from daily crises to engage in collaborative problem solving. Assistance with self-assessment from outside groups or consultants will be most effective if offered in a constructive way, with practical, cost-effective suggestions for improvement of inadequate conditions. The planning stage presents the most hurdles because it requires the development of consensus among all parties involved in the reform. Once worked through, however, it will facilitate successful implementation of improved conditions.

Reform often requires major changes in funding and policy, and both administrators and advocates must be willing to creatively reach agreement on some issues.

The final stage, implementation, depends on a well-detailed plan. Success of the implementation also depends on the commitment of each person involved in the reform efforts. Once implementation has been carried out, continuous monitoring will ensure that the process of reform through self-assessment leads to actual and measurable improvements in the conditions of confinement for detained and committed youth.

Consultant Model: Juvenile Detention Example

In 1992, a group of juvenile justice administrators and others involved in juvenile corrections recognized that overcrowding in the juvenile detention facilities in their State had reached a crisis level. The detention facility administrators and State agency officials contacted Community Resource Associates (CRA), a national organization that provides technical assistance to States. CRA hired two attorneys with extensive experience in this area from the San Francisco-based Youth Law Center to be consultants to the agencies.

After visiting five detention facilities, the consultants drafted a vulnerability assessment that summarized constitutional and statutory violations supported by pertinent case law citations. The introduction to the assessment noted that detention administrators were candid and gave the consultants free access to all parts of the institutions. One of the consultants described the agencies as "courageous" because of their willingness to expose the detention facilities to scrutiny and their interest in knowing how the conditions compared with those of facilities in other States. A section of the report addressed the potential liability of certain officials, pointing out that under Federal civil rights law, State tort law, and statutes such as the Individuals with Disabilities Education Act, supervisors or governing bodies might be liable for failing to act where the corrective inaction amounts to deliberate indifference or tacit authorization of the offensive practices.

The officials in this effort knew that their juvenile detention facilities were in deplorable condition and wanted to take the steps necessary to reduce overcrowding and improve conditions. They felt that they did not control significant root causes of overcrowding and chose the consultant model because they hoped a respected outsider's opinion could lead to wider discussions of collaborative remedies and thereby force needed action in the State.

The Youth Law Center's vulnerability assessment of detention conditions covered eight areas that may be useful as a juvenile justice diagnostic tool in any community:

- **Overcrowding.** Severe overcrowding existed in each detention facility and resulted in inadequate education, health, mental health, and recreation services, coupled with increases in institutional violence, suicide, and disciplinary restraints. These conditions violated children's rights under the 14th amendment due process clause. The report described ways court-imposed population caps and limitations on sleeping arrangements have been imposed to remedy overcrowding in juvenile facilities around the country.

- **Safety.** The report found that, "Overcrowding means that staff has lost the ability to appropriately place children . . . in different living units or private rooms," resulting in young or aggressive or suicidal detainees all being placed together. This condition violated the right of incarcerated youth to be protected from threats of violence and sexual assault.[125]

- **Restraints/Isolation.** Mechanical restraints and excessive isolation in juvenile detention facilities stripped away the juveniles' liberty in violation of constitutional due process requirements. The report commented that "our experience in past litigation is that courts are not persuaded by the excuse [that restraints and isolation become necessary because] the mental health agency has not provided adequate services for, or removed from the facility, emotionally disturbed youth." Furthermore, "an extensive body of case law sets limits on the deprivations to which inmates may be subjected in isolation" and provides due process rights for disciplinary hearings on institutional rule infractions.[126]

- **Education.** The incarcerated youth did not receive a full day of school nor adequate special education services. These conditions violated the detained youth's right to an adequate education program.[127]

- **Health Care.** Each facility lacked routine health screening and medical and dental services, especially for residents who were taking medication, were pregnant, or had serious medical conditions. Furthermore, the absence of basic mental health services, such as the means to recognize and intervene in suicidal behavior, violated the juveniles' constitutional rights.[128]

- **Recreation.** The inadequacy of exercise and outdoor recreation in the detention facilities violated children's constitutional rights.[129]

- **Staffing/Training.** Poor staffing ratios, overtime, and lack of training "amount[ed] to deliberate indifference to the rights of persons with whom staff come into contact."

- **Environment.** Fire and safety hazards, filth, crumbling plaster, serious lighting problems, plumbing leaks, and lack of private bathrooms constituted unsanitary and inhumane environmental conditions violating the incarcerated youth's constitutional rights under the 8th and 14th amendments.

Eight areas that can be useful as juvenile justice diagnostic tools:

- ***Overcrowding.***
- ***Safety.***
- ***Restraints/Isolation.***
- ***Education.***
- ***Health Care.***
- ***Recreation.***
- ***Staffing/Training.***
- ***Environment.***

To address the substantial violations outlined in the vulnerability assessment, the consultants made the following recommendations to the facility administrators and advocates for juveniles:

- **Do not try to build your way out of overcrowding.** The report noted that preventing overcrowding requires strict detention criteria to limit predisposition placement in facilities. Adequate alternative programs must be available to maintain juveniles in the community. Moreover, most of the overcrowding conditions in the detention facilities were too urgent to wait for construction.

- **Do not permit detention centers to be used for postdispositional programs or shock treatment.** The report observed that the purpose of detention facilities is to provide short-term secure confinement pending adjudication. While detention facilities must offer services, they should not attempt to provide long-term rehabilitative care. Most youth in postdisposition status in detention facilities could have been appropriately served in less restrictive settings.

- **Adopt more restrictive detention criteria and systematize detention review.** The report urged facilities to develop procedures to ensure that only youth who are dangerous or are likely to flee are held in the facilities. Facilities need to review

juvenile detainees regularly to identify youth who could be released to a less restrictive environment, thereby reducing overcrowding. Facilities also need to create risk assessment instruments to assist in this process.

- **Increase home detention and other nonsecure alternatives to detention.** The report noted that although a continuum of noninstitutional detention options had been proven successful, too few slots were available to serve eligible children.
- **Expeditiously move out children awaiting placement in State facilities or nonsecure placement.** The report urged efficient movement of children from detention facilities to comply with juvenile court dispositional orders.
- **Reduce overrepresentation of racial minorities in detention.** The report found that, "the system as a whole must . . . scrutinize whether intake determinations of eligibility for nonsecure alternatives work against minority youth and, if so, how to eliminate that bias."
- **Prohibit the use of fixed restraints.** The report emphasized that, "the use of mechanical restraints, particularly restraint to a fixed object, should be strictly prohibited."

The release of the report served as a catalyst for discussion and action. It was presented at a meeting of detention facility administrators and State agency officials, and two major newspapers carried articles discussing findings made in the report.

The detention facility administrators embraced the recommendations and followed the self-assessment process by immediately addressing several of the report's findings. One of the facilities self-initiated a cap on the number of detainees. Another facility limited the number of youth per dormitory to four. In another facility, the number of slots in home detention was increased, and the use of padlocks on individual rooms, a serious fire risk, was universally banned.

Within a few months of the report, judges had reduced the number of youth sent to secure detention, and more youth were removed from detention within 72 hours of commitment. These measures limited the detention of preadjudicated youth and had a direct impact in reducing overcrowding.

In February 1994, a statewide secure detention plan that addressed overcrowding as a systemic problem was released by the State agency with oversight responsibility for juvenile detention facilities. The extensive plan described conditions of confinement and provided data on length of stay in juvenile detention facilities. New detention criteria were proposed, and detention review committees were developed in several communities to enhance consideration of alternative placements in appropriate cases. Capacity for secure detention facilities was established, and a capacity compliance advisory committee was appointed to develop procedures for reducing populations at crowded facilities to their stated capacities. These steps resulted in an immediate reduction in overcrowding in one region of the State. The detention plan endorsed the expansion of alternatives to secure detention and for this purpose was approved by the State legislature. Certain facilities were given assistance to expand secure detention alternatives, such as electronic monitoring and intensive supervision, with the philosophy that detention is a process, not a place. Additionally, secure detention beds were approved by adding two small facilities in areas of the State with no secure beds and by enlarging existing facilities through construction. The plan concluded that collaborative initiatives by agencies, detention administrators, juvenile court judges, and local officials were under way to reduce overcrowding and improve conditions. Although the long-term prognosis remains uncertain, the self-assessment process helped improve conditions of confinement and avoided costly and time-consuming litigation.

Working Group Model: Child Welfare Example

In another State, the working group model is leading to child welfare reform. Local attorneys, in partnership with the National Center for Youth Law, presented a written critique of the handling of children in foster care and children potentially in need of foster care placement to administrators in a State department of human resources (DHR) and a children's services division (CSD) in 1993. The

critique focused on unnecessary removals from home, lack of services for families, lack of services for children with emotional disturbances and developmental disabilities, poorly prepared foster parents, dangerous foster homes, multiple placements for many children, and unequal treatment of minority children.

Based on these findings, the attorneys were preparing to sue the State. Through their representation of individual children and their parents, the attorneys had numerous examples of children's and families' rights violations occurring in the child welfare system. The attorneys believed that the pervasiveness of specific problems in the system would allow them to file a class action suit. They hoped the CSD staff would recognize their vulnerability to a successful suit and would therefore be open to a collaborative effort to improve the child welfare system.

The attorneys invited CSD to enter into a process to plan a significant reform of the State child welfare system. A key factor in initiating the self-assessment was that both sides were able to agree that working together to design a reform was preferable to litigation. Everyone agreed that litigation would drain resources from all parts of the child welfare system. Given their disagreements about the extent of the problems and about possible remedies, it was a significant achievement that the parties could agree that the costly 1 or 2 years of discovery typical in such cases would not lead to much information that they did not know at the outset.

A series of meetings among the collaborators resulted in an agreement that the CSD administrator would appoint a working group comprising three advocates, three State staff (including the DHR attorney and a representative from the mental health and developmental disabilities services division), and two experts from a State university who had been involved in child welfare training and research.[130] The working group, led by a CSD representative and one of the attorneys for the children, decided on a three-step process. First, they would collect information on the problems in the child welfare system. Second, they would design a system of care for children and families that would include an implementation plan for achieving such a system. Third, after presenting this plan to the CSD administrator, the parties would negotiate the implementation and monitoring of the reform.

The working group struggled with major disagreements during the first step of the process and was challenged to move beyond the polarized roles of prospective plaintiffs and prospective defendants. While the agency had agreed that problems existed in the child welfare system, the agency working group participants were defensive when advocates described egregious cases. For weeks, trust remained low among working group participants, and many had difficulty believing that they would be able to cooperate sufficiently to achieve their desired end result.

The working group struggled with major disagreements during the first step of the process and was challenged to move beyond the polarized roles of prospective plaintiffs and prospective defendants.

The working group met for an entire day at least three times a month for 5 months. CSD agreed to hire a consultant to help design a system of care for children and families and to develop an implementation plan, and agreed to the working group hiring two national experts. Working group members and consultants read volumes of materials, visited CSD local offices and the central office, reviewed cases, and met with foster parents, residential and nonresidential providers, and parents of children. A letter soliciting input to the working group was sent to 1,000 individuals and organizations concerned about children and families in the State; the letter received many responses. Working group members and consultants also visited innovative local interagency programs and met with a commission on children and families, State and local mental health organizations, the judiciary, and a citizens' review board. CSD staff visited other States to learn about child welfare reforms that seemed closest to the process they envisioned for their State.

The final product of the working group was a cooperatively written document that contained little disagreement between advocates and CSD. The report

began with a strong statement of goals for change. A primary goal was improving practice by caseworkers and providers in reaching agreements with families about their needs. Improvement was also called for in the development of services that build on family strengths and meet the needs of children and families. The report discussed specific elements of reform necessary to keep children safely in their homes and to improve out-of-home placement practice and foster care quality. Services to families and improved care for children removed from their homes were envisioned as part of the integrated reform. The report concluded with specific steps to implement and monitor reform, including a locally based reform process with training and support to staff in each branch to ensure changed practice, flexible funds at the local level, and collaborative relationships with other caregivers.

It is not yet clear whether the process will result in the systemic reform hoped for, but participants are optimistic. It appears that the State has been able to design a reform built on collaboration with more commitment on both sides than is typical of court orders and consent decrees. In contrast to being forced from the outside, the State reform is a local initiative resulting in a collaborative working group process.

Several elements were necessary for the success of the working group self-assessment process:

- **Cooperation.** Despite their initial mistrust, working group members stuck with a process. Instead of remaining polarized, they spent a lot of time with each other and remained more committed to improving care for children and families than to disagreeing with or defeating the other side. The group's shared leadership helped keep both sides at the table.
- **Accurate Information.** CSD allowed data about removals, services, and foster homes to inform the working group's efforts. The consultants were impressed with the information compiled in the working group's early stage, which helped in reaching agreement about how to improve care for children and families.
- **Working Group Staff Person.** A CSD employee knowledgeable about child welfare reform was instrumental in staffing the working group—she kept information flowing, involved the consultants effectively in the working group process, and helped to maintain the belief that reform could be achieved.

Conclusion

Both methods of self-assessment can be instrumental in providing more lawful, safer, and healthier conditions of confinement for detained and committed youth. An advocate or administrator who wishes to engage in self-assessment can start by gathering information about systemic deficiencies. Once the process is initiated, many complex issues will inevitably emerge. Patience and persistence are essential. Most facility administrators have a genuine desire to run safe, humane facilities. Advocates should tap into and consult with those individuals to urge and support a self-assessment process.

Checklist for Self-Assessment

- ✓ Choose the consultant model or working group model, or prepare a new model.
  - ✓ If using the consultant model, do some research and talk to local agencies about which consultants would be the most helpful.
  - ✓ If using the working group model, determine how members are appointed and by whom and then talk to each member of the working group.
- ✓ Gather documentation (or work with others to gather documentation) that supports the need for assessment and improvements from the following sources:
  - ✓ Staff and administrators of the facility.
  - ✓ Residents of the facility.
  - ✓ Available records.
  - ✓ Parents.
  - ✓ Local agencies and child advocates.
- ✓ Plan the assessment process so that it focuses on issues and outcomes that result in improved conditions.
- ✓ Implement the assessment process by:
  - ✓ Assembling all of the necessary people.
  - ✓ Scheduling regular, required meetings.
  - ✓ Working through disagreements.
  - ✓ Focusing on practical ways to reach desired end results.

Conclusion

Youth in the juvenile justice system should not have to fear the very facilities that are being utilized for their treatment and rehabilitation. However, many youth are being subjected to abusive, unlawful, and inhumane conditions of confinement. Detained and committed youth in need of education, treatment, health care, and legal counsel have the right to be protected from violence, unsanitary conditions, and inadequate access to counsel. Research shows that subjecting youth to such harsh confinement conditions increases rates of violence and recidivism. In a society that already faces daily violence and crime, deficiencies in the care of incarcerated youth serve only to further threaten the well-being of our children, families, and communities.

Beyond the Walls is an important resource for all those who are committed to improving the quality of care received by juveniles in detention and correctional facilities across the country. It is designed to be a reference that helps youth advocates, parents, attorneys, and program administrators safeguard and maintain the rights of youth in confinement. Although this report does not include an exhaustive list of mechanisms and strategies, it does provide six key tools that can have a positive impact on the serious problems and issues facing incarcerated youth. The methods discussed in these pages—the Civil Rights of Institutionalized Persons Act, ombudsman programs, the Individuals With Disabilities Education Act, protection and advocacy systems, the Administrative Procedure Acts, and self-assessment—can assist readers in taking the first steps toward making a difference in the lives of youth entrusted to this Nation's care.

The Office of Juvenile Justice and Delinquency Prevention and the American Bar Association Juvenile Justice Center have a shared goal for *Beyond the Walls:* to provide practical suggestions and ideas for improving conditions of youth in custody.

Endnotes

1. Pub. L. No. 96–247, 94 Stat. 349 (1980) (codified at 42 U.S.C. §§ 1997–1997j).

2. 42 U.S.C. §§ 1997–1997j.

3. *See* S. Rep. No. 416, 96th Cong., 1st Sess. 16–17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 783, 798.

4. Mark Soler, et al., Representing the Child Client ¶¶ 1.55–.62 (Matthew Bender 1987).

5. 42 U.S.C. § 1997(1)(B)(iv).

6. Information supplied by the Special Litigation Section, Civil Rights Division, U.S. Department of Justice (November 1997).

7. *See* S. Rep. No. 416, *supra* note 3, at 29, *reprinted in* 1980 U.S.C.C.A.N. 783, 811.

8. 42 U.S.C. § 1997c.

9. *Id.* § 1997c(a)(1).

10. *Id.* § 1997c(a)(2).

11. *Id.* § 1997c(b)(1).

12. *See Summary and Analysis: Civil Rights of Institutionalized Persons Act*, 7 M.D.L.R. 5, 5–8 (1983) (discussing advocacy groups' response to DOJ's enforcement policy under CRIPA).

13. 42 U.S.C. § 1997(1)(A).

14. *Id.* § 1997(1)(B).
The five types of facilities are:
- (i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;
- (ii) a jail, prison, or other correctional facility;
- (iii) a pretrial detention facility;
- (iv) for juveniles—
  - (I) held awaiting trial;
  - (II) residing in such facility or institution for purposes of receiving care or treatment; or
  - (III) residing for any State purpose in such facility or institution [other than for educational purposes]. . . ; or
- (v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

15. *Id.* § 1997b (a)(1) (this findings letter is also known as the "49-day letter").

16. S. Rep. No. 416, *supra* note 3, at 27, *reprinted in* 1980 U.S.C.C.A.N. 783, 809.

17. S. Rep. No. 416, *supra* note 3, at 32, *reprinted in* 1980 U.S.C.C.A.N. 783, 814.

18. *See* H.R. Conf. Rep. No. 897, 96th Cong., 1st Sess. at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 824, 832–833.

19. 21. S. Rep. No. 416, *supra* note 3, at 33, *reprinted in* 1980 U.S.C.C.A.N. 783, 815.

20. Investigation and negotiation regarding a juvenile facility in Alabama have been ongoing since 1992.

21. Information provided by the Special Litigation Section, Civil Rights Division, U.S. Department of Justice (November 1997).

22. 42 U.S.C. § 1997a(a).

23. *Id.* § 1997b.

24. *Id.* § 1997a(a).

25. S. Rep. No. 416, *supra* note 3, at 31, *reprinted in* 1980 U.S.C.C.A.N. 783, 813.

26. United States v. Oregon, 839 F.2d 635 (9th Cir. 1988); *see also* John K. Cornwell, *CRIPA: The Failure of Federal Intervention for Mentally Retarded People*, 97 Yale L.J. 845, 854 (1988).

27. Investigations that resulted in no litigation included investigations of facilities in Philadelphia, PA; Sandy Creek, PA; Prunytown, WV; Manchester, NH; Ione, Los Angeles, and San Francisco, CA; Jacksonville, FL;

Buffalo, NY; Jackson, MS; Hato Rey and Victoria, PR; and Helena and Miles City, MT.

28. States with ongoing CRIPA investigations in juvenile facilities include Alabama, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Ohio, and Virginia.

29. United States v. Commonwealth of Kentucky (W. D. Ky.) (consent decree covering all 13 juvenile treatment facilities ordered on Nov. 13, 1995).

30. United States v. Essex County (D.N.J.) (consent decree covering Essex County Youth House ordered on Dec. 22, 1987); United States v. Commonwealth of Puerto Rico (D.P.R.) (consent decree covering eight juvenile detention and correctional facilities ordered on Oct. 6, 1994, settlement agreement covering an additional 12 detention and correctional facilities filed on Oct. 7, 1997).

31. *See* Special Education in the Criminal Justice System 3–6 (C. Michael Nelson et al. eds., 1987) (reporting that over 42 percent of incarcerated youth exhibit one of three prevalent categories of mental disabilities); *see also* Susan P. Leviton and Nancy B. Shugar, *Maryland's Exchangeable Children: A Critique of Maryland's System of Providing Services to Mentally Handicapped Children*, 42 Md. L. Rev. 823, 843 n.125 (1983) (reporting same statistics).

32. The Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 14141 1994 (this section of the act refers to the Pattern or Practice of Police Misconduct Provision, which authorizes the Attorney General to seek declaratory and equitable relief to remedy conduct by juvenile justice officials that deprives individuals of their constitutional and Federal statutory rights).

33. Webster's New Collegiate Dictionary 823 (9th ed. 1989).

34. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Challenge Grants Program Guideline, 60 Fed. Reg. 24, 886 (1995).

35. *See* Laureen D'Ambra, Survey of Ombudsman Offices for Children in the United States (June 5, 1996) (report for presentation at the ABA 8th National Conference on Children and the Law).

36. Lauren D'Ambra, Office of the Child Advocate, Annual Report for the Office of the Child Advocate 14 (1995).

37. Ombudsman Services in Minnesota, Making Government Responsive to Citizens: A Comprehensive Overview with Recommendations for Efficient Ombudsman Services (Dec. 1995) (a public report prepared by the Ombudsman Roundtable).

38. 20 U.S.C. §§ 1401–1485. Prior to 1990 the Act, as amended, was referred to as the Education of the Handicapped Act (EHA).

39. *See* R.B. Rutherford, C.M. Nelson, and B.I. Wolford, *Special Education in the Most Restrictive Environment: Correctional/Special Education*, 19 J. Special Educ. 59 (1985); Peter E. Leone, A Review of Special Education Programming at Catalina Mountain Juvenile Institution (Nov. 1988) (a report submitted to U.S.D.C., D. Ariz.); Peter E. Leone, Evaluation of Educational and Vocational Services at Cedar Knoll and Oak Hill Youth Centers (Dec. 1990) (a report submitted to the Office of the Monitor); and Peter E. Leone, *Education Services for Youth with Disabilities in a State-operated Juvenile Correctional System: Case Study and Analysis*, 28 J. Special Educ. 43 (1994).

40. 20 U.S.C. § 1401(a)(18).

41. *Id.* §§ 1411(a)(1)(A), 1412(2)(C).

42. *Id.* § 1412(5)(C).

43. *Id.* § 1401(a)(1).

44. 34 C.F.R. § 300.342(b)(1).

45. 20 U.S.C. § 1401(a)(20).

46. 34 C.F.R. pt. 300, App. C, ¶¶ 36–39.

47. 20 U.S.C. § 1401(a)(18).

48. 34 C.F.R. § 300.504(a).

49. 20 U.S.C § 1415.

50. The age of eligibility varies slightly from State to State.

51. The Handicapped Children's Protection Act of 1986, Pub. L. No. 99–372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415(e)(4)); *see* J.E. West, The Handicapped Children's Protection Act: A Case Study of Policy Formation (1988) (Ph.D. dissertation, University of Maryland (College Park) providing more information about the creation of the act).

52. *See*, *e.g.*, H.R. 3268, 104th Cong. (1996) (proposing to permit schools to expel disabled students and end all educational services for misconduct unrelated to their disability).

53. *See* Perryman, DiGangi, and Rutherford, Recidivism of Handicapped and Non-Handicapped Juvenile Offenders: An Exploratory Analysis (Nov. 1989) (paper presented at the Learning Handicapped Offender Conference, Pittsburgh, PA); Nelson and Rutherford, Impact of the Correctional Special Education Training (C/SET) Project on Correctional Special Education

(Sept. 1989) (paper presented at the CEC/CCBD National Topical Conference on Behavioral Disorders, Charlotte, North Carolina); Rutherford, Nelson, and Wolford, *supra* note 39.

54. *See* Casey and Keilitz, *Estimating the Prevalence of Learning Disabled and Mentally Retarded Juvenile Offenders: A Meta-Analysis, in* Understanding Troubled and Troubling Youth 82 (P. Leone ed., 1990).

55. *See* R.K. Otto et al., *Prevalence of Mental Disorders Among Youth in the Juvenile Justice System*, *in* Responding to the Mental Health Needs of Youth in the Juvenile Justice System (J.J. Cocozza ed., 1992).

56. U.S. Department of Education 15th Annual Report (1993) (reporting that the percentage of school-aged children identified as disabled during the 1991–92 school year was 10.1 percent).

57. *See* Rothstein, Special Education Law (1990) (for a discussion of special education legislation and litigation).

58. *See* Board of Educ. v. Rowley, 458 U.S. 176 (1982).

59. *See* Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984).

60. *See* Smith v. Robinson, 468 U.S. 992 (1984).

61. *See* School Bd. of Nassau County v. Arline, 107 S. Ct. 1123 (1987).

62. *See* Honig v. Doe, 108 S. Ct. 592 (1988).

63. All States and the District of Columbia currently receive Federal funding under IDEA. See also Virginia Dep't of Educ. v. Riley, 86 F.3d 1337 (4th Cir. 1996) (the Virginia Department of Education successfully litigated to have the authority to withhold Virginia's FY 94 and 95 allocation under IDEA for permitting local school districts to deprive students with disabilities all education services when they are expelled or suspended for behavior unrelated to their disability).

64. *See* 14 Youth Law News (March–April, 1993) (for a discussion of the Johnson v. Upchurch consent decree and juvenile justice reform in Arizona).

65. Allen F. Breed, Peter E. Leone, and Russell K. VanVleet, Sixth Semi-Annual Report on the Implementation of the Johnson v. Upchurch Consent Decree by the Arizona Department of Corrections (June 12, 1996).

66. *See* M.J. Dale and C. Sanniti, *Litigation as an Instrument for Change in Juvenile Detention: A Case Study*, 39 Crime & Delinquency 49 (1993).

67. To obtain copies of these standards, write to the National Criminal Justice Reference Service, P.O. Box 6000, Rockville, Maryland 20849–6000; or phone 800–851–3420; or e-mail: askncjrs@ncjrs.aspensys.com to request Document No. 113094, the Standards for Adult and Juvenile Correctional Education Programs by the Correctional Education Association.

68. *See* Joseph B. Tulman, *The Best Defense is a Good Offense: Incorporating Special Education Law into Delinquency Representation in the Juvenile Law Clinic,* 42 J. Urb. & Contemp. L. 223 (1992).

69. Pub. L. No. 94–103, 89 Stat. 486 (codified as amended at 42 U.S.C. §§ 6000–6083) (1996) (the Developmental Disabilities Act was an extension of the Developmental Disabilities Service and Facilities Construction Act of 1970, Pub. L. No. 91–517, 84 Stat. 1316).

70. 42 U.S.C. § 6042(a)(1) (1996).

71. *Id.* §§ 10801–10807.

72. 29 U.S.C. § 794e (1996).

73. 42 U.S.C. § 6042(a)(2)(A) (1996).

74. *Id.* § 6042(a)(2)(B).

75. *Id.* § 6042(K).

76. *See* National Association of Protection & Advocacy Systems, Inc., Annual Report of the P&A System 1995–1996 18 (1996).

77. 29 U.S.C. § 732 (1996).

78. *See* Casey and Keilitz, *supra* note 54 (estimating that 35.6 percent of juvenile offenders have learning disabilities and 12.6 percent have mental retardation).

79. *See* NAPAS report, *supra* note 69.

80. NAPAS report, *supra* note 69, at 10.

81. 42 U.S.C. § 6009 (1996).

82. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981).

83. 42 U.S.C. §§ 6021–6030 (1996).

84. *Id.* § 6001.
[t]he term *developmental disability* means a severe, chronic disability of an individual 5 years of age or older that—
- (A) is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (B) is manifested before the individual attains age 22;
- (C) is likely to continue indefinitely;
- (D) results in substantial functional limitations in three or more of the following areas of major life activity—

(i) self-care;
(ii) receptive and expressive language;
(iii) learning;
(iv) mobility;
(v) self-direction;
(vi) capacity for independent living; and
(vii) economic self-sufficiency; and

(E) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, supports, or other assistance that is of lifelong or extended duration and is individually planned and coordinated, except that such term, when applied to infants and young children means individuals from birth to age 5, inclusive, who have substantial developmental delay or specific congenital or acquired conditions with a high probability of resulting in developmental disabilities if services are not provided.

85. 42 U.S.C. § 6042(a)(2)(G) (1996).

86. *Id*. § 6042.

87. *Id*. § 6042 (d).

88. *Id*. §§ 10801–10807.

89. *Id*. § 10802(4).
Under the statute:

(4) The term "individual with mental illness" means an individual—

(A) who has a significant mental illness or emotional impairment, as determined by a mental health professional under the laws and regulations of the State; and

(B) (i) who is an inpatient or resident in a facility rendering care or treatment, even if the whereabouts of such patient are unknown;

(ii) who is in the process of being admitted to a facility rendering care or treament, including persons being transported to such a facility; or

(iii) who is involuntarily confined in a municipal detention facility for reasons other than serving a sentence resulting from conviction for a criminal offense.

90. *Id*. § 10802(2) (defining "eligible system" as PADD).

91. *Id*. § 6001.

92. *Id*. § 10802(4).

93. *Id*. § 10802(4)(B).

94. *Id*. § 10802(3).

95. 29 U.S.C. § 701 et seq (1996).

96. Rehabilitation Act Amendments of 1992, Pub. L. No. 102–569, § 510(a), 106 Stat. 4430 (codified at 29 U.S.C. § 794e (1996)).

97. Telephone Conferences with P&A's in Twelve States (1994) (the jurisdictions that contributed are Alabama, California, the District of Columbia, Maryland, Michigan, Nevada, New Hampshire, New Jersey, New York, South Carolina, Virginia, and Wisconsin).

98. Alexander S. v. Boyd (S.C. filed Dec. 28, 1990).

99. James O. v. Marsden (D.N.H. filed 1991).

100. See also Bi-Metallic Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (case facts presenting an example where public participation in the political process sufficiently protects individual rights); Londoner v. Denver, 210 U.S. 373 (1908) (case facts presenting an example where a hearing is necessary to protect individual rights).

101. 5 U.S.C. § 551(4) (1996); compare Uniform Law Commissioner's Model State Administrative Procedure Act § 1–102(10), 15 U.L.A. 7, 12 (1981) (does not include either "statement of future effect" or "statement of . . . particular applicability" as part of its definition).

102. 5 U.S.C. § 551(5) (1996).

103. *Id*. § 553 (provides the informal procedures that Federal agencies must follow when promulgating rules.)

104. *Id*. § 553(b).

105. *Id*. § 553(b)(1)–(3).

106. *Id*. § 553(c).

107. *Id*.

108. *Id*. § 553(d).

109. Uniform Law Commissioner's Model State Administrative Procedure Act § 1–102(10), 15 U.L.A. at 12 (1981).

110. Uniform Law Commissioner's Model State Administrative Procedure Act § 3–107, 15 U.L.A. at 42 (1981).

111. BASE Wyandotte Corp. v. Costle, 598 F.2d 637 (D.C. Cir 1979).

112. Uniform Law Commissioner's Model State Administrative Procedure Act §§ 3–101 to 117, 15 U.L.A. 33–57 (1981).

113. 5 U.S.C. § 551(7) (1996).

114. *Id*. § 551(6).

115. Matthews v. Eldridge, 424 U.S. 319 (1976).

116. Vitef v. Jones, *445* U.S. *780* (1980).

117. Uniform Law Commissioner's Model State Administrative Procedure Act §§ *4*–101, *4*–201, 15 U.L.A. at *67*, *74* (1981).

118. 5 U.S.C. § *554*(a) (1986).

119. *See Id*. §§ *554*, *556*–*57* (containing the formal protections of the APA).

120. *Id*. § 555(b).

121. *Id*. § 555(c), (d).

122. *Id*. § 555(e).

123. Uniform Law Commissioner's Model State Administrative Procedure Act §§ 4–101 to 221, 15 U.L.A. at *67*–98 (1981).

124. *Id*. (providing the formal Model State APA procedures).

125. Smith v. Wade, *461* U.S. 30 (1973); Withers v. Levine 615 F.2d 158 (4th Cir. 1980); Woodhouse v. Virginia, *487* F.2d (4th Cir. 1973); Redman v. County of San Diego, 942 F.2d 1435 (9th Cir. 1991).

126. Youngberg v. Romeo, *457* U.S. 307 (1982); Pena v. New York State Div. for Youth, *419* F. Supp. 203 (S.D.N.Y. 1976).

127. D.B. v. Tewksbury, *545* F. Supp. 896 (D. Or. 1982); Tommy P. v. Board of County Comm'rs, *645* P.2d 697 (1982); Green v. Johnson, 512 F. Supp. 965 (D. Mass. 1981).

128. Estelle v. Gamble, *429* U.S. 97 (1976); D.B. v. Tewksbury, *545* F. Supp. 896 (D. Or. 1982); Morgan v. Sproat, *432* F. Supp. 1130 (S.D. Miss. 1977); Ahrens v. Thomas, *434* F. Supp. 873 (W.D. Mo. 1977); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980).

129. D.B. v. Tewksbury, *545* F. Supp. 896 (D. Or. 1982); Morgan v. Sproat, *432* F. Supp. 1130 (S.D. Miss. 1977); Baker v. Hamilton, *345* F. Supp. 345 (W.D. Ky 1972); Thomas v. Mears, *474* F. Supp. 908 (E.D. Ark. 1979).

130. The working group hoped that the State Department of Education would also participate in designing the reform, but the State Department of Education declined the invitation.

Appendix A: Additional Information and Contacts

The following sources provide information on the use of the six methods to address unlawful conditions of detention and confinement for juveniles. Staff at the American Bar Association Juvenile Justice Center are available to help you locate additional resources and contact persons beyond the abbreviated list below. Please contact:

ABA Juvenile Justice Center
740 15th Street NW., 10th Floor
Washington, DC 20005–1009
www.abanet.org/crimjust/juvjus/home.html
HN3754@handsnet.org
202–662–1515
202–662–1501 (Fax)

CHAPTER 1—Civil Rights of Institutionalized Persons Act (CRIPA)

1. The Statute: 42 U.S.C. §§ 1997–1997j (1988).

2. Reports/books with case law and statutory law outlining rights of detained and confined youth:

   a. Mark Soler et al., *Representing the Child Client* ¶¶ 1.55–.62 (Matthew Bender 1987).

   b. Abt Associates, Inc., *Conditions of Confinement: Juvenile Detention and Corrections Facilities* (February 1994).

3. Contact:

   a. Special Litigation Section, Civil Rights Division
   U.S. Department of Justice
   Washington, DC 20530
   202–514–6255

   b. Kim Brooks
   Northern Kentucky University
   Salmon P. Chase College of Law
   Children's Law Center
   9 East 12th Street
   Covington, KY 41011
   606–431–3313
   606–292–0100 (Fax)

CHAPTER 2—Ombudsman Programs

1. Sample Enacting Statutes:

   a. Rhode Island
   R.I. Gen. Laws §§ 40–11–1, 42–73–7 (1996).

   b. Michigan
   Children's Ombudsman Act, 1994 Mich. Pub. Acts 204, Mich. Comp. Laws § 722.921 et seq.

2. Reports:

   a. Howard A. Davidson, Cynthia Price Cohen, and Linda K. Girdner, American Bar Association on Children and the Law, *Establishing Ombudsman Programs for Children and Youth: How Government's Responsiveness to Its Young Citizens Can Be Improved* (1993).

   b. Laureen D'Ambra, Office of the Child Advocate, *Survey of Ombudsman Offices for Children in the United States* (June 5, 1996) (report for presentation at the ABA 8th National Conference on Children and the Law).

   c. Laureen D'Ambra, Office of the Child Advocate, *Annual Report for the Office of the Child Advocate 14* (1995).

d. Ombudsman Services in Minnesota, *Making Government Responsive to Citizens: A Comprehensive Overview with Recommendations for Efficient Ombudsman Services* (December 1995) (a public report by the Ombudsman Roundtable).

3. Contacts: (See survey in appendix E)

CHAPTER 3—Individuals with Disabilities Education Act (IDEA)

1. The Statute: 20 U.S.C. §§ 1401–1485 (1975).

2. A resource on the statute and IDEA's varied uses: Eileen L. Ordover and Kathleen B. Boundy, Center for Law and Education, Educational Rights of Children with Disabilities: A Primer for Advocates (1991).

3. Contacts:

   a. Claudette M. Brown
   Advocates for Children and Youth, Inc.
   300 Cathedral Street, Suite 500
   Baltimore, MD 21201
   410–547–9200
   410–547–8690 (Fax)

   b. Peter E. Leone
   Department of Special Education
   College of Education
   University of Maryland
   College Park, MD 20742
   301–405–6489

   c. Joseph B. Tulman, Director
   District of Columbia School of Law
   Juvenile Law Clinic
   719 13th Street NW.
   Washington, DC 20005
   202–727–5268
   202–727–5242 (Fax)

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CHAPTER 4—Protection and Advocacy Systems (P&A's)

1. The Statutes:

   a. Protection and Advocacy System for Persons with Developmental Disabilities (PADD)
   PADD, 42 U.S.C. §§ 6000–6083 (1996).

   b. Protection and Advocacy System for Individuals with Mental Illness (PAIMI)
   PAIMI, 42 U.S.C. §§ 10801–10807 (1996).

   c. Protection and Advocacy System for Individual Rights (PAIR)
   PAIR, 29 U.S.C. § 794e (1996).

2. Reports:

   a. National Association of Protection & Advocacy Systems, Inc., *Annual Report of the P&A System 1995–1996* (1996).

3. Contacts: (See State-by-State P&A list in appendix G)

CHAPTER 5—Administrative Procedure Acts (APA's)

1. The Statutes:

   a. Federal Administrative Procedure Act
   5 U.S.C.A. §§ 551 et seq., 701 et seq., 3105, 3344 (1996).

   b. Model State Administrative Procedure Act
   Uniform Law Commissioner's Model State Administrative Procedure Act, 14 U.L.A. 70 (1981).

2. Books and Articles About Administrative Procedure Acts:

   a. Arthur E. Bonfield and Michael Asimow, *State and Federal Administrative Law* (West Publishing Co. 1989).

   b. Arthur E. Bonfield, *State Administrative Rule Making* (Little Brown Co. 1965).

   c. Kenneth C. Davis, *Administrative Law Treatise* (2d ed. 1979).

d. Walter F. Dickey, *Rulemaking in Corrections: The Wisconsin Experience,* 1983 Wis. L. Rev. 313 (1983).

e. Arthur E. Bonfield, *The Federal APA and State Administrative Law,* 72 Va. L. Rev. 297 (1986).

f. L. Jaffe, *Judicial Control of Administrative Action* (1965).

3. Contacts:

National Conference of Commissioners
on Uniform State Laws
676 North Saint Clair Street, Suite 1700
Chicago, IL 60611
312–915–0195
(write or call for a copy of the Model State APA)

The Virginia Poverty Law Center
201 West Broad Street, Suite 302
Richmond, VA 23220
804–782–9430
804–649–3746 (Fax)
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CHAPTER 6—Self-Assessment

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Appendix B: Text of the Prison Litigation Reform Act of 1995

Prison Litigation Reform Act of 1995, Pub. L. No. 104–134 (codified as amended in scattered titles and sections of the U.S.C.); *see also* H.R. 3019, 104th Cong. (1996).

SEC. 801. SHORT TITLE.
This title may be cited as the "PRISON LITIGATION REFORM ACT of 1995".

SEC. 802. APPROPRIATE REMEDIES FOR PRISON CONDITIONS.

(a) IN GENERAL.— Section 3626 of title 18, United States Code, is amended to read as follows:
"s 3626. Appropriate remedies with respect to prison conditions

"(a) REQUIREMENTS FOR RELIEF.—

"(1) PROSPECTIVE RELIEF.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

"(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless —

"(i) Federal law permits such relief to be ordered in violation of State or local law;

"(ii) the relief is necessary to correct the violation of a Federal right; and

"(iii) no other relief will correct the violation of the Federal right.

"(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

"(2) PRELIMINARY INJUNCTIVE RELIEF.— In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

"(3) PRISONER RELEASE ORDER.—(A) In any civil action with respect to prison conditions, no prisoner release order shall be entered unless —

"(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

"(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

"(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

"(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

"(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

"(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

"(i) crowding is the primary cause of the violation of a Federal right; and

"(ii) no other relief will remedy the violation of the Federal right.

"(F) Any State or local official or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of program facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

"(b) TERMINATION OF RELIEF.—

"(1) TERMINATION OF PROSPECTIVE RELIEF.—(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener—

"(i) 2 years after the date the court granted or approved the prospective relief;

"(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

"(iii) in the case of an order issued on or before the date of enactment of the PRISON LITIGATION REFORM ACT, 2 years after such date of enactment.

"(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

"(2) IMMEDIATE TERMINATION OF PROSPECTIVE RELIEF.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

"(3) LIMITATION.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

"(4) TERMINATION OR MODIFICATION OF RELIEF.—Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

"(c) SETTLEMENTS.—

"(1) CONSENT DECREES.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection(a).

"(2) PRIVATE SETTLEMENT AGREEMENTS.—(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

"(B) Nothing in this section shall preclude any party claiming that a private settlement agreement

has been breached from seeking in State court any remedy available under State law.

"(d) STATE LAW REMEDIES.—The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

"(e) PROCEDURE FOR MOTIONS AFFECTING PROSPECTIVE RELIEF.—

"(1) GENERALLY.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.

"(2) AUTOMATIC STAY.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—

"(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

"(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

"(B) ending on the date the court enters a final order ruling on the motion.

"(f) SPECIAL MASTERS.—

"(1) IN GENERAL.—(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

"(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

"(2) APPOINTMENT.—(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

"(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

"(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

"(3) INTERLOCUTORY APPEAL.—Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

"(4) COMPENSATION.—The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

"(5) REGULAR REVIEW OF APPOINTMENT.—In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

"(6) LIMITATIONS ON POWERS AND DUTIES.—A special master appointed under this subsection—

"(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

"(B) shall not make any findings or communications ex parte;

"(C) may be authorized by a court to assist in the development of remedial plans; and

"(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

"(g) DEFINITIONS.—As used in this section—

"(1) the term 'consent decree' means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

"(2) the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

"(3) the term 'prisoner' means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of

criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

"(4) the term 'prisoner release order' includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

"(5) the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

"(6) the term 'private settlement agreement' means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

"(7) the term 'prospective relief' means all relief other than compensatory monetary damages;

"(8) the term 'special master' means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

"(9) the term 'relief' means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.".

(b) APPLICATION OF AMENDMENT.—

(1) IN GENERAL.—Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

(2) TECHNICAL AMENDMENT. —Subsections (b) and (d) of section 20409 of the Violent Crime Control and Law Enforcement Act of 1994 are repealed.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter C of chapter 229 of title 18, United States Code, is amended to read as follows:

"3626. Appropriate remedies with respect to prison conditions.".

SEC. 803. AMENDMENTS TO CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.

(a) INITIATION OF CIVIL ACTIONS. —Section 3(c) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997a(c)) (referred to in this section as the "Act") is amended to read as follows:

"(c) The Attorney General shall personally sign any complaint filed pursuant to this section.".

(b) CERTIFICATION REQUIREMENTS. —Section 4 of the Act (42 U.S.C. 1997b) is amended—

(1) in subsection (a)—

(A) by striking "he" each place it appears and inserting "the Attorney General"; and

(B) by striking "his" and inserting "the Attorney General's"; and (2) by amending subsection (b) to read as follows:

"(b) The Attorney General shall personally sign any certification made pursuant to this section.".

(c) INTERVENTION IN ACTIONS.—Section 5 of the Act (42 U.S.C. 1997c) is amended—

(1) in subsection (b)—

(A) in paragraph (1), by striking "he" each place it appears and inserting "the Attorney General"; and

(B) by amending paragraph (2) to read as follows:

"(2) The Attorney General shall personally sign any certification made pursuant to this section."; and

(2) by amending subsection (c) to read as follows:

"(c) The Attorney General shall personally sign any motion to intervene made pursuant to this section.".

(d) SUITS BY PRISONERS.—Section 7 of the Act (42 U.S.C. 1997e) is amended to read as follows:

"SEC. 7. SUITS BY PRISONERS.

"(a) APPLICABILITY OF ADMINISTRATIVE REMEDIES.—No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

"(b) FAILURE OF STATE TO ADOPT OR ADHERE TO ADMINISTRATIVE GRIEVANCE PROCEDURE.—The failure of a State to adopt or

adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act.

"(c) DISMISSAL.—(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

"(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

"(d) ATTORNEY'S FEES.—(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that—

"(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

"(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

"(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

"(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

"(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

"(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

"(e) LIMITATION ON RECOVERY.—No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

"(f) HEARINGS.—(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

"(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

"(g) WAIVER OF REPLY.—(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

"(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

"(h) DEFINITION.—As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted

of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.".

(e) REPORT TO CONGRESS.—Section 8 of the Act (42 U.S.C. 1997f) is amended by striking "his report" and inserting "the report ."

(f) NOTICE TO FEDERAL DEPARTMENTS.—Section 10 of the Act (42 U.S.C. 1997h) is amended—

(1) by striking "his action" and inserting "the action"; and

(2) by striking "he is satisfied" and inserting "the Attorney General is satisfied".

SEC. 804. PROCEEDINGS IN FORMA PAUPERIS.

(a) FILING FEES.—Section 1915 of title 28, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "(a) Any" and inserting "(a)(1) Subject to subsection (b), any";

(B) by striking "and costs";

(C) by striking "makes affidavit" and inserting "submits an affidavit that includes a statement of all assets such prisoner possesses";

(D) by striking "such costs" and inserting "such fees";

(E) by striking "he" each place it appears and inserting "the person";

(F) by adding immediately after paragraph (1), the following new paragraph:

"(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined."; and

(G) by striking "An appeal" and inserting "(3) An appeal";

(2) by redesignating subsections (b), (c), (d), and (e) as subsections (c), (d), (e), and (f), respectively;

(3) by inserting after subsection (a) the following new subsection:

"(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

"(A) the average monthly deposits to the prisoner's account; or

"(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

"(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

"(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

"(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.";

(4) in subsection (c), as redesignated by paragraph (2), by striking "subsection (a) of this section" and inserting "subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b)"; and

(5) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

"(e)(1) The court may request an attorney to represent any person unable to afford counsel.

"(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

"(A) the allegation of poverty is untrue; or

"(B) the action or appeal—

"(i) is frivolous or malicious;

"(ii) fails to state a claim on which relief may be granted; or

"(iii) seeks monetary relief against a defendant who is immune from such relief.".

(b) EXCEPTION TO DISCHARGE OF DEBT IN BANKRUPTCY PROCEEDING.—Section 523(a) of title 11, United States Code, is amended—

(1) in paragraph (16), by striking the period at the end and inserting "; or"; and

(2) by adding at the end the following new paragraph:

"(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28.".

(c) COSTS.—Section 1915(f) of title 28, United States Code (as redesignated by subsection (a)(2)), is amended—

(1) by striking "(f) Judgment" and inserting "(f)(1) Judgment";

(2) by striking "cases" and inserting "proceedings"; and

(3) by adding at the end the following new paragraph:

"(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

"(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

"(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.".

(d) SUCCESSIVE CLAIMS.—Section 1915 of title 28, United States Code, is amended by adding at the end the following new subsection: "(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.".

(e) DEFINITION.—Section 1915 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(h) As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.".

SEC. 805. JUDICIAL SCREENING.

(a) IN GENERAL.—Chapter 123 of title 28, United States Code, is amended by inserting after section 1915 the following new section:

"s 1915A. Screening

"(a) SCREENING.—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

"(b) GROUNDS FOR DISMISSAL.—On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

"(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

"(2) seeks monetary relief from a defendant who is immune from such relief.

"(c) DEFINITION.—As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.".

(b) TECHNICAL AMENDMENT.—The analysis for chapter 123 of title 28, United States Code, is amended by inserting after the item relating to section 1915 the following new item:

"1915A. Screening.".

SEC. 806. FEDERAL TORT CLAIMS.

Section 1346(b) of title 28, United States Code, is amended—

(1) by striking "(b)" and inserting "(b)(1)"; and

(2) by adding at the end the following:

"(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.".

SEC. 807. PAYMENT OF DAMAGE AWARD IN SATISFACTION OF PENDING RESTITUTION ORDERS.

Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner.

SEC. 808. NOTICE TO CRIME VICTIMS OF PENDING DAMAGE AWARD.

Prior to payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending payment of any such compensatory damages.

SEC. 809. EARNED RELEASE CREDIT OR GOOD TIME CREDIT REVOCATION.

(a) IN GENERAL.—Chapter 123 of title 28, United States Code, is amended by adding at the end the following new section:

"s 1932. Revocation of earned release credit

"In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit under section 3624(b) of title 18, United States Code, that has not yet vested, if, on its own motion or the motion of any party, the court finds that—

"(1) the claim was filed for a malicious purpose;

"(2) the claim was filed solely to harass the party against which it was filed; or

"(3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.".

(b) TECHNICAL AMENDMENT.—The analysis for chapter 123 of title 28, United States Code, is amended by inserting after the item relating to section 1931 the following:

"1932. Revocation of earned release credit.".

(c) AMENDMENT OF SECTION 3624 OF TITLE 18.—Section 3624(b) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking the first sentence;

(B) in the second sentence—

(i) by striking "A prisoner" and inserting "Subject to paragraph (2), a prisoner";

(ii) by striking "for a crime of violence,"; and

(iii) by striking "such";

(C) in the third sentence, by striking "If the Bureau" and inserting "Subject to paragraph (2), if the Bureau";

(D) by striking the fourth sentence and inserting the following: "In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree."; and

(E) in the sixth sentence, by striking "Credit for the last" and inserting "Subject to paragraph (2), credit for the last"; and

(2) by amending paragraph (2) to read as follows:

"(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the PRISON LITIGATION REFORM ACT shall vest on the date the prisoner is released from custody.".

SEC. 810. SEVERABILITY.

If any provision of this title, an amendment made by this title, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this title, the amendments made by this title, and the application

of the provisions of such to any person or circumstance shall not be affected thereby.

This Act may be cited as the "Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996.". (b) For programs, projects or activities in the District of Columbia Appropriations Act, 1996, provided as follows, to be effective as if it had been enacted into law as the regular appropriations Act: An Act making appropriations for the government of the District of Columbia and other activities chargeable in whole or in part against the revenues of said District for the fiscal year ending September 30, 1996, and for other purposes.

Appendix C: Significant Decisions Under §§ 802 and 803(d) (§§ 7(d) and (e)) of the Prison Litigation Reform Act*

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Automatic Stay—Prison Litigation Reform Act (PLRA) § 802(a) (amending 18 U.S.C. § 3626(e)(2)).

United States* v. *Michigan, No. 1:84 CV 63, Opinion (W.D. Mich. July 3, 1996) (*stay denied* by 6th Cir., Sept. 17, 1996): Judge Enslen found the provision violative of separation of powers and due process.

Hadix* v. *Johnson, 933 F. Supp. 1362 (W.D. Mich. July 3, 1996) (*stay denied* by 6th Cir., Sept. 19, 1996): Judge Enslen found the provision violative of separation of powers and due process.

Hadix* v. *Johnson, 933 F. Supp. 1360 (E.D. Mich. July 5, 1996): Judge Feikens declared the provision unconstitutional, adopting Judge Enslen's reasoning.

Carty* v. *Farrelly, No. 94–78, Order (D.V.I., July 17, 1996): Judge Brotman granted plaintiffs' motion for a stay of the provision. His Order contained no analysis.

Gavin* v. *Ray, No. 4–78–70062, Ruling and Order Staying Automatic Stay Provision (S.D. Iowa Aug. 9, 1996): Judge Vietor declined to give effect to the automatic stay provision. The Order did not set forth any reasons, but, at the hearing on the motion, Judge Vietor stated that the provision is "very likely unconstitutional" and that Judge Enslen's decision in *United States* v. *Michigan/Hadix* v. *Johnson* is "well-reasoned."

Ruiz* v. *Scott, Civ. Action No. H–78–987 (S.D. Tex. Sept. 25, 1996): Judge Justice found the PLRA's 30-day and 180-day automatic stay provisions unconstitutional. (He addressed both provisions because the defendants have filed two termination motions—one under the PLRA and the other under *Dowell/Freeman*.) He reasoned as follows:

> It is impossible for the Court to resolve defendants' motions within the 30-day period specified in 18 U.S.C. sec. 3626(e)(2)(A)(I), or the 180-day period in subsection (A)(ii). The Court believes that the status quo should be preserved pending the resolution of defendants' motions, and finds that the PLRA "automatic stay" provisions violate the Separation of Powers and due process of law, substantially for the reasons discussed in *Hadix* and *Gavin*.

McClendon* v. *Albuquerque, Civ. No. 95–24 MV/RLP, Memorandum Opinion and Order (D.N.M. Oct. 29, 1996): Judge Vasquez found that the automatic stay provision violates the separation of powers because it encroaches upon the uniquely judicial act of deciding to terminate relief. His reasoning drew extensively on Judge Enslen's decision in *Hadix* and turned in part on the finding that the parties were not (and could not have been) prepared to make the requisite evidentiary presentation within the 30-day

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period. Although not at issue in the order, the court stated in dicta that it "agrees that the immediate termination provision of the Act is unconstitutional as applied to final judgments." *Id.* at 7.

Inmates at the Indiana State Farm* v. *Bayh, Cause No. IP 82–0477–C M/S (S.D. Ind. Nov. 20, 1996): The defendants moved for termination of a consent decree pursuant to the PLRA. Two days before the 30-day automatic stay was to take effect, the plaintiffs moved for a preliminary injunction of the stay provision. Approximately 1 week later, Judge Larry McKinney denied the plaintiffs' motion, stating that the stay had already gone into effect under the statute "by operation of law" and that the motion is therefore moot.

Termination—PLRA § 802(a) (amending 18 U.S.C. §§ 3626(b)(2) and (b)(3)).

Plyler* v. *Moore, 100 F.3d 365 (4th Cir. 1996) (reh'g denied Jan. 10, 1997, application for stay pending petition for cert. filed Jan. 17, 1997): In a unanimous opinion (Judges Wilkins, Williams, and Motz), the court upheld the district court's termination of a consent decree under § 3626(b)(2). The court ruled that interpreting "Federal right" to include rights created in a consent decree would be "nonsensical"; that the holding of *Plaut* v. *Spendthrift Farm Inc.*, 115 S. Ct. 1447 (1995), is limited to retrospective relief and that the holdings of *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (hereinafter *Wheeling Bridge*), *System Fed'n No. 91* v. *Wright*, 364 U.S. 642 (1961), and *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), authorize the legislative termination of prospective relief; that the provision does not run afoul of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), because Congress has amended the underlying law (which is not the Eighth Amendment, but the authority of the courts to award relief greater than that required by Federal law) and because the provision provides a standard to which district courts must adhere (the Constitution sets the ceiling) but does not dictate the result that they must reach; that the provision does not burden the fundamental right of access to courts because it impairs neither the rights to bring a claim nor to enforce the relief that is obtained (rather, it just limits the relief to which one is entitled); that the provision rationally serves the legitimate purpose of preserving State sovereignty by protecting States from overzealous supervision by the Federal courts in the area of prison conditions litigation (a point that the inmates conceded); that the provision does not violate the due process "vested rights doctrine" because the plaintiffs have no property interest in the rights conferred by the consent decree; and that the test required of "retroactive" application of statutes need not be met because this is not a retroactive application.

Gates* v. *Gomez, Civ. No. S–87–1636 LKK (E.D. Cal. July 23, 1996): The defendants moved under § 3626(b)(2) to terminate an order issued by Judge Karlton on April 9, 1996. That order found that defendants were not in compliance with the consent decree in the case and ordered defendants to take necessary action to remain in compliance. Judge Karlton denied the defendants' motion to terminate the April 9th order, finding that the order was necessary to "correct the violation of [a] Federal right," namely, the violation of the consent decree. That is, a final judgment of a Federal court, valid at the time of entry, creates rights that can fairly be characterized as a "Federal right." *Id.* at 5.

The court also found that the defendants had waived their right—a right that was existent at the time the decree was entered, and one that they retain under the PLRA—to have plaintiffs' relief limited to statutory or constitutional minima. *Id.* at 7. This finding relied in part on the fact that the decree at issue states that "the parties agree that in entering into this consent decree they waive specific findings of fact and conclusions of law and any determination whether the remedies provided are legally required." However, the court's reasoning seems applicable to decrees that do not include such a provision because such "waiver" is implicit in a consent decree.

The court stated that its rulings were based on its duty to construe statutes to avoid constitutional questions. The court also stated that "to the extent that the PLRA appears to constrain the ability of a state to settle its litigation on terms satisfactory to itself, the statute raises questions under the Tenth Amendment." *Id.* at 9 n.11 (citing *United States* v. *Bekins,* 304 U.S. 27, 52 (1937) ("It is of the essence

of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power")).

Benjamin* v. *Jacobson, 935 F. Supp. 332 (S.D.N.Y. July 23, 1996) (*stayed by* 2d Cir., Aug. 27, 1996): Judge Baer upheld § 3626(b)(2), terminating consent decrees in 7 different cases involving Rikers Island and 16 other jails in New York City. He rejected the Rules Enabling Act argument, finding that the termination provision is not in direct conflict with Federal Rule of Civil Procedure 60(b).

Separation of Powers: He rejected the finality argument, finding that the holding of *Plaut* does not apply to injunctions, pursuant to the holding of *Wheeling Bridge*. He rejected the *United States* v. *Klein,* 80 U.S. (13 Wall.) 128 (1871), argument, finding that the PLRA does not dictate certain findings or results under old law, but changes the law governing the district court's remedial powers. He found that the termination provision does not prevent the Federal courts from imposing effective relief for constitutional claims, although it does create "cramped . . . new legal standards."

Equal Protection: He found that the statute is subject to "rational basis" scrutiny because it does not "implicate [prisoners' fundamental right of court access, which is limited under *Lewis* v. *Casey,* 116 S. Ct. 2174 (1996), to a] right of initial access to commence a lawsuit." The termination provision survives this scrutiny because it serves the legitimate interests of (1) "ensur[ing] that federal courts return control over prison management to democratically accountable state and local governments as soon as federal court supervision became unnecessary to remedy a . . . constitutional violation;" and (2) "creat[ing] a uniform national standard for consent and litigated judgments based on a belief that consent judgments, even though agreed to initially, imposed severe burdens on states and local governments and that these burdens exceeded what was constitutionally required." With respect to singling out prison conditions litigation, he ruled that "Congress may determine that the problems of prison conditions consent decrees involve unique issues that are more pressing and in need of reform."

Due Process: He found that the analysis under the "vested rights" doctrine is parallel to that under *Plaut/ Wheeling Bridge*. Moreover, although consent decrees are contracts, the impairment of such contracts is subject to the rational basis review that is applied to congressional impairment of private contracts.

Judge Baer found that he lacked a record on which to make the findings that would be necessary to allow the relief to remain in effect under 18 U.S.C. § 3626(b)(3), and that the statute directed the immediate termination of an injunction in such circumstances. He denied the plaintiffs' request to postpone a decision on this motion pending an opportunity to create a factual record necessary to make such findings.

United States* v. *Michigan, No. 1:84 CV 63 (W.D. Mich. Sept. 12, 1996): In response to the defendants' motion for termination, the United States asked for an evidentiary hearing under § 3626(b)(3) (they did not argue that the termination provision is unconstitutional). In order to prepare for the hearing, the United States sought to tour the defendants' facilities but the defendants denied the request. Judge Enslen granted the plaintiffs' motion to conduct tours, reasoning that the court "intends to conduct fact-finding proceedings as necessary to rule on the motion to terminate the consent decree" and the "record at this time is not sufficient as to current conditions to allow the Court to make findings as to how the PLRA applies to the various issues, and evidence produced by the parties will assist the Court in making its determination." The decision lends support to the position that plaintiffs are entitled to a (b)(3) hearing before relief is terminated.

Gavin* v. *Ray, Civ. No. 4–78–CV–0062, Order Denying Motion for Immediate Termination (S.D. Iowa Sept. 18, 1996): Judge Vietor declared the PLRA's immediate termination provisions unconstitutional under the principle of the separation of powers. He found that the holding of *Wheeling Bridge* is limited to public rights, and that the holding of *Plaut* extends to cases involving injunctive relief for constitutional claims. He also found as follows:

> Further, the PLRA undermines the court's power to decide when prospective relief should end. The federal judiciary is vested with the "power, not merely to rule on cases, but to *decide* them . . ."

Plaut, 115 S. Ct. at 1453. Under the PLRA, however, in order to prevent immediate termination of the decree, plaintiffs must show a current or ongoing violation of a federal right. 18 U.S.C. § 3626(b)(3). As long as defendants comply with the consent decree, plaintiffs cannot prove a current or ongoing violation of a Federal right. In these types of cases, there is no opportunity for the court to "decide" whether prospective relief should remain in effect.

He declined to reach the other constitutional arguments raised by the plaintiffs—equal protection and due process. He rejected the Rules Enabling Act argument.

McClendon* v. *Albuquerque, Civ. No. 95–24 MV/RLP, Memorandum Opinion and Order (D.N.M. Oct. 29, 1996): In ruling on the constitutionality of the automatic stay provision, Judge Vasquez stated that "the court agrees that the immediate termination provision of the Act is unconstitutional as applied to final judgments [but] the parties disagree and the Court questions [, but does not here decide,] whether [one of the four orders sought to be terminated] constitute a final judgment." *Id.* at 7. Although the order states that the termination motion remains to be decided by the court, this sentence appears to be a ruling (or at least a tentative ruling) on the termination question with respect to the other three orders.

Hadix* v. *Johnson, 947 F. Supp. 1100 (E.D. Mich. Nov. 1, 1996): Judge Feikens ruled that §§ 3626(b)(2) and (b)(3) violate the principle of separation of powers because they run afoul of *Plaut* and because they abrogate a court's power to enforce its orders, one of the most vital constitutional powers of the judiciary. This power is not one that is subject to congressional override because it derives from the Constitution, as interpreted by the Supreme Court in the line of cases from *Dowell* to *Rufo*. Judge Feikens makes the following notable point:

> The Act's use of the term "prospective relief" masks the real issue . . . : can injunctive relief based on past negotiations, costs assessments, and compromises between parties be overturned by an act of Congress? I conclude that it is not prospective relief that is being altered, but the consent judgment itself.

Id. at 1109. Judge Feikens did not reach the plaintiffs' other arguments, such as equal protection and due process.

Bobby M.* v. *Chiles, No. 83–7003 MMP (N.D. Fla. Nov. 6, 1996): Judge Maurice Paul terminated the remaining portions of a consent decree pursuant to the PLRA. The plaintiffs did not argue that the termination provisions are unconstitutional; rather, they asked the court to make the findings necessary to allow the relief to remain in effect under § 3626(b)(3). The court declined to do so, reasoning that even if current conditions are unconstitutional, the defendants have adopted renovation and construction plans to remedy the problem areas. Thus, continuation of the consent decree is not a necessary means of correcting the violations.

Hadix* v. *Johnson, No. 4:92:CV:110 (W.D. Mich. Nov. 18, 1996): Judge Enslen expressed the view that the termination provisions of the PLRA require a court to alter a final judgment pursuant to new standards and thereby "impermissibly invade[] upon the province of the judiciary." *Id.* at 7. However, he acknowledged that reasonable minds can differ on this question and he reserved ruling on the motion until the Sixth Circuit issues a decision on the appeal of his ruling that the stay provision is unconstitutional. He did, however, proceed to address the two other constitutional arguments made by the plaintiffs against the termination provisions. First, he held that the termination provisions do not obstruct a court's ability to effectively remedy violations of constitutional rights. *Id.* at 9–10. Second, he held that the provisions do not run afoul of *United States* v. *Klein,* 80 U.S. (13 Wall.) 128 (1871), because, unlike the stay provision (in which "Congress automatically grants movants relief with no provision for a case-by-case analysis"), the termination provisions "simply change . . . the standard that courts are to apply in a particular type of case. The ultimate decision is left to the courts after a determination of the specific facts of the case." *Id.* at 10.

Inmates at the Indiana State Farm* v. *Bayh, Cause No. IP 82–0477–C M/S (S.D. Ind. Nov. 20, 1996): In addressing the defendants' motion to terminate a

consent decree, Judge Larry McKinney found that the present record did not provide sufficient evidence to allow him to make the findings that permit continuation of the decree under § 3626(b)(3). He then gave the parties the following obtuse directions:

> Assuming that it was not Congress' intent to destroy valid consent decrees based on settlements that were freely reached by both sides after years of litigation, the Court now orders both sides of this controversy to do one of three things. First, they may request a hearing at which both sides will present evidence that would enable the Court to have a basis to find that the original agreed entry met the requirements of the PLRA . . . . Second, they could request a hearing at which each side would present evidence and defend a proposed modification of the original consent decree. If either of these first two alternatives is employed, the parties are cautioned that the Court would expect to be presented with evidence with which to make written findings that the relief remains necessary to correct a current or ongoing violation of a Federal right, that it is narrowly drawn and the least intrusive means of correcting the violation. If neither of these alternatives is acceptable, the Court will have no choice but to find that non-constitutional grounds do not exist for deciding the dispute, and will turn to the constitutional issues raised by the Inmates.

Order at 12–13 (citation and paragraph breaks omitted). To muddle matters further, the court added the following footnote (without any citations to the legislative history or to anything else):

> The Court acknowledges the logic of the Inmates' argument that for the PLRA to require a finding that the defendant has actually violated the prisoners' Federal rights it would have to have a full-blown trial. It would be highly unlikely that a defendant would stipulate to that fact during a settlement. Moreover, conducting a trial to determine the existence of a violation would defeat the purpose of a settlement. Apparently, something less than a full adversarial hearing was contemplated by Congress. All that is needed, in fact, is a finding that the remedy sought would be aimed at correcting a violation.

Order at 12 n.3.

Hazen* v. *Reagan, No. 4–75–CV–80201, and ***Dee* v. *Brewer,*** No. 4–77–CV–80102 (S.D. Iowa Nov. 29, 1996): Judge Charles R. Wolle denied the defendants' motion to terminate consent decrees in two cases pursuant to the PLRA, stating as follows:

> I have compared the issues, the briefs, and the theories presented here and in *Gavin*. The arguments presented by counsel are essentially the same. Judge Vietor's reasoning is sound. Judges of this court have usually followed decisions of other district judges in cases with facts and applicable law that are not readily distinguishable.
>
> For the reasons set forth by Honorable Harold D. Vietor in *Gavin* v. *Ray,* Civil No. 4–78–CV–70062 (S.D. Iowa Sept. 18, 1996), the court denies the defendants' motion for termination of relief in these two cases.

Inmates of the Suffolk County Jail* v. *Sheriff of Suffolk County, No. 71–162–REK, 1997 WL 2474, Order (D. Mass. Jan. 2, 1997): In ruling on the defendants' motion to terminate a consent decree pursuant to the PLRA, Judge Keeton elected to avoid a constitutional question by interpreting the termination provision to call for the termination of "the threat of specific enforcement of orders to comply, backed up by the contempt power of the court for noncompliance," but not to call for termination of the "judgment" or "the adjudication of defendants' obligation to comply with their agreement." *Id.* at 29. In another portion of his order, he explains this distinction as one between remedial provisions on the one hand and "an adjudication of a breach of some legally recognized duty or violation of some legally protected right, or a consent or agreement in lieu of litigating all the way to an adjudication," on the other. *Id.* at 19. As an alternative ground of decision, should his interpretation of the statute be rejected on appeal, he ruled that the termination provision "offends the principle of separation of powers to the extent that it is interpreted as having retroactive effect to reopen consent decrees entered before its enactment." *Id.* at 30.

James* v. *Lash, Nos. S 73–5 AS, 3687, 1996 WL 738957, 1996 U.S. Dist. LEXIS 19081 (N.D. Ind. Dec. 13, 1996): Judge Sharp terminated a consent

decree entered in 1982, finding that the record did not demonstrate a current or ongoing violation of a Federal right. The plaintiffs argued that the defendants' desire to terminate the consent decree demonstrates that "they no longer want to comply with its terms," such that relief is rendered "necessary" under § 3626(b)(3). The court found "an unsupported assertion that the defendants might alter the status quo to the extent a violation occurs . . . to be too speculative to satisfy § 3626(b)(3)." "At most, the statute could be interpreted as allowing for a finding that there is a substantial and very real danger that a violation of rights will follow the termination of a consent judgment." Because that was not shown here, termination was appropriate. The court acknowledged that the courts are split on the question of the constitutionality of the termination provision, but the court declined to reach this question because the plaintiffs did not raise it. Id. at *2–3.

Watson* v. *Ray, No. 4–78–CV–80106 (S.D. Iowa Feb. 10, 1997): Judge Wolle denied the defendants' motion to terminate a decree that was entered in 1981. The decree had been entered with the consent of the parties after the court had made a finding of a constitutional violation. Judge Wolle reasoned as follows:

> I have studied other decisions on the constitutionality of section 3626(e) [sic] of the PLRA. I find the reasoning in the decision filed by Judge Vietor [in *Gavin* v. *Ray, supra*], and the decisions on which Judge Vietor relied, to be more persuasive than the reasoning in cases upholding the constitutionality of that PLRA provision. In particular, I am not persuaded by *Plyler* v. *Moore,* 100 F.3d 365 (4th Cir. 1996).

Judge Wolle previously weighed in on this issue in *Hazen* v. *Reagen* and *Dee* v. *Brewer*.

Johnson* v. *Robinson, Civ. Action Nos. WMN 77–113, 78–1730, and 77–116, Memorandum (D. Md. Feb. 26, 1997): Judge William M. Nickerson terminated various consent agreements that were entered into between 1983 and 1988 governing conditions of confinement at the Maryland House of Correction in Jessup, the Maryland Correctional Institute at Hagerstown, and the Maryland Penitentiary in Baltimore. Because the case is in the Fourth Circuit, the court's hands were somewhat tied by the decision in *Plyler* v. *Moore,* 100 F.3d 365 (4th Cir. 1996). The court rejected the two arguments raised by plaintiffs that were not directly addressed in *Plyler*, namely, that the termination provision violates the 10th amendment and that the provision strips the Federal courts of the power to impose effective remedial measures for constitutional violations.

Shortly after the defendants filed their termination motion, the plaintiffs had filed a motion requesting a hearing pursuant to 18 U.S.C. § 3626(b)(3) to allow them to demonstrate current and ongoing constitutional violations at the facilities. (This had not occurred in *Plyler*.) The court declined to rule on whether "an evidentiary hearing is ever permitted or required in response to a § 3626(b)(2) motion to terminate" (*id.* at 7), but found that such a hearing was not called for because (1) even if they rise to the level of constitutional violations, the incidents described in the expert reports filed by plaintiffs in support of their motion do not warrant the broad, systemwide prospective relief required under the stipulated agreements and should be addressed with suits for individual relief instead; (2) plaintiffs' counsel have had liberal access to the institutions since the entry of the stipulated agreements, but the constitutional violations of which they now complain have not previously been brought to the court's attention; and (3) the plaintiffs' request that the court delay ruling on the termination motion to give them an opportunity to develop a record of current conditions is inconsistent with the PLRA's "clear message that Courts are to determine as expeditiously as possible whether a consent decree must be terminated." *Id.* at 6–9.

Attorneys' Fees—PLRA § 803, subsec. (d) (amending 42 U.S.C. § 1997 (e)).

Retroactivity

Jensen* v. *Clarke, 94 F.3d 1191 (8th Cir. Sept. 5, 1996): The Eighth Circuit ruled that the fee provisions do not apply retroactively "in this case" because "[t]he Act was not in effect when the plaintiffs' attorneys accepted this appointment, when liability and fee determinations were made, or even when we [previously] remanded this case." The court found that a contrary ruling would unsettle

reasonable expectation and reliance. *Id.* at *31–34. The opinion does not specify whether the work at issue was performed before or after passage. (The plaintiffs' attorney stated that all of the work at issue in the fee award was done before the PLRA's passage.)

Cooper* v. *Casey, USCA No. 95–2324 and 95–3529, 1996 U.S. App. LEXIS 26009 (7th Cir. Oct. 2, 1996): Judge Posner held that the PLRA's attorney fee provisions are inapplicable to work performed before the Act's passage. A contrary ruling would attach new consequences to completed conduct without clear indication of congressional intent to do so. *Id.* at *21. The plaintiffs had prevailed in the case before the PLRA's passage, although the court did not mention this in discussing the question of retroactivity.

Bowers* v. *Boyd, Civ. Action No. 3:90–3062–17, Order Awarding Attorneys' Fees (D.S.C. May 29, 1996): Judge Anderson found that the fee provisions are inapplicable to work performed before passage of the Act. The court reasoned that the amendments in section 802 specify their application to previously granted relief, while the amendments regarding fees are in a section that does not contain such a provision. Furthermore, the language of the fee provisions themselves "would seem ineffective to modify a rate to be paid for work already completed." *Id.* at 2 and n.1. The decision does not address the question of the applicability of the provisions to work performed after passage. Although not explicitly mentioned in the order, it is apparent that the plaintiffs prevailed before the PLRA's passage.

Hadix* v. *Johnson, Civ. Action No. 80–73581, Opinion and Order Regarding Plaintiffs' Motion for Attorney Fees (E.D. Mich. May 30, 1996): Judge Feikens ruled that the fee provisions are inapplicable to work performed before passage of the Act. The court found that congressional intent was unclear, but that application of the provisions to work done before passage would disrupt the established expectations of the parties. *Id.* at 3. The decision does not address the question of the applicability of the provisions to work performed after passage. The plaintiffs prevailed in the case many years ago, and the matter has been in a monitoring phase since that time.

Weaver* v. *Clarke, 1996 U.S. Dist. LEXIS 9682 (D. Neb. June 18, 1996): The court found at a preliminary injunction hearing that the plaintiff was likely to succeed on the merits but denied the request for a preliminary injunction because of the lack of irreparable injury. Thereafter, the defendants "voluntarily" ceased the practice that plaintiff was challenging and then successfully moved for summary judgment. The plaintiffs then filed for attorneys' fees. The defendants argued that the PLRA's requirement that fees can only be awarded to the extent that they are "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" abolished catalyst theory.

The judge ruled in the plaintiff's favor, finding that the fee provisions are not applicable retroactively to cases in which "all the events that triggered entitlement to attorney's fees took place prior to the date of enactment of the PLRA." This is so because "the portion of the PLRA upon which defendants rely has no stated effective date as compared with section 802 of the Act" and application of the provisions would cause "manifest injustice" and upset settled expectations. *Id.* at *7. (The decision does not specify whether all of the fees at issue were for work done before passage, although that appears likely.) The court also ruled that "at the very least Plaintiff established a presumptive violation of the Eighth Amendment [at the preliminary injunction hearing]. Consequently, . . . the requested attorney's fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights." *Id.* at *8–9.

Chappell* v. *Gomez, No. C 93–4421 FMS, Order Finding Prison Litigation Reform Act Shall Not Apply to Requests for Fees; Vacating Hearing (N.D. Cal. Aug. 8, 1996): Judge Fern Smith ruled that the fee provisions are inapplicable to a case that was reduced to judgment before the passage of the PLRA because a contrary ruling would upset settled expectations and reasonable reliance and would cause manifest injustice. "Because the judgment was rendered before the PLRA was enacted, the law governing at the time of the judgment will apply to all attorney fees incurred in association with this case, including fees incurred after the enactment of the PLRA." *Id.* at 6.

Miller-Bey* v. *Stiller, Civ. Action No. 93–CV–72111–DT, Order Adopting Magistrate Judge's Report and Recommendation (E.D. Mich. Feb. 25, 1997): Judge Horace W. Gilmore adopted a Magistrate's recommendation that the fee provisions be found inapplicable to work performed before passage of the Act in a case in which the plaintiff obtained a preliminary injunction before the PLRA's passage. The Magistrate had reasoned that the application of the provisions would attach new consequences to events completed prior to enactment. Magistrate's Report and Recommendation at 5. The judge stated that the PLRA is not applicable "in this case." Order at 2. He also awarded, at pre-PLRA rates, attorneys' fees for work done in litigating the issue of fees. *Id.* This amounts to a ruling that the PLRA's attorney fee provisions are not applicable to work performed after passage. (One has to consult the fee petition to determine the hourly rate that was used to compute the latter award. The order simply sets forth the total amount, and states that the PLRA is inapplicable to "this case.")

Anderson* v. *Kern, Civ. No. F–90–0205 GEB JFM P, Order (E.D. Cal. Sept. 30, 1996) (adopting Magistrate's Findings and Recommendations of Aug. 20, 1996): Judge Burrell adopted a Magistrate's recommendation that the fee provisions be found inapplicable to work performed before or after the PLRA's passage in a case in which an injunction was issued, and plaintiffs' counsel was found to be entitled to a fee award (although the amount of the fee award has been the subject of dispute since that time) before the act's passage. Order at 2 n.1. A contrary ruling would constitute a manifest injustice and upset settled expectations. Magistrate's Findings and Recommendations at 5–6. (The decisions do not squarely address whether the triggering date for retroactivity analysis is the date of the district court's decision on the merits or the district court's decision that plaintiffs' counsel is entitled to fees.)

Webb* v. *Ada County, No. CV 91–0204–S–EJL, Order Adopting Report and Recommendation (D. Idaho Sept. 30, 1996): Judge Lodge held that the PLRA's attorney fee provisions are not applicable to a case in which plaintiffs "prevailed" before the statute's passage and all of the work at issue was performed before passage. The court reasoned that the fees provisions appear in section 803, which was not made applicable to pending cases, unlike section 802; and that application of the provisions would constitute a manifest injustice. *Id.* at 15–18.

Browning* v. *Vernon, No. CV 91–0409–S–BLW, Report and Recommendation (D. Idaho Oct. 2, 1996): A magistrate recommended that the fee provisions be found inapplicable to work performed before passage for several reasons: (1) the plaintiffs had prevailed, and the magistrate had recommended a fee award, before passage, although the Judge adopted that recommendation after passage; (2) application of the provisions would be unjust "because the PLRA was not the law at the time that the Plaintiffs' counsel agreed to take the case"; and (3) the section of the bill that contains the fee provisions does not include a retroactivity provision, unlike another section of the act. *Id.* at 3–4. The language in the recommendation would support a claim that the PLRA's attorney fee provisions should not be applied to cases that were filed before the PLRA's passage, regardless of whether the plaintiffs prevailed before passage or the award relates to work performed before passage.

Gates* v. *Gomez, Civ. No. S–87–1636 LKK JFM P, Findings and Recommendations (E.D. Cal. Nov. 25, 1996), adopted in full (E.D. Cal. Jan. 8, 1997): In a case involving a 1989 consent decree, Judge Karlton has adopted in full Magistrate Judge Moulds' recommendation that the PLRA's attorney fee provisions be found inapplicable to a plaintiffs' claim for fees, which was limited to work done before the act's passage, because the decree specified that fees are to be awarded under the terms set forth in 42 U.S.C. 1988 and 29 U.S.C. 794(b) and has not been modified. Recommendation at 5. The Magistrate declined to reach the question of the applicability of the provisions to work performed after passage. *Id.* (This decision has little application to a case in which the consent decree does not include a similar provision.)

Hadix* v. *Johnson, 947 F. Supp. 1113 (E.D. Mich. Dec. 4, 1996): In a case involving an 11-year-old consent decree, Judge Feikens ruled that PLRA rates—$112.50 per hour—are applicable to work performed after April 26, 1996, the date of the

statute's passage. Finding congressional intent unclear, the court reasoned that the prospective application of the statute was not "retroactive" under *Landgraf* and would not create a manifest injustice. *Id.* at 1115.

Perrier* v. *City of Albuquerque, Civ. 95–943 RLP/WWD, Memorandum Opinion and Order (D.N.M. Dec. 17, 1996): Magistrate Judge Puglisi recommended that the PLRA's fee provisions be found inapplicable to a "catalyst" case that the plaintiff voluntarily dismissed several months after the PLRA's passage. The magistrate recommended that the provisions be found inapplicable to work performed before and after passage because "[t]he events giving rise to this lawsuit occurred in the summer of 1995, before the PLRA was enacted" and "Plaintiff's counsel undertook the case and performed most of the work for which he is seeking fees before the PLRA was enacted." A contrary ruling would give the PLRA retroactive effect. *Id.* at 4.

Hurley* v. *Rahman, No. 77 Civ. 3847 (RLC), Endorsement (S.D.N.Y. Dec. 23, 1996): In a case involving a 1983 consent decree, Judge Carter ruled that the PLRA's fee provisions are not "retroactively applicable to cases initiated before PLRA's enactment." A contrary ruling would upset settled expectations and attach new legal consequences to the rendering of services. *Id.* at 1. Although the work at issue was performed before the effective date of the act, the ruling lends support to the argument that the fee provisions are inapplicable to work performed after passage as well as in cases initiated before passage.

Coleman* v. *Wilson, Civ. No. S–90–0520 LKK JFM P, Findings and Recommendations (E.D. Cal. Jan. 21, 1997): Magistrate Moulds has recommended that the fee provisions be found inapplicable to work performed before passage because a contrary ruling would give retroactive effect to the statute. *Id.* at 5.

Hook/Gluth/Casey* v. *Arizona Department of Corrections, Nos. 95–17317, 96–15642, slip op. (9th Cir. Feb. 27, 1997): The Ninth Circuit implicitly ruled that the PLRA's attorney fee provisions are not applicable to work performed before the act's passage. The defendants had appealed a decision that predated the PLRA, in which the district court had awarded attorneys' fees to plaintiffs' counsel—under pre-PLRA terms—for prosecuting a contempt motion and successfully defending against a motion to modify the injunction. The Ninth Circuit affirmed the decision. (*This decision is of limited value for three reasons. First, the defendants did not argue that the PLRA should govern the attorney fee award, and the Ninth Circuit did not squarely address the question. Second, in a section of the opinion unrelated to attorneys' fees, the court stated that it would not "consider the applicability, if any, of the [PLRA] to this appeal," a question that "should be decided, in the first instance, by the district court." *Id.* at n.1. Finally, a court has the inherent power to award attorneys' fees for the prosecution of contempt. *See Perry* v. *O'Donnell*, 759 F.2d 702, 703–05 (9th Cir. 1985). An award entered pursuant to this power is probably not subject to the PLRA.)

Gates* v. *Gomez, Civ. No. S–87–1636 LKK JFM P, Findings and Recommendations (E.D. Cal. Mar. 14, 1997): In a case involving a 1989 consent decree, Magistrate Judge Moulds has recommended that the PLRA's attorney fee provisions be found inapplicable to the plaintiffs' claim for fees for work performed after passage, because the decree specified that fees are to be awarded under the terms set forth in 42 U.S.C. 1988 and 29 U.S.C. 794(b) and has not been modified. Recommendation at 3. (This decision has little application to a case in which the consent decree does not include a similar provision.)

Application to Juvenile Plaintiffs

Alexander S.* v. *Boyd, Civ. Action No. 3:90–3062–17, Order Awarding Attorneys Fees for the Period February–July 1996 (D.S.C. Aug. 30, 1996): Judge Anderson ruled that the fee provisions are inapplicable to actions filed by juvenile plaintiffs. His conclusion rests on the distinction between adult and juvenile facilities in the definitional sections of 42 U.S.C. § 1997, which were not amended by the PLRA.

Special Masters—PLRA § 802(a) (amending 18 U.S.C. § 3626(f)).

The omnibus appropriations bill signed by the President on September 30, 1996, contains a provision prohibiting the use of funds appropriated to the

judiciary for the payment of masters appointed before the PLRA's passage. The precise text of the provision is as follows:

> None of the funds available to the Judiciary in fiscal years 1996 and 1997 and hereafter shall be available for expenses authorized pursuant to section 802(a) of title VIII of section 101(a) of title I of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104–134, for costs related to the appointment of Special Masters prior to April 26, 1996.

Pub. L. No. 104–208, tit. III, § 306 (Sept. 30, 1996), *reprinted in* 142 CONG. REC. H 11656 (Sept. 28, 1996). The provision strongly supports the view that the other provisions regarding masters are also inapplicable to masters appointed before the Act's passage.

Casey* v. *Lewis, Nos. 90–0054 and 91–1808 PHX CAM (D. Ariz. May 15, 1996); *Gluth* v. *Arizona Department of Corrections*, Civ. No. 84–1626–PHX CAM (D. Ariz. May 15, 1996); *Hook* v. *Arizona*, Civ. No. 73–97 PHX CAM (D. Ariz. May 16, 1996): Judge Muecke ruled in three separate cases that the appointment of a special master is not "prospective relief" and that, consequently, the automatic stay provisions are not applicable to a motion to modify an appointment.

Coleman* v. *Wilson, Civ. No. S–90–520 LKK (E.D. Cal. July 11, 1996); *Gates* v. *Gomez*, Civ. No. S–87–1636 LKK (E.D. Cal. July 12, 1996): Judge Karlton found in two separate cases that: (1) the appointment of a special master is not "relief" within the meaning of the statute such that the PLRA's special master provisions are not applicable to masterships created before passage of the act; and (2) a "mediator" whose appointment was a "creature of an agreement between the parties" (rather than a creature of Federal Rule of Civil Procedure 53 or the "inherent power of the court"), and whose powers and duties resemble and overlap with, but differ from, a Rule 53 master, is not subject to the special master provisions of the PLRA.

Madrid* v. *Gomez, No. C90–3094–THE, Order (N.D. Cal. Aug. 23, 1996): Judge Henderson ruled that the special master provisions are inapplicable to masterships created before passage because the appointment of a master is not "relief" and the application of the provisions to such masterships would have a "retroactive" effect under the holding of *Landgraf*.

Williams* v. *Edwards, 87 F.3d 126, 133 (5th Cir. 1996): Judge Henderson cited this case in *Madrid* as implicitly reaching the same conclusion. *See Madrid* Order at 7 n.6.

Prisoner Release Orders—PLRA § 802(a) (amending 18 U.S.C. § 3626(a)(3)).

Doe* v. *Younger, Civ. Action No. 91–187, Opinion and Order at 10–12 (E.D. Ky. Sept. 4, 1996): Judge Bertelsman ruled that an injunction that forbids the county from housing juveniles in the Kenton County Detention Center (KCDC) for a period of more than 15 days is not a "prisoner release order" under the PLRA. The county argued that the order "has the purpose or effect of reducing or limiting the prison population" under 18 U.S.C. § 3626(g)(4) so that the order cannot go into effect without invoking the procedural mechanisms set forth in § 3626(a)(3). The court disagreed, finding that the text of the statute and the House Judiciary Committee's Report indicated that "prisoner release orders" are limited to "prison caps, i.e., orders directing the release of inmates housed in a particular institution once that institution houses more than a specific number of persons."

Exhaustion—PLRA § 803(d) (amending 42 U.S.C. § 1997e(a)).

Handeberry* v. *Thompson, No. 96 Civ. 6161 (KMW) (S.D.N.Y. Dec. 10, 1996): Magistrate Francis recommended that the PLRA's exhaustion requirement be found inapplicable to a class action in which the available grievance system did not provide an "adequate and speedy" remedy for the plaintiffs' claims; in such a case, exhaustion would be "futile." In reaching this ruling, the Magistrate drew on the general body of law regarding exhaustion of administrative remedies.

Nunn* v. *Michigan Department of Corrections, No. 96–CV–71416 (E.D. Mich. Feb. 4, 1997): Judge Corbett O'Meara held that the PLRA's exhaustion requirement is inapplicable to cases filed before

passage. The court held that a contrary ruling would run afoul of *Landgraf*. In reaching this conclusion, the court relied on decisions declining to apply the PLRA's attorney fee provisions retroactively.

Mental or Emotional Injury Without Physical Injury—PLRA § 803(d) (amending 42 U.S.C. 1997e(e)).

Taifa* v. *Bayh, 1996 WL 441809 (N.D. Ind. June 6, 1996), *report and recommendation approved sub nom., Isby* v. *Bayh*, 1996 WL 441820 (N.D. Ind. July 24, 1996): The court conclusorily applied the provision in rejecting a claim that was filed before the PLRA's passage, without reference to the issues of statutory construction, retroactivity, or constitutionality.

Markley* v. *DeBruyn, 1996 WL 476635 (N.D. Ind. Aug. 19, 1996): The court conclusorily applied the provision in rejecting a claim that had been filed before the PLRA's passage, without reference to the issues of statutory construction, retroactivity, or constitutionality.

Adams* v. *Hightower, No. 3:96–CV–2683–G (N.D. Tex. Sept. 25, 1996): The plaintiff sought compensation for mental stress caused by an invasion of his privacy. The court dismissed the action after finding that the plaintiff had failed to show physical injury, without any discussion about the breadth of the application of the provision or its constitutionality.

Barnes* v. *Ramos, 1996 WL 599637 (N.D. Ill. Oct. 11, 1996): Judge Coar found this provision inapplicable to the plaintiff's due process challenge to a prison disciplinary proceeding:

> Barnes has not brought this suit to recover damages for mental or emotional injuries suffered as a consequence of defendants' actions. Rather, he alleges that his constitutional rights were violated because he was denied due process, because false charges were filed against him, and because he was subjected to cruel and unusual punishment. For none of these claims does Barnes assert that he suffered emotional or mental harm, nor do any of these causes of action require such an allegation. For example, a § 1983 action alleging a procedural due process clause violation requires proof of three elements, none of which include emotional, mental, or physical harm: 1) a deprivation of a constitutionally protected liberty or property interest; 2) State action; and 3) constitutionally inadequate process. Therefore, the PLRA does not require dismissal of Barnes's claims.

Id. at 2 (citation omitted).

Puisis* v. *Nyberg, No. 93 C 6602, 1996 WL 754107, 1996 U.S. Dist. LEXIS 19586 (N.D. Ill. Dec. 31, 1996): Judge Plunkett denied the defendants' motion to dismiss the plaintiffs' claim regarding inadequate medical care. The defendant argued that 42 U.S.C. § 1997e(e) mandates dismissal because the plaintiff failed to allege physical injury. The court stated as follows:

> [T]his case was filed two years before the PLRA was passed. The parties have not had an opportunity to brief the issue of whether the PLRA's restriction of a civil action by a prisoner to a showing of a prior physical injury applies to pending cases. More importantly, we cannot say that discovery or expert testimony might not reveal that a physical injury has in fact resulted from Nyberg's three days without proper medication. These issues are better resolved at summary judgment or trial rather than on a motion to dismiss.

Id. at *4.

Ramirez* v. *City and County of San Francisco, No. C 89–4528 FMS, Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment (N.D. Cal. Jan. 23, 1997): Judge Fern Smith ruled that the "physical injury" provision is inapplicable to a medical care claim filed before the PLRA's passage. She reasoned that a contrary ruling would constitute an impermissible retroactive application under *Landgraf* because it would "eliminate plaintiff's once legally cognizable claim for pain and suffering." *Id.* at 19.

Woods* v. *Eberly, Civ. Action No. 95–M–368, Recommendation of United States Magistrate Judge (D. Colo. Jan. 21, 1997): Magistrate Judge Borchers recommended that 42 U.S.C. § 1997e(e) be found inapplicable to a general conditions of confinement challenge that was initiated before the PLRA's passage. The magistrate reasoned that the

application of the provision to pending claims would create a retroactive effect under the holding of *Landgraf*.

Zehner* v. *Trigg, 1997 U.S. Dist. LEXIS 369 (S.D. Ind. Jan. 15, 1997): The plaintiff-prisoners and ex-prisoners sought monetary damages against the defendant correction officials for violations of their eighth amendment rights caused by deliberate exposure to asbestos. Defendants moved for judgment on the pleadings based on § 803(d)(e) of the PLRA, codified at 42 U.S.C. 1997e(e). Judge David Hamilton granted the defendants' motion, finding that (1) "physical injury" requires a showing of "disease or other adverse physical effects," rather than mere inhalation or ingestion of asbestos, *id.* at *14; (2) the provision is applicable to former prisoners, *id.* at *15–27; (3) the provision does not unconstitutionally impair judicial power to effectively vindicate prisoners' constitutional rights because the Constitution does not require a damages remedy for every violation (as demonstrated by the doctrines of qualified and absolute immunity), and injunctive relief remains available, *id.* at *29–41; (4) the provision does not burden prisoners' constitutional right of access to courts because it does not "completely prevent plaintiffs from vindicating their Eighth Amendment rights," it simply limits the relief available to them, *id.* at 43–47; and (5) plaintiffs' equal protection challenge to the provision does not call for strict scrutiny because prisoners are not a suspect class and no fundamental right is burdened, and the provision rationally serves the legitimate purpose of discouraging the filing of frivolous suits, *id.* at *47–54. Plaintiffs did not argue that the provision is inapplicable to actions filed before the PLRA's passage. *Id.* at *8 n.1.

Nunn* v. *Michigan Department of Corrections, No. 96–CV–71416 (E.D. Mich. Feb. 4, 1997): Judge Corbett O'Meara held that the "physical injury" requirement is inapplicable to the plaintiffs' eighth amendment claim (for which plaintiffs seek damages) because their emotional distress stems from rape and sexual assault—which involved "physical injury"—suffered at the hands of Department of Corrections employees.

***In Forma Pauperis* Provisions**—PLRA § 804 (amending 28 U.S.C. § 1915). (Note: This document is not intended to include the various court decisions regarding the PLRA's *in forma pauperis* (IFP) provisions. These cases are included here because of their relevance to the arguments in support of striking down the provisions that *are* covered here.)

Lyon* v. *Van De Krol, 940 F. Supp. 1433 (S.D. Iowa 1996), *appeal pending* (8th Cir. 1997): Judge Longstaff struck down the "three strikes you're out" provision of the PLRA (§ 804(d), *codified at* 28 U.S.C. § 1915(g)), as violative of equal protection because it treats those who proceed IFP differently from those who do not. He subjected the provision to strict scrutiny because it burdens the fundamental right of prisoners to file constitutional claims in Federal court. He found that the standards of review set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987), *Procunier* v. *Martinez*, 416 U.S. 396 (1974), and *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), are inapplicable because they involved "prison administration and security matters," while § 1915(g) relates to "Federal court administration and legal issues." In applying strict scrutiny, he found that, even if the interest in deterring frivolous lawsuits is compelling, § 1915(g) only stops *indigent* inmates. Furthermore, the provision's application is *not* limited to frivolous lawsuits. That is, the provision is both under- and over-inclusive, rather than narrowly tailored.

Hampton* v. *Hobbs, 1997 U.S. App. LEXIS (6th Cir. Feb. 13, 1997): The Sixth Circuit upheld the filing fee requirements, finding that they do not violate (1) the right of access to courts; (2) the first amendment; (3) equal protection; (4) substantive or procedural due process; or (5) the double jeopardy clause.

Roller* v. *Gunn, USCA No. 96-6992, slip op. (4th Cir. Feb. 19, 1997): The Fourth Circuit upheld the filing fee and cost provisions of the PLRA (§ 804(a), *codified at* 28 U.S.C. § 1915(1), (2), (3) & (4)). The court rejected the plaintiffs' challenge based on the right of court access for three reasons: First, the right of court access is subject to Congress' article III power to set limits on Federal jurisdiction. "Congress is no more compelled to guarantee free access to Federal courts than it is to provide unlimited access to them." *Id.* at 7. Second, courts have generally upheld the imposition of partial filing fees on IFP plaintiffs. *Id.* at 8 (citing numerous cases). Third, the filing fee requirements are too "mild" to amount to a

"burden" on the right. *Id.* at 9–10. With respect to equal protection, the court ruled that prisoners are not a suspect class and the provisions do not burden any fundamental rights and are therefore reviewed under rational basis scrutiny. The classification chosen by Congress—singling out prisoners—was rational because prisoners are not similarly situated to nonprisoners. They have their basic material needs, paper, postage, and legal assistance provided at State expense, and they often have free time on their hands that other litigants do not possess. As a result, there has been a far greater opportunity for abuse of the Federal judicial system in the prison setting. Prisoners are also different from other litigants in that they are under the control of the State, so it is administratively easier for the courts to check their finances than it would be for other IFP plaintiffs. A legislature may take one step at a time, addressing itself to the phase of the problem that seems most acute. *Id.* at 11–12.

Additional Decisions on *In Forma Pauperis* Provisions

Those who are following the case law regarding the retroactivity of the IFP provisions should look at two recent cases: *Strickland* v. *Rankin County Correctional Facility*, 195 F.3d 972 (5th Cir. 1997) (applying *Landgraf* to reach the conclusion that certification and filing fee requirements apply to cases in which Notice of Appeal was filed before PLRA's passage; no constitutional analysis); *Ayo* v. *Bathey*, 106 F.3d 98 (5th Cir. 1997) (applying *Landgraf* to reach the conclusion that certification and filing fee requirements apply to cases in which appellate briefing was completed before PLRA's passage; no constitutional analysis). There is already a substantial body of case law on this question. The Second Circuit has ruled that the IFP provisions generally apply to appeals pending at the time of the PLRA's enactment (*see Covino* v. *Reopel*, 89 F.3d 105, 108 (2d Cir. 1996)), but that they do not apply to appeals that were fully briefed before the PLRA's passage. *Duamutef* v. *O'Keefe*, 98 F.3d 22, 24 (2d Cir. 1996); *Ramsey* v. *Coughlin*, 94 F.3d 71, 73 (2d Cir. 1996). The Tenth Circuit has ruled, without analysis, that the filing fee requirements do not apply if the notice of appeal was filed before the act's effective date. *See White* v. *Gregory*, 87 F.3d 429 (10th Cir. 1996); *Zimmer* v. *Bork*, No. 95–3337, 1996 U.S. App. LEXIS 21441 (10th Cir. Aug. 20, 1996); *Hay* v. *Giles*, No. 96–3142, 1996 U.S. App. LEXIS 21149 (10th Cir. Aug. 20, 1996). The Seventh Circuit has reached the same conclusion. *Thurman* v. *Gramley*, No. 96–1062 (7th Cir. Sept. 23, 1996). The Ninth Circuit has reached a contrary conclusion. *See Marks* v. *Solcum*, No. 96–15877 (9th Cir. Oct. 18, 1996).

With respect to the PLRA's "three strikes" provisions, 28 U.S.C. § 1915(g), at least two courts have held that cases dismissed before the PLRA's passage count towards the three strikes. *See Adepegba* v. *Hammons*, 103 F.3d 383 (5th Cir. 1996); and *Green* v. *Nottingham*, 90 F.3d 415 (10th Cir. 1996). The analysis in these cases rested solely on *Landgraf*; the Constitution went unmentioned. For those challenging this provision, *Burris* v. *Parke*, No. 95–3725 (7th Cir. Sept. 12, 1996), which considered the question of the retroactivity of the 1996 Antiterrorism and Effective Death Penalty Act's limitation on the filing of successive habeas corpus petitions, lends support to the position that pre-PLRA filings should not count toward the three strikes. Also, remember the decision in *Lyon* v. *Van De Krol*, 940 F. Supp. 1433 (S.D. Iowa 1996), striking down this provision as unconstitutional. See Update XIII. That decision is currently on appeal.

Another case worth examining is *In re Prison Litigation Reform Act*, 105 F.3d 1131 (6th Cir. 1997) (addressing the application of the IFP provisions to class actions and plaintiffs released from prison before the filing fee is fully paid); and *McGann* v. *Commissioner, Social Security Administration*, No. 96–6071 (2d Cir. Sept. 9, 1996) (finding that filing fee provisions do not apply to plaintiffs released from prison while appeal is pending).

Finally, there is a conflicting body of law on the application of the PLRA's IFP provisions to habeas and mandamus proceedings. The following cases address the question: *Madden* v. *Myers*, 102 F.3d 74 (3d Cir. 1996) (filing fee requirements do not apply to mandamus); *United States* v. *Cole*, 101 F.3d 1076 (5th Cir. 1996) (filings fee requirements do not apply to habeas); *Liriano* v. *United States*, 1996 U.S. App. LEXIS 26297 (2d Cir. 1996) (filings fee requirements do not apply to § 2244 actions and other

"gatekeeping" motions); *Martin* v. *United States*, 96 F.3d 853 (7th Cir. 1996) (PLRA not applicable to mandamus); *Reyes* v. *Keane*, 90 F.3d 676 (2d Cir. 1996) (filing fee requirements do not apply to habeas); *In re Nagy*, 89 F.3d 115 (2d Cir. 1996) (filing fee requirements apply to extraordinary writs such as mandamus that seek relief analogous to civil complaints under 42 U.S.C. § 1983, but do not apply to writs directed at judges conducting criminal trials); *Green* v. *Nottingham*, 90 F.3d 415 (10th Cir. 1996) (filing fee requirements apply to mandamus); *United States* v. *Jones*, 1996 U.S. Dist. LEXIS (N.D. Ill. 1996) (filing fee requirements do not apply to habeas); and *Doren* v. *Mazurkiewicz*, 935 F. Supp. 604 (E.D. Pa. 1996) (filing fee requirements apply to habeas).

Note: The above list of cases is not intended to be exhaustive. These filing fee cases are included because they set forth analysis that may be relevant to the other provisions of the PLRA.

Appendix D: Text of the Civil Rights of Institutionalized Persons Act

42 U.S.C.A. 1997–1997j

42 U.S.C.A. 1997

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 21—CIVIL RIGHTS SUBCHAPTER I–A—INSTITUTIONALIZED PERSONS

Current through P.L. 104–150, approved 6–3–96

s 1997. Definitions

As used in this subchapter—

(1) The term "institution" means any facility or institution—

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles—

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or (v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

(2) Privately owned and operated facilities shall not be deemed "institutions" under this subchapter if—

(A) the licensing of such facility by the State constitutes the sole nexus between such facility and such State;

(B) the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII [42 U.S.C. 1381 et seq., 1395 et seq.], or under a State plan approved under title XIX [42 U.S.C. 1396 et seq.], of the Social Security Act, constitutes the sole nexus between such facility and such State; or

(C) the licensing of such facility by the State, and the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII [42 U.S.C. 1381 et seq., 1395 et seq.], or under a State plan approved under title XIX [42 U.S.C. 1396 et seq.], of the Social Security Act, constitutes the sole nexus between such facility and such State;

(3) The term "person" means an individual, a trust or estate, a partnership, an association, or a corporation;

(4) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States;

(5) The term "legislative days" means any calendar day on which either House of Congress is in session.

s 1997a. Initiation of civil actions

(a) Discretionary authority of Attorney General; preconditions

Whenever the Attorney General has reasonable cause to believe that any State, political subdivision of a State, official, employee, or agent thereof, or

other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution, as defined in section 1997 of this title, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this subchapter to persons residing in or confined to an institution as defined in section 1997(1)(B)(ii) of this title only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

(b) Discretionary award of attorney fees
In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

s 1997b. Certification requirements; Attorney General to personally sign certification

(a) At the time of the commencement of an action under section 1997a of this title the Attorney General shall certify to the court—

(1) that at least 49 calendar days previously the Attorney General has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of—

(A) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(B) the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification, and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General; and

(C) the minimum measures which the Attorney General believes may remedy the alleged conditions and the alleged pattern or practice of resistance;

(2) that the Attorney General has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of the Attorney General's intention to commence an investigation of such institution, that such notice was delivered at least seven days prior to the commencement of such investigation and that between the time of such notice and the commencement of an action under section 1997a of this title—

(A) the Attorney General has made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which the Attorney General believes may assist in the correction of such conditions and pattern or practice of resistance;

(B) the Attorney General has encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation and persuasion, including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and it is the Attorney General's opinion that reasonable efforts at voluntary correction have not succeeded; and

(C) the Attorney General is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions and pattern or practice, taking into consideration the time required to remodel or make necessary

changes in physical facilities or relocate residents, reasonable legal or procedural requirements, the urgency of the need to correct such conditions, and other circumstances involved in correcting such conditions; and

(3) that the Attorney General believes that such an action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) The Attorney General shall personally sign any certification made pursuant to this section.

s 1997c. Intervention in actions

(a) Discretionary authority of Attorney General; preconditions; time period

(1) Whenever an action has been commenced in any court of the United States seeking relief from egregious or flagrant conditions which deprive persons residing in institutions of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to suffer grievous harm and the Attorney General has reasonable cause to believe that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may intervene in such action upon motion by the Attorney General.

(2) The Attorney General shall not file a motion to intervene under paragraph (1) before 90 days after the commencement of the action, except that if the court determines it would be in the interests of justice, the court may shorten or waive the time period.

(b) Certification requirements by Attorney General

(1) The Attorney General shall certify to the court in the motion to intervene filed under subsection (a) of this section—

(A) that the Attorney General has notified in writing, at least fifteen days previously, the Governor or chief executive officer, attorney general or chief legal officer of the appropriate State or political subdivision, and the director of the institution of—

(i) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(ii) the supporting facts giving rise to the alleged conditions, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred; and

(iii) to the extent feasible and consistent with the interests of other plaintiffs, the minimum measures which the Attorney General believes may remedy the alleged conditions and the alleged pattern or practice of resistance; and

(B) that the Attorney General believes that such intervention by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(2) The Attorney General shall personally sign any certification made pursuant to this section.

(c) Attorney General to personally sign motion to intervene

The Attorney General shall personally sign any motion to intervene made pursuant to this section.

(d) Discretionary award of attorney fees; other award provisions unaffected

In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs. Nothing in this subsection precludes the award of attorney's fees available under any other provisions of the United States Code.

s 1997d. Prohibition of retaliation

No person reporting conditions which may constitute a violation under this subchapter shall be subjected to retaliation in any manner for so reporting.

s 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail,

prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) Definition

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

s 1997f. Report to Congress

The Attorney General shall include in the report to Congress on the business of the Department of Justice prepared pursuant to section 522 of Title 28—

(1) a statement of the number, variety, and outcome of all actions instituted pursuant to this subchapter including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;

(2) a detailed explanation of the procedures by which the Department has received, reviewed, and evaluated petitions or complaints regarding conditions in institutions;

(3) an analysis of the impact of actions instituted pursuant to this subchapter, including, when feasible, an estimate of the costs incurred by States and other political subdivisions;

(4) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and

(5) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.

s 1997g. Priorities for use of funds

It is the intent of Congress that deplorable conditions in institutions covered by this subchapter amounting to deprivations of rights protected by the Constitution or laws of the United States be corrected, not only by litigation as contemplated in this subchapter, but also by the voluntary good faith efforts of agencies of Federal, State, and local governments. It is the further intention of Congress that where Federal funds are available for use in improving such institutions, priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist. It is not the intent of this provision to require the redirection of funds from one program to another or from one State to another.

s 1997h. Notice to Federal departments

At the time of notification of the commencement of an investigation of an institution under section 1997a of this title or of the notification of an intention to file a motion to intervene under section 1997c of this title, and if the relevant institution receives Federal financial assistance from the Department of Health and Human Services or the Department of Education, the Attorney General shall notify the appropriate Secretary of the action and the reasons for such action and shall consult with such officials. Following such consultation, the Attorney General may proceed with an action under this subchapter if the Attorney General is satisfied that such action is consistent with the policies and goals of the executive branch.

s 1997i. Disclaimer respecting standards of care

Provisions of this subchapter shall not authorize promulgation of regulations defining standards of care.

s 1997j. Disclaimer respecting private litigation

The provisions of this subchapter shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons. In this regard, the fact that the Attorney General may be conducting an investigation or contemplating litigation pursuant to this subchapter shall not be grounds for delay of or prejudice to any litigation on behalf of parties other than the United States.

Appendix E: Survey of Ombudsman Offices for Children in the United States*

Preface

In recent years, a growing number of States have developed ombudsman offices for the protection of children in need of State care and intervention. This national trend is directly related to public concern regarding the inadequacy of child welfare systems to protect and care for vulnerable children who are victims of physical abuse, sexual abuse, and neglect. Limited resources, high staff turnover, and a lack of training and recruitment of experienced personnel have added to the States' inability to meet the needs of the burgeoning number of children requiring protection and care. Unfortunately, it usually takes a tragic event, such as the death of a child known to State protective services, to focus attention on our Nation's most vulnerable children.

In response to the need for reforms, State policymakers, administrators, and elected officials have explored more aggressive steps to save children from abuse and neglect. One such avenue is the creation of State ombudsman offices designed to protect the legal rights of children in State care as well as to monitor programs, placements, and departments responsible for providing children's services. Advocacy on behalf of this voiceless population can enhance planning, cultivate coordination, and encourage the best utilization of limited resources that will improve outcomes for children and families in the State system.

In *Establishing Ombudsman Programs for Children and Youth,*[1] the American Bar Association Center on Children and the Law identified the Rhode Island Office of the Child Advocate as a model ombudsman office for children.[2] This national report, which recommended that each State establish an ombudsman office for children, has been a catalyst for the founding of new ombudsman offices. The Rhode Island office is frequently contacted and consulted by elected officials and policymakers when States without a child advocate office are exploring legislative initiatives to establish one. In July 1995, the Connecticut General Assembly passed legislation[3] creating an Office of the Child Advocate modeled after the Rhode Island version.

Based on our many contacts with officials throughout the country, it became obvious that sharing vital information regarding the many roles that ombudsman offices can assume to benefit children was essential. The statutory jurisdiction, power, size, and role of the office can vary greatly, but the basic mission of the office is universal. Improving conditions for children in State care is the primary goal of our offices.

In an effort to be better informed about other ombudsman offices, we contacted agencies in all 50 States and obtained information from more than half of the States surveyed regarding their State offices for children. We were not able to include information regarding all of the responding agencies, but we have highlighted a representative group that appears best to fit the categories based on the information provided to us. It is our hope that this information will be helpful in the creation of new offices as well as in the expansion of existing offices.

*Presented by Laureen D' Ambra, Esq., Rhode Island Office of the Child Advocate at the American Bar Association's 8th National Conference on Children and the Law: "Achieving Justice in Child-Related Conflicts," Crystal City, VA, June 5, 1996.

Rhode Island Office of Child Advocate: A Model Ombudsman Agency

A. Historical Perspective

The primary purposes of a child welfare ombudsman office are to address complaints related to government services for children and youth, to provide a system accountability mechanism, and to protect the interests and legal rights of children and their families who are parties in the child welfare and juvenile justice arenas.[4] The Rhode Island legislature was one of the first in the country to create an ombudsman-like office in the area of child welfare. The Office of the Child Advocate (OCA) was established in 1979.[5] It is a legal office that represents the best interests of individuals involved in the child welfare system as a class, and investigates and resolves complaints against the Department of Children, Youth, and Families (DCYF) that may infringe on the rights of State-involved children. Special attention is given to children in care who are not entitled to appointed counsel, primarily voluntary admittees; and to children who, though represented in Family Court, need legal assistance in collateral matters such as public benefits, education, mental health, and employment.[6] In order to carry out these mandates, the Child Advocate has broad statutory rights and powers, including the right to communicate privately with a child in DCYF care; to inspect, copy, and/or subpoena records regarding the child; to subpoena persons with whom the child has been placed or has received medical/mental health treatment; and to take appropriate steps to publicize the office's purpose and role.[7] During 1995, the office handled more than 700 complaints from professionals, foster parents, family members, and concerned citizens.

Effective ombudsman offices maintain a degree of independence[8] and are granted the power to act on complaints and investigatory findings. The fact that the Rhode Island OCA can litigate disputes on behalf of State-involved children is significant, because this ability most often serves to promote meaningful negotiation of grievances that leads to timely procedural and substantive reforms.

The functions of OCA are diverse[9] and include the following tasks. First, in-State child fatalities in which the victims had some connection to DCYF are investigated. Formal investigations are conducted by multidisciplinary Fatality Review Panels comprised of staff from OCA and community members who have particular expertise serving as reviewers. The reviews culminate in public reports that focus on specific recommendations for reform. Eleven such reviews have been conducted since 1989.[10] The ability to investigate fatalities thoroughly has statutory authority.[11]

Second, public and private residential placement facilities and shelters are periodically reviewed by OCA to ensure that the legal rights of children in care are protected and that the placement facilities promote safety and conform with mandated policy and procedure.[12] A vital aspect of this review process is to interview children for feedback on the quality of the program and to inform them of their rights. Toward that end, all placement facilities must post a copy of the Children's Bill of Rights, which delineates the legal and civil rights of all children in State care.[13] In order to solicit information and to encourage children to bring vital information to the attention of OCA, the office has the power to communicate privately, either orally or in writing, with any child in the care or custody of DCYF.[14] OCA also assesses the quality of care provided to children by reviewing all investigations of institutional abuse involving residential programs, foster homes, the Rhode Island Training School, and daycare providers. As a result of this close review of formal complaints to DCYF, the office engages in followup procedures necessary to protect children living in out-of-home care.

Third, OCA adopts an active role in the legislative and public education processes.[15] The Child Advocate sits on the General Assembly's Children's Code Commission, which reviews legislation relating to children, and routinely testifies in the General Assembly on legislative proposals related to children.[16] The office publishes an annual public report summarizing all laws passed by the Rhode Island General Assembly that affect children.[17] OCA fulfills its mandate to educate the public regarding its services in several ways, including making presentations at conferences, convening public hearings, conducting studies released as public documents, and actively

participating on many committees, task forces, and coalitions that are concerned about children's issues.

To respond to the special needs of children in care who are either victims of crime or who qualify for special education, OCA delivers legal and advocacy services through programs targeted to address these populations. Regarding child-victims of crime, OCA is legislatively designated through Project Victim Services[18] to identify and represent children in State care who may have a viable claim for victim's compensation. Similarly, representation for particular children in State care, those who do not have parents able or willing to make educational decisions for them, is provided by the State's surrogate parent/educational advocates program, managed by OCA.

B. Comparative Study: Rationale and Methodology

In January 1995, OCA mailed a letter requesting information about their offices to 150 agencies throughout the country identified in the *Child Welfare League Annual Directory of Members* as advocacy organizations. The purpose of this mailing was to gather information about ombudsman offices for children in the various States and to determine precisely the types of services available in each State. To date, responses from 26 States have been documented, with most of the respondents noting that the State has some type of ombudsman office or an identified agency responsible for performing ombudsman-like functions.[19]

Several student interns in the Rhode Island State Government Internship Program assisted in the compilation of the information received and in some instances in telephone surveys with some of the States identified in this report.

Summaries of the responsibilities of State ombudsman offices for those States responding to OCA solicitation are provided. The offices are classified by function and by State. Many States absent from examination in this report do have ombudsman-like offices. Other States have contacted OCA for information and assistance regarding the creation of an ombudsman office for children. Recent inquiries were made by the States of Kentucky, New York, Oregon, Tennessee, and Washington.

Ombudsman Offices

Some of the agencies that exist throughout the United States to provide ombudsman services for children are profiled below. The listed agencies responded to the Rhode Island Office of the Child Advocate's request for information.

ALASKA (Juneau and Anchorage)

1. Office of the Ombudsman, State of Alaska
   P.O. Box 113000
   240 Main Street, Suite 202
   Juneau, AK 99811–3000
   907–465–4970

and

2. Office of the Ombudsman, State of Alaska
   P.O. Box 196650
   Anchorage, AK 99519–6650
   907–343–4461

The Office of Ombudsman in Alaska was established in 1975 to operate under the legislative branch of the State's government. Its role and powers are mandated by statute.[20] Presently, there are 10 staff members and an annual operating budget of $700,000. In the past 2 years, funding has decreased, resulting in a significant cut in staff and the loss of an office located in the town of Fairbanks. However, at the same time, caseload has increased and demands on the agency have intensified. The ombudsman is well known and accessible to the public.

The purpose of the Alaska State Ombudsman's Office is to assist the public with questions and complaints about State agencies as well as problems with the University of Alaska system. It receives many complaints involving children in care of the Division of Family and Youth Services. The staff will investigate these complaints and, if a problem is found, recommend solutions. Also, in child support enforcement cases, a major portion of the office's workload, the office serves as a link between parents and the Child Support Enforcement Division.[21]

Written reports required for all investigated cases[22] are submitted to the agency against which the complaint is made, to the complainant, and when

appropriate, to the legislature and Governor. Each year, the ombudsman submits a list of subjects that, based on the complaint pattern and the office's investigations, merit legislative attention. The office has also completed reviews of child fatalities, but that service is more often provided by the Division of Family and Youth Services or State law enforcement agencies.

ARKANSAS

Arkansas Advocates for Children and Families
103 East Seventh Street, Suite 931
Little Rock, AR 72201–4531
501–371–9678; fax: 501–371–9681

Arkansas Advocates for Children (AAFC) is a private, nonprofit organization funded by membership contributions. It was founded in 1977 by Hillary Rodham Clinton and concerned citizens. There are 5 staff members and 22 board members who have an operating budget of $400,000.

The mission of the office is to advocate for children's rights and well-being.[23] During the 1980's, the organization helped create the Governor's Commission on Early Childhood to ensure quality, affordable health care for all families. It successfully lobbied for legislation that would require mandatory participation in the Federal school breakfast and summer food programs, as well as for reforms to Arkansas' system of handling abused and neglected children. This led to more training for social workers and foster parents, along with improved placement and adoption procedures. Members are also responsible for updating Arkansas' juvenile justice system.[24] In 1993, advocates established the Children's Data Center to help State agencies and policymakers direct resources for families.

The reports and research studies the organization has produced on such topics as school dropout rates and children without health insurance have led to vital legislation that has been a model for all States. The Arkansas Advocates for Children testify before the legislature, work with State agencies, serve on government commissions, and develop collaboration between public and private agencies.

COLORADO (Denver)

Department of Social Services
Complaint Resolution Process
1575 Sherman Street
Denver, CO 80203
303–866–5825

The Complaint Resolution Process within the Department of Social Services was established in 1993 by executive order. It is a public, government-funded agency staffed by three employees who assist the State government in meeting the needs of children in State care. The agency monitors placement facilities and serves approximately 50 children annually, submitting written reports to the Governor's office. It also makes presentations, convenes public hearings, and conducts studies released as public reports. In the past 2 years, staff, budget, and caseload have remained constant.

CONNECTICUT

Office of the Child Advocate
505 Hudson Street
Hartford, CT 06106
860–550–6313

Connecticut recently passed legislation to create an Office of the Child Advocate modeled after the Rhode Island version.[25] Previously, many of the functions of an advocacy office were performed by other entities in the State. Unlike Rhode Island's system of child protection, there was no Connecticut State agency empowered to bring class action lawsuits on behalf of children. That function was generally assumed by the Connecticut Civil Liberties Union. Connecticut's Commission on Children, Department of Children and Families, and Department of Social Services fulfilled some of the duties of other States' child advocacy offices.

In the wake of three Connecticut children's deaths within 8 days in the spring,[26] on July 10, 1995, Governor John Rowland signed into law a measure establishing an Office of the Child Advocate responsible for all State programs involving the care of children. It provides that the Governor, with the approval of the

General Assembly, appoint a child advocate knowledgeable about the child welfare system and the legal system. The child advocate may appoint such staff as deemed necessary.

The Connecticut Office of the Child Advocate acts independently of any State department in performing its duties. These duties include reviewing procedures of any State department serving children or affecting children's rights; reviewing facilities and procedures of institutions or residences, public or private, where juveniles are placed by the Superior Court or Department of Children and Families; and reviewing policies and procedures for placement of special needs children. It investigates complaints when it appears that a child or family needs assistance.

The office also evaluates delivery of services by agencies and entities providing State-funded services to children, recommends policy and procedural changes and proposals for systemic reform and formal legal action, conducts public education programs and legislative advocacy, provides training and technical assistance to guardians ad litem and special court-appointed advocates, and serves on the child fatality review panel.

FLORIDA (Tallahassee)

Human Rights Advocacy Committee
Building 1, Room 400
1317 Winewood Boulevard
Tallahassee, FL 32399–6570
904–488–6173

Florida has a volunteer-staffed Human Rights Advocacy Committee (HRAC) in each of the 34 service districts of the Department of Health and Rehabilitative Services (HRS). The committees are overseen by an appellate body, the Statewide Human Rights Advocacy Committee (SHRAC). The statewide committee may investigate threats to life, safety, and health without referral from a district committee.[27]

A State-run agency established in 1979 by the legislature,[28] SHRAC has three volunteer employees. It has a statutory mandate to perform advocacy services and is funded by the legislature. While it does handle child welfare cases, including review of child fatalities and monitoring of placement facilities, its purpose is to investigate all complaints regarding HRS and serve as a check and balance on its programs.[29] The office, therefore, is considered to operate independently of HRS to act as an impartial third-party mediator between HRS and its clients. It submits annual reports to the State summarizing complaints, activities, and recommendations.[30] It has reported that in the past 2 years, while the number of staff has remained constant, caseload has increased.

ILLINOIS (Springfield)

Department of Children and Family Services
The Ombuds' Office
406 East Munroe
Springfield, IL 62701–3798
217–524–2029

Inspector General
2240 West Ogden
Chicago, IL 60612
312–433–3000

The Ombuds' Office operates within the State of Illinois' Department of Children and Family Services (DCFS), but independently of the bureaucratic structure. It was established in 1973 by executive order to investigate and respond to concerns relating to child welfare issues. About 50,000 children are served annually. The office compiles written reports and makes presentations at conferences. Five ombudsmen are employed, though staff, budget, and caseload have decreased in the past few years.

In 1993, the Illinois legislature created the position of inspector general[31] to oversee delivery of DCFS services and to investigate child fatalities and complaints regarding any employee, foster parent, service provider, or contractor of DCFS. The statute also mandated establishment of a toll-free hotline for foster parents. The inspector general is appointed by the Governor, reports to the DCFS director, and may make recommendations for sanctions against service providers under DCFS jurisdiction. The inspector general makes annual reports to the legislature and Governor, including recommendations for administrative and legislative action.[32]

KANSAS (Topeka)

Ombudsman Program for Social and Rehabilitation Services
Perry Building
300 SW. Oakly
Topeka, KS 66606
913–296–4687

The Ombudsman Program for Social and Rehabilitation Services was established in 1990 by executive order. The office is a State agency with 12 employees. The purposes of the office are to receive complaints, address concerns, and advocate for all children and adults within the system. Approximately 40 percent of cases involve children's issues. In the past 2 years, staff, budget, and caseload have remained constant.

Inquiries and complaints are channeled through the Governor's Office and Social Rehabilitation Services. Recommendations to improve services are ordinarily made to the Youth Commission and occasionally to governmental authorities or legislative committees. The existence and functions of the office are well known and it is accessible to the public. Written reports are distributed statewide. The Youth Commission reviews child fatalities, monitors placement facilities, and uses legal staff to access the courts.

KENTUCKY (Frankfort)

Office of the Ombudsman
275 East Main Street, 1E-B
Frankfort, KY 40621
502–564–5497; 800–372–2973

The Office of Ombudsman, established by the legislature in 1980,[33] is a State-operated agency within the State's Cabinet for Human Resources. It has 15 employees and an annual budget of $485,000, which is funded by the Federal and State governments. The office is statutorily mandated to advocate for citizens involved with cabinet services and particular government-funded programs and to respond to inquiries and complaints of cabinet members.[34] Written reports are submitted to the Regulation cabinet, and recommendations for policy and procedural changes are made to governmental authorities. The functions of the office are well known, and the office is easily accessed by the public. In the past 2 years, staff, budget, and caseload level have all increased.

A Juvenile Care Ombudsman Office is currently being established within a reorganized Office of the Ombudsman in accordance with a Federal court consent decree.

MASSACHUSETTS (Boston)

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office for Children
One Ashburton Place
Boston, MA 02108
617–727–8900

The Massachusetts Office for Children is a State agency charged with licensing and monitoring the child placement system. The Office for Children may work in conjunction with the Department of Social Services (DSS) to investigate complaints.[35] DSS offices are regionalized and have experienced budgetary and staff increases in recent years.

MICHIGAN (Lansing)

Office of Children's Ombudsman
P.O. Box 30026
Michigan National Tower, Suite 100
124 West Allegan
Lansing, MI 48909
517–373–3077

Michigan's Office of Children's Ombudsman was created in January 1995 by the legislature[36] as a means of monitoring and ensuring compliance with relevant statutes, rules, and policies pertaining to children's protective services, the children's justice system, and the placement, supervision, and treatment of children in foster care and adoptive homes. It may conduct formal investigations, hold hearings, and request that people appear to give testimony and produce evidence.[37]

The office oversees and recommends improvements in children's programs of all State departments, including social services, mental health, and public health and education.[38] The ombudsman is empowered to file petitions in court on behalf of children. In its first 8 months, the office opened 255 cases,

closing 86 percent of them; 51.3 percent involved protective services, 8 percent foster care, 8.8 percent adoption services, and 32.1 percent a combination of those or other concerns.[39]

The ombudsman is appointed by the Governor, but acts independently of the Department of Management and Budget.[40] The office makes recommendations to the Governor and legislature, which appropriated an $800,000 budget for 1995.[41] At the end of its first year, it had 8 investigators and had handled more than 400 complaints, mostly concerning Department of Social Services protective services.[42]

MINNESOTA (St. Paul)

Office of Ombudsman for Mental Health
and Mental Retardation
Metro Square Building, Suite 420
121 Seventh Place East
St. Paul, MN 55101–2117
612–296–3848; 800–657–3506

Minnesota has two ombudsman's offices whose responsibilities have an impact on children:[43] the Office of Ombudsperson for Families and the Office of Ombudsman for Mental Health and Mental Retardation. The Ombudsman Roundtable, which formed in 1994 to allow the State's eight ombudsman offices to share expertise, prevents duplication of services.

The Office of Ombudsperson for Families, an independent State agency, was created by the legislature[44] in 1991 to ensure that children of color and their families are guaranteed fair treatment by child protection agencies. The high rate of removal of children of color from their families was a condition that led to the office's creation.[45]

The office monitors agency compliance with all laws governing child protection and placement as they affect children of color. It ensures that court officials, public policymakers, and service providers are trained in cultural diversity; that experts from the appropriate community of color are available as court advocates and are consulted in placement decisions involving children of color; and that guardians ad litem and other individuals from communities of color are recruited, trained, and employed in court proceedings to advocate on behalf of children of color.[46]

Four ombudsmen are appointed, one each by the councils on Indian Affairs, Spanish-Speaking Affairs, Black Minnesotans, and Asian-Pacific Minnesotans.[47] The Office of Ombudsman is equipped to receive complaints from any source concerning an action of an agency, facility, or program. Upon investigation and determination that a complaint has merit, the ombudsman may make recommendations to the agency and may send findings and conclusions to the Governor. The office also submits an annual report to the Governor.[48]

The Office of Ombudsman for Mental Health and Mental Retardation, established in 1987,[49] is also an independent State agency that receives and investigates complaints involving actions of agencies, facilities, or programs. It provides advocacy and mediation on behalf of individual clients, conducts death and serious injury reviews, and makes recommendations to elected officials, government agencies, and service providers for improvement of mental disabilities service delivery.[50] The office also submits annual reports to the Governor.[51]

Although the office reported that children are a small percentage of those it serves, it identified the need to develop a child's specialist position that can devote exclusive time to needs of children with emotional disturbance as a top priority in 1995.[52] The ombudsman must receive reports of abuse and neglect leading to deaths of children placed in foster care or government facilities. The ombudsman also serves on a task force regarding residential and inpatient treatment services for children.[53]

The ombudsman, appointed by the Governor, has regional advocates throughout the State and a 15-member advisory board.[54]

NEW MEXICO (Santa Fe)

Client Relation Liaison
P.O. Drawer 5160 PER, Room 254
Santa Fe, NM 87502
505–827–8442

The Client Relation Office is a division of the Department of Children, Youth, and Family and does not operate independently. It does review child fatalities, and about 25 percent of those served by the office are children. It has just one employee who is responsible

for tracking the validity of complaints and mediating between department fieldworkers and clients. There is no separate budget for the office, and its caseload has increased over the past 2 years. It was created by an administrative directive/executive order and is considered well known and accessible to the public.

OKLAHOMA (Oklahoma City)

Oklahoma Commission on Children and Youth
Office of Juvenile System Oversight
4545 North Lincoln Boulevard, Suite 114
Oklahoma City, OK 73105
405–521–4016

The Oklahoma Commission on Children and Youth (OCCY) was established by the legislature on May 28, 1982,[55] to develop and improve Oklahoma's services to children and youth by overseeing public and private children's services, facilitating coordination among public and private agencies, and funding model projects for effective services to children and youth. The commission has a statutory mandate to monitor public and private placement facilities for children. In addition, it has access to all children in those facilities as well as to all records. The commission can also convene public hearings and issue subpoenas. The majority of its work involves investigating allegations of misfeasance and malfeasance against the child welfare agency in its handling of child abuse cases.[56]

The commission oversees juvenile justice and delinquency programs, early childhood intervention programs, services for children with disabilities, mental health services for youth, the Child Death Review Board, and court-appointed special advocates. The office does not have the authority to litigate on behalf of children.[57]

The 16-member commission[58] meets at least quarterly to consider proposals, approve agency budgets, hear staff reports, make appointments to councils and committees, and submit recommendations to the Governor, legislature, judicial system, and State agencies.[59]

The commission also issues public reports that include recommendations for system improvement and recommendations for correction of multiagency systems breakdowns. The reports also include requests for prosecution, when appropriate.[60]

SOUTH CAROLINA (Columbia)

Office of the Governor
Division of Foster Care Review
Ombudsman Division: Children's Case Resolution System
1205 Pendleton Street
Columbia, SC 29201
803–734–0480; fax: 803–734–1223
803–734–0457; fax: 803–734–0385

The Foster Care Review Board was established in 1974 by the legislature[61] as a division of the Governor's office. The Division of Foster Care Review consists of 21 staff members serving on 35 review boards across the State. Twice annually, the agency conducts reviews regarding approximately 5,000 children in foster care, statistically evaluates foster care in South Carolina, and makes recommendations to the General Assembly and childcare facilities.[62]

The Governor's Office of Children's Affairs, part of the Governor's Office Division of Ombudsman and Citizen Services, has three units: the Children's Case Resolution System (CCRS), the Investigative Unit, and Ombudsman and Citizen Services.[63]

CCRS, established in 1986,[64] reviews cases of children whose emotional, physical, and educational needs are not being met by the State's service delivery system. It facilitates interagency cooperation, assists in developing and implementing treatment plans, resolves disputes among State agencies with regard to delivery of services to children, and recommends improvements. It submits an annual report and other reports as necessary to the Governor and the Joint Legislative Committee on Children.[65]

The Investigative Unit is mandated to investigate abuse and neglect allegations involving children in public or private health facilities, agencies licensed by the Department of Health and Environmental Control, or facilities operated by the Department of Mental Health.[66] The Office of Children's Affairs must initiate an investigation within 24 hours of a complaint and resolve it within 60 days.

The Office of Children's Affairs also provides ombudsman services on behalf of families with children and on behalf of institutionalized children. It promotes and coordinates cooperation among State agencies serving special needs children and advocates for increased availability of children's services.[67]

TEXAS (Austin)

Protective and Regulatory Services
701 West 51st Street
Austin, TX 78714
512–834–3744

The Texas Department of Protective and Regulatory Services (PRS) Ombudsman Office was established in 1993 by administrative and legislative initiative.[68] PRS is charged with protecting children and elderly or disabled adults; licensing residential childcare facilities, group daycare homes, daycare centers, and child-placing agencies; and registering family homes. The agency's board of directors and executive director created an ombudsman office to provide oversight and review of abuse and neglect investigations involving PRS services and to compile statistical data and prepare reports regarding investigations in facilities operated by State agencies.[69]

The ombudsman is a State-funded office with an annual operating budget of $385,487. The staff consists of a director, three associates, two consultants, and a receptionist. The agency is required to submit written reports to the State and elected officials. In the past 2 years, while the office's caseload increased, staff and budget decreased.

The office investigates child fatalities only in special circumstances[70] and monitors only those placement facilities that have had complaints filed against them. Approximately 75 percent of those served are children (200,000+ annually). Inquiries and complaints come from professionals, caretakers, concerned adults, and children themselves. In its first 2 years, the agency responded to 2,803 inquiries involving Child Protective Services, Child Care Licensing, and Adult Protective Services.[71]

With the intention of becoming more accessible to the public, the office recently installed a 24-hour 800 number and is developing a handbook. Protective and Regulatory Services staff frequently make recommendations to the State legislature for alternative action, legislation, and policy changes.

Child Fatality and Abuse Reviews

The agencies in this section perform some of the important functions of a children's ombudsman office: They conduct child fatality reviews and investigate abuse complaints. Multidisciplinary investigations of child deaths involving teams of medical, law enforcement, and childcare experts can be a catalyst for changes in policy, procedure, and law that have a direct effect on many children in State care. These are just a sample of the State and local agencies that exist throughout the United States.[72]

ARIZONA (Phoenix)

Arizona Child Fatality Review Team
Arizona Department of Health Services
1740 West Adams Street
Phoenix, AZ 85007–2670
602–542–1025

The Arizona Child Fatality Review Team was established in 1992 by a legislative act.[73] The team works in conjunction with the Arizona Department of Health Services to assist in the development of local child fatality review teams; to develop protocols for fatality investigations; to educate the public on incidence, causes, and prevention of child deaths; and to develop a child fatality data collection system.[74] The members of the team represent a wide range of interests and organizations, including, but not limited to, the Attorney General's Office, the Governor's Office for Children, the Navajo Nation, and a child advocate not employed by the State. The team held its first meeting in December 1993 and continues to meet bimonthly.

Focusing on public health aspects of child fatalities, the team endeavors to reduce preventable child fatalities through interdisciplinary training; community-based prevention education; and systematic, multidisciplinary, multiagency, and multimodality review of child fatalities in the State. A State data system showed that 350 cases have been reviewed since June 1994.[75] The team

submits an annual report to the Governor and legislature[76] and makes recommendations for legislation and public policy.

The team's funding is derived from a surcharge on certified copies of death certificates.[77] The budget for the 1993–94 fiscal year was $100,000.

Arizona has been selected by the American Bar Association Center on Children and the Law and the Los Angeles County Council on Child Abuse and Neglect as a pilot site for development of a national model for training State and local fatality teams.

MISSOURI (Jefferson City)

The State Technical Assistance Team
Missouri Department of Social Services
Division of Family Services
P.O. Box 88
615 Harden Court
Jefferson City, MO 65103–0088
573–751–1479

The State Technical Assistance Team (STAT) works in conjunction with the Missouri Department of Social Services. The team was created when House Bill 185 was passed in 1991 and signed into law by Governor John Ashcroft to establish a statewide, county-based system of child fatality review panels. The Department of Social Services and STAT were given primary responsibility for implementing the legislation,[78] which requires that Missouri have 115 county-based multidisciplinary Child Fatality Review Programs (CFRP) to examine the deaths of children up to age 17. CFRP panels consist of local community professionals who attempt to identify the cause and circumstances of child deaths. Regional coordinators offer oversight and technical assistance. An appointed State panel provides further oversight and makes recommendations for change and refinement.[79]

Findings of the panels can be used to determine trends, target prevention strategies, identify family and community needs, or, when appropriate, support criminal justice intervention. Reviews are not open to the public, and specific case details are not divulged.

STAT assists the regions and panels with expert training and investigative assistance. Recognizing the importance of multidisciplinary interaction in dealing with dysfunctional families, child abuse, and neglect, the team acts as an intermediary to bring agencies that have dual roles and responsibilities together to address problem issues. It collects information and data to identify patterns and risks to children and makes CFRP-related presentations to professional and civic organizations. It also develops teams to investigate the sexual abuse of children[80] and is a resource (via an 800 number, pagers, and oncall investigators) for referral, technical, and informational support on children's concerns.[81]

Public Education

The offices in this section strive to strengthen and enhance public awareness of agencies working with children through public information campaigns. Advocacy efforts of these offices bring problems to public attention in order to promote policy changes, legislative initiatives, and enhanced resources for children. This is another very important function of an ombudsman office for children, who are often voiceless victims in child welfare systems across the country. The following agencies responded to the Child Advocate Office's request for information and are only a sample of these types of offices that exist throughout the United States.

ARIZONA (Phoenix)

Children's Action Alliance
4001 North Third Street, Suite 160
Phoenix, AZ 85012
602–266–0707

The Children's Action Alliance (CAA), a private, nonprofit organization, was founded in 1988 by concerned business and community leaders. To build support for public and private investments in successful policies and programs, CAA strives to focus attention on children's issues through research, publications, media campaigns, public education, and advocacy. Its projects include the Arizona Children's Campaign, which brings together citizens and civic leaders to impact public policy and State fiscal priorities through public information and development of legislation. CAA publishes an annual report, *The*

State of Arizona's Children,[82] and *Arizona Kids Count*, which contains data on health, social, educational, and economic problems,[83] and a compilation of child welfare questions and a platform for children to inform candidates for public office.[84] The Alliance was a prime supporter of Arizona's "Success by 6" legislation, intended to ensure that all children were ready for school by the age of 6, which created controversy statewide in 1994.[85]

GEORGIA (Atlanta)

Child Welfare Institute
Two Midtown Plaza, Suite 900
1349 West Peachtree Street NE.
Atlanta, GA 30309–2956
404–876–7949

The Child Welfare Institute, founded in 1984, is a private, nonprofit organization that provides training and consultation services to more than 35 States, the District of Columbia, and several foreign governments. The organization's mission is to enhance the ability of child welfare agencies to protect children, preserve families, build families through adoption, and prepare youth for adult life. The institute offers assistance with agency assessment, planning, staff training, and implementation of policy and procedure changes. Its program models include Partnerships in Parenting, which assists agencies in delivering their services in partnership with parents.[86]

MICHIGAN (Lansing)

The Michigan Association of Children's Alliances
530 West Ionia Street, Suite E
Lansing, MI 48933
517–485–0840

The Michigan Association of Children's Alliances (MACA) was formed in 1957. It is a nonprofit 501(c)3 corporation whose membership includes private and public agencies (64 in 1995) and individuals.[87] Its mission is to improve services to children and their families to ensure that each child has access to the resources he or she needs to promote physical, emotional, and intellectual growth and development. MACA also focuses on public education and advocacy, along with education and training for foster parents and professionals who work for or with children.

Conclusion

This report attempts to provide a sampling of advocacy agencies in the United States, both governmental and private, that monitor the rights of children. Most States contacted have clearly recognized the need for independent oversight of child welfare agencies to ensure the protection of children in State care. The role of an ombudsman office is to provide public accountability and independent monitoring of State departments entrusted with the care of children and youth. Legislative initiatives in many States have resulted in the creation of State-funded ombudsman offices for children. Most of these State agencies provide monitoring and oversight of child placement facilities, institutional abuse complaints, investigations of child fatalities, public education, advocacy, and troubleshooting of individual complaints and concerns. Some of these agencies are much broader in scope, encompassing, for instance, all people with disabilities or involving governmental institutions that may impact children and their families. In addition to public ombudsman offices, there are many nonprofit organizations that receive State subsidies to provide advocacy for children.

State public policy changes and reform of child welfare systems can only be accomplished through a concerted effort of the citizenry. It is hoped that more States will examine ways to improve their advocacy networks on behalf of victimized children and that this report will be a catalyst for the creation of advocacy offices in every State in the country.

Notes

1. Howard A. Davidson, Cynthia P. Cohen and Linda K. Girdner, ABA Center on Children and the Law, Establishing Ombudsman Programs for Children and Youth (1993).

2. *Id.* at 95.

3. 1995 Conn. Acts 95–242A.

4. Davidson, *supra* note 1, at vi, 61.

5. *See* R.I. Gen. Laws § 42–73–1 *et seq.* (1993) (enactment creating the Office of the Child Advocate).

6. Davidson, *supra* note 1, at 65–66, 95–98.

7. R.I. Gen. Laws § 42–73–9(3) (1993); Office of the Child Advocate staff, 1995.

8. *See* R.I. Gen. Laws § 42–73–5 (1993).

9. *See generally* Thomas Finn and Laureen D'Ambra, *Lawyering for Children in the Care of the State*, R.I. Bar J., Mar. 1994, at 7; Davidson, *supra* note 1, at 65–66; 95–98.

10. *See* R.I. Pub. Doc. Nos. 89–118, 89–121, 90–122, 90–123, 91–126, 91–127, 96–136.

11. R.I. Gen. Laws § 42–73–7(2)(1993). *See also* Finn and D'Ambra, *supra* note 10, at 7–8.

12. R.I. Gen. Laws § 42–73–7(4) (1993). *See generally* The Rhode Island Child Advocate's Review of Children in Residential Placement Facilities, R.I. Pub. Doc. 89–120 (1989) (report on the methodology and results of the office's review process).

13. R.I. Gen. Laws § 42–72–15 (1993).

14. R.I. Gen. Laws § 42–73–9(1)(1993)

15. R.I. Gen. Laws § 42–73–7(6)(1993).

16. *See* R.I. Gen. Laws § 42–74–1 et seq. (1993) (creating Children's Code Commission).

17. *See, e.g.,* Laws Affecting Children: A Guide to the R.I. Public Laws of 1995, R.I. Pub. Doc. 95–134 (1995).

18. *See* R.I. Gen. Laws §§ 42–73–7(6), 42–73–9.1 (1993); Finn and D'Ambra, *supra* note 10, at 10.

19. Rhode Island and four other States have an independent ombudsman reporting to the Governor; at least 20 other States have some kind of advocate for children and families, according to Howard Davidson, director of the American Bar Association Center on Children and the Law. Kathy Barks Hoffman, *Ombudsman is in Kids' Corner,* The Detroit News, July 10, 1995, at 1–D.

20. Alaska Stat. § 24.55.010 et seq. (1992).

21. State of Alaska Ombudsman, Ombudsman's Guide to the Alaska Child Support System.

22. *Id.*

23. *Id.*

24. The Arkansas Coalition for Juvenile Justice (formerly the Arkansas Juvenile Supervisory Board) was established by executive order of the Governor in 1981.

25. *See supra* note 3.

26. *See* Kimberly J. McLarin, *Slaying of Connecticut Infant Shifts Policy on Child Abuse,* N.Y. Times, July 30, 1995, at A–1; Candy J. Cooper, *Children in Balance,* The Detroit Free Press, May 6, 1996, at 1–A.

27. Davidson, *supra* note 1, at 77.

28. Fla. Stat. ch. 402.165 et seq. (1986 & Supp. 1993).

29. Davidson, *supra* note 1, at 77–78.

30. *See, e.g.,* Statewide Human Rights Advocacy Committee Annual Report 1995/96.

31. 325 Ill. Comp. Stat. Ann. 20/1 et seq. (West 1993).

32. Davidson, *supra* note 1, at 76–77.

33. Davidson, *supra* note 1, at 76–77.

34. Davidson, *supra* note 1, at 79.

35. Davidson, *supra* note 1, at 79.

36. Davidson, *supra* note 1, at 79.

37. Candy J. Cooper, *Ombudsman Stresses Independence,* The Detroit Free Press, Jan. 10, 1995, at 1–A.

38. Cecil Angel, *Children Have Ombudsman on Their Side,* The Detroit Free Press, Jan. 5, 1995, at 1–A.

39. Judy Putnam, *Children's Ombudsman Protects Kids,* The Flint Journal, Oct. 1, 1995, at A–3, A–10. *Also, see generally* Hoffman, *supra* note 19 at 1–D; Candy J. Cooper and Jack Kresnak, *Confusion, Fight Put Boy in the Middle,* The Detroit Free Press, May 9, 1995, at 1–A; Rick Brundrett, *Police Have Called Five Area Children's Deaths Homicides, But No Charges Have Been Filed,* The Herald-Palladium (Southwest Michigan), April 14, 1996, at 1–A; Brenda Ingersoll, *State's Ombudsman for Kids Has Hope and a Lot to Prove,* The Detroit News, April 13, 1995; Richard Bearup, *Children's Ombudsman Begins Duties,* Michigan Chronicle, Mar. 29–Apr. 4, 1995.

40. *See* Cooper and Kresnak, supra note 39.

41. Putnam, *supra* note 39 at A–3.

42. Candy J. Cooper, *The Children's Watchdog,* The Detroit Free Press, Feb. 18, 1996, at 1–F, 4–F.

43. *See* Davidson, *supra* note 1, at 70–74.

44. Minn. Stat. § 257.0755 et seq. (Supp. 1991).

45. In one county alone, 97 percent of children removed from their families were children of color. The Ombudsman Roundtable, Ombudsman Services in Minnesota: Making Government Responsive to Citizens, A Comprehensive Overview with Recommendations for Efficient Ombudsman Services, at A–3, Dec. 1995 [*hereinafter* Ombudsman Services].

46. *Id.* at 10.

47. *Id.* at A–27; Minn. Stat. § 257.0755 (Supp. 1912 & 1994).

48. Davidson *supra* note 1, at 71–72.

49. Minn. Stat. § 245.91 et seq. (1982 & Supp. 1993).

50. Ombudsman Services, *supra* note 45, at 10, A–5.

51. Minn. Stat. § 245.95 (1982 & Supp. 1993).

52. Office of the Ombudsman of Mental Health and Mental Retardation, Annual Report to the Governor (1994), at 7, 30.

53. Davidson, *supra* note 1, at 73.

54. Ombudsman Services, *supra* note 45, at A–5.

55. Okla. Stat. tit. 10 § 601.1 et seq. (1982).

56. Oklahoma Commission on Children and Youth, 1994 Annual Report, at 1, 2.

57. *Id.* at 10–11.

58. Okla. Stat. tit. 10, § 601.1 (1982).

59. *See* Oklahoma Commission on Children and Youth, *supra* note 56, at 1.

60. *See* Office of Juvenile System Oversight, Report of a Complaint Investigation, A Psychiatric Hospital, I.D. No. 761–94, Mar. 3, 1995; Office of Juvenile System Oversight, Report of a Complaint Investigation, A Private Psychiatric Hospital, I.D. No. 698–93, Feb. 6, 1995. The Oklahoma Commission on Children and Youth was authorized to create the Office of Juvenile System Oversight by Okla. Stat. tit. 10, § 601.3. OJSO performs the inspection, investigative and oversight functions. *See* Oklahoma Commission on Children and Youth, Juvenile Justice and Delinquency Prevention Profile: A Governmental Response to Monitoring the Juvenile Justice System.

61. S.C. Code Ann. § 20–7–2376 et seq. (Law Co-op 1985).

62. State of South Carolina, Office of the Governor, *Division of Foster Care Review Annual Report 1994–95,* at 1–2.

63. *See* Office of the Governor, Division of Ombudsman and Citizen Services, Executive Summary; Davidson, *supra* note 1, at 67–70.

64. S.C. Code Ann. § 20–7–5210 et seq. (Law Co-op 1985 & Supp. 1992); Davidson, *supra* note 1, at 67–68.

65. S.C. Code Ann. § 20–7–5240(f)–(I) (Law Co-op 1985 & Supp. 1992).

66. S.C. Code Ann. § 20–7–6709(c) (Law Co-op 1985 & Supp. 1992).

67. *See* Executive Summary, *supra* note 63.

68. Tex. V.T.C.A., Hum. Res. Code Ann. § 48.081 (West 1997).

69. Texas Department of Protective and Regulatory Services, A Legislative Guide to the Ombudsman Office.

70. The State has Child Death Teams to investigate fatalities.

71. Letter from Betty B. Hable, Director, Ombudsman Office, to Rhode Island Office of the Child Advocate, Nov. 7, 1995 (on file at OCA).

72. In the fall of 1995, 23 States had teams that reviewed individual cases of child deaths; 6 States were establishing teams; 5 were planning to establish teams; and 2 were reconsidering their review processes. In addition, 27 States reported local teams in some stage of implementation and another 4 States were planning to implement them. *See* Sarah R. Kaplan, *What's Out There,* Unified Response: The Child Fatality Review Team Newsletter, Fall 1995, at 6.

73. Ariz. Rev. Stat. Ann. § 36–3501 et seq. (West 1993).

74. Robert Schackner, *Arizona's Child Fatality Review Program,* Unified Response: the Child Fatality Review Team Newsletter, 1996.

75. *See* Arizona Department of Health Services, Arizona Child Fatality Review Team First Annual Report (1994).

76. *See* Arizona Department of Health Services, *supra* note 75.

77. Ariz. Rev. Stat. Ann. § 36–3504 (West 1993).

78. Mo. Rev. Stat. § 210.192 (1992).

79. Missouri Department of Social Services, State Technical Assistance Team, Missouri Child Fatality Review Program Annual Report 1994, at 1, 31 (Sept. 1995).

80. Mo. Rev. Stat. § 660.520, 210.110 et seq. (1992).

81. Missouri Department of Social Services, State Technical Assistance Team, *supra* note 79, at 1–3.

82. *See* Children's Action Alliance, *The State of Arizona's Children Action Agenda (1994).*

83. *Id.* Arizona Kids Count Partnership is a collaborative effort between CAA and the Morrison Institute for Public Policy at Arizona State University. It is one of 48 State projects funded by the Anne E. Casey Foundation to identify trends in child well-being.

84. Children's Action Alliance, Who's for Kids, Who's Just Kidding? 36 Questions To Ask Candidates Running for Public Office in Arizona (1994); Children's Action Alliance, A Platform for Arizona's Children (1994).

85. A compromise bill, the Arizona Children and Family Stability Act, was enacted in June 1994. *See* Irene Jacobs, The Little Bill That Could: Success by Six, Arizona Children Today, Summer 1994 at 1, 12. *See also* Success by Six: a Project of Children's Action Alliance, Quiet Crisis, Early Care and Education in Arizona (1994).

86. *See* Child Welfare Institute, Ideas In Action: Tenth Anniversary Issue (1994).

87. Michigan Association of Children's Alliances, Speaking Up for Kids, Feb. 1995 (advocacy/membership newsletter).

Appendix F: Key Provisions of the Individuals With Disabilities Education Act

From: Special Education Manual 1995
Published by MICPEL (March 1995)

CHAPTER 1

OVERVIEW OF SPECIAL EDUCATION LAW

By: Leslie Seid Margolis

I. FEDERAL LAW—THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

A. INTRODUCTION

1. Cite: 20 U.S.C. Sections 1400–1485 (also known as P.L.94–142).

2. Regulations: 34 C.F.R. Part 300.

3. Mandates that a free appropriate public education be available to all students with disabilities, ages three to twenty-one.

4. Amended in 1986 to require services for infants and toddlers, ages birth to three.

5. Establishes procedural protections to safeguard parent/guardian rights.

6. Has its roots in two cases: Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and Mills v. District of Columbia Board of Education, 348 F. Supp. 866 (D.D.C. 1972)

B. STATEMENT OF PURPOSE

1. At time of enactment in 1975, Congress found:

a. More than eight million children with disabilities in the United States;

b. More than half of those children not receiving appropriate educational services;

c. One million children excluded from school;

d. Many children in regular education not successful because disabilities undetected.

C. KEY PROVISIONS OF IDEA

1. Definitions

a. Children with disabilities—children who have one or more of the following disabilities who, because of the impairment, need special education and related services:

i. mental retardation
ii. deafness
iii. hearing impairment
iv. speech or language impairment
v. visual impairment, including blindness
vi. serious emotional disturbance
vii. orthopedic impairment
viii. other health impairment
ix. deaf-blindness
x. specific learning disability
xi. autism
xii. traumatic brain injury
xiii. multiple disabilities

20 U.S.C. s. 1401(a)(1); 34 C.F.R. s. 300.7. See also: COMAR 13A.05.01.02(B)(12).

b. Free appropriate public education — special education and related services that:

(i) are provided at public expense at no charge to parents;

(ii) meet standards of State educational agency;

(iii) include an appropriate preschool, elementary, or secondary school education;

(iv) are provided in conformity with an individualized education program.

20 U.S.C. s. 1401 (a) (18); 34 C.F.R. s. 300.8. See also: COMAR 13A.05.01.02(B)(2).

c. Special education — specially designed instruction, at no cost to parent/guardian, to meet unique needs of child with a disability.

(i) Includes classroom instruction, home instruction, hospital/institutional instruction, and physical education.

20 U.S.C. s. 1401(a)(16) ; 34 C.F. R. s. 300.17. See also: MD. EDUC. CODE ANN. Section 8–401(a)(2); COMAR 13A.05.01.02(B)(9).

d. Related services — services required to assist child with disability to benefit from special education.

(i) Include, but are not limited to, early identification and assessment, transportation, speech pathology, psychological services, physical and occupational therapy, recreation, including therapeutic and social work services, counseling, medical diagnostic and evaluation services, school health services, social work services in schools, rehabilitation counseling, and parent counseling and training.

20 U.S.C. s. 1401(a)(17) ; 34 C.F.R. s. 300.16. See also: COMAR 13A.05.01.02(B)(8).

2. Individualized education program (IEP) — written statement for each student with a disability developed in a meeting by an education representative, teacher, parent/guardian, and student when appropriate. IEP must include:

a. statement of present levels of educational performance;

b. statement of annual goals and short-term objectives;

c. statement of specific educational services to be provided and extent to which student will be able to participate in regular educational programs;

d. projected date for initiation and anticipated duration of services;

e. appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved;

f. for students 16 and older, or, if appropriate, beginning at age 14 or younger, a statement describing needed transition services, which are coordinated activities for a student that are designed to promote movement from school to post-school activities and which must be based upon the student's needs and take into account the student's interests and preferences.

20 U.S.C. s. 1401(a)(20); 34 C.F.R. s. 300.346. See also: COMAR 13A.05.01.09.

3. Procedural safeguards — 20 U.S.C. s. 1415; 34 C.F.R. s. 300.500–300.515. See also: COMAR 13A.05.01.13–.15.

a. Parent/Guardian has right to examine educational records. 34 C.F.R. 300.502. See also: COMAR 13A.05.01.13(C)(1)(a)(vii)

b. Parent/Guardian has right to obtain independent educational evaluation. 34 C.F.R. s. 300.503. See also: COMAR 13A.05.01.13(C)(1)(a)(v) and (vi).

c. Parent surrogate to be assigned when parents or guardian unknown, unavailable, or child is ward of state. 20 U.S.C. s. 1415(b)(1)(B); 3 C.F.R. s. 300.514. See also: MD. EDUC. CODE ANN. Section 8–414; COMAR 13A.05.01.16.

d. Written prior notice to parent/guardian when agency proposes or refuses to initiate or change the identification, evaluation, or educational placement, or the provision of a free appropriate public education. 34 C.F.R. s. 300.504. See also: COMAR 13A.05.01.13(B).

e. Notice must be in parent/guardian's native language unless clearly not feasible. 34 C.F.R. s. 505. See also: COMAR 13A.05.01.13(C)(2)(b).

f. Opportunity to present complaints. 20 U.S.C. s. 1415(b)(1)(E).

g. Opportunity for impartial due process hearing. 34 C.F.R. s. 506. See also: COMAR 13A.05.01.13(C)(1)(a)(I).

h. Right to participate in meetings. 34 C.F.R. s. 300.506–300.510. See also: MD.EDUC. CODE. ANN. Section 8–415; COMAR 13A.05.01.14 and 14.

4. Due process hearings 20 U.S.C. s. 1415; 34 C.F.R. s. 300.506–300.510. See also: MD.EDUC.CODE ANN. Section 8–415; COMAR 13A.05.01.14 and .15.

a. Any party has the right to:

(i) be accompanied and advised by counsel and by individuals with special knowledge or training with respect to children with disabilities;

(ii) present evidence;

(iii) confront, cross-examine, and compel attendance of witnesses;

(iv) prohibit introduction of evidence not disclosed to party at least five days prior to hearing;

(v) written or electronic verbatim record of hearing;

(vi) written findings of fact and decision.

b. Hearing must be held and decision rendered within forty-five days. 34 C.F.R. s. 300.512

c. Parent has right to have child present and to open hearing to public.

d. Any party aggrieved by findings and decision may appeal to:

(i) state court; or

(ii) United States district court.

e. Exhaustion of administrative remedies necessary.

f. "Stay put" provision—During pendency of any proceedings, unless education agency and parent/guardian agree otherwise, student shall remain in current educational placement. 20 U.S.C. s. 1415(e)(3); 34 C.F.R. s. 300.513. See also: COMAR 13A.05.01.14(L).

(i) If initial school admission, child shall, with parent/guardian consent, be in public school program until proceedings complete.

(ii) If the proceedings involve a student who has brought a weapon (defined as a firearm) to school, the student may be placed in an interim alternative educational setting for not more than 45 days. If parent/guardian requests due processes hearing, student shall remain in alternative educational setting during the pendency of any proceedings, unless the parent and educational agency agree otherwise.

g. Attorney's fees—available in any "action or proceeding" at the discretion of the court.

(i) Reasonable fees—based on prevailing rates in community for kind/quality of services furnished.

(ii) No bonus or multiplier allowed.

(iii) Fees not available if written offer of settlement made, offer not accepted within ten days, and relief obtained through hearing is not more favorable than settlement offer. 20 U.S.C. s. 1415(e)(4). See also: COMAR 13A.05.01.14(G).

5. Early intervention amendments

a. 20 U.S.C. s. 1471–1485; 34 C.F.R. Part 303. See also: COMAR 01.04.01.

b. Also known as P.L. 99–457 or Part H amendments.

c. Covers children from birth to age three who are developmentally delayed, or who have a diagnosed condition which has a high probability of resulting in developmental delay. State option (Maryland did not choose) to cover children who are at risk of having developmental delay if early intervention services not provided.

d. Multidisciplinary, interagency system with individualized family services plan (IFSP).

e. Procedural safeguards.

6. Least restrictive environment

a. To maximum extent appropriate, students with disabilities to be educated with nondisabled students.

b. Special classes, separate schooling or other removal of students with disabilities from regular educational environment only when nature and severity of the disability is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily.

c. Continuum of alternative placements required to be available to meet the needs of students with disabilities for special education and related services.

d. Placement must be determined annually.

e. Placement must be based on individualized education program.

f. Placement must be as close as possible to student's home.

g. Unless a student's individualized education program requires some other arrangement, the student must be educated in the school he or she would attend if not disabled.

h. Consideration of any potential harmful effect on student or on quality of services s/he needs.

i. Participation in nonacademic and extracurricular activities to maximum extent appropriate to needs of student.

20 U.S.C s. 1412(5)(B) and 1414(a)(1)(C)(iv); 34 C.F.R. s. 300.550–300.556; See also: COMAR 13A.05.01.02(B)(3) and 13A.05.01.10(B).

7. Binding policy rulings made by the United States Department of Education's Office of Special Education Programs (OSEP). See Chapter 8, Section D for information about locating OSEP policy rulings.

II. FEDERAL LAW—SECTION 504 OF THE REHABILITATION ACT OF 1973

A. Cite: 29 U.S.C. 794

B. Relevant regulations: 34 C.F.R. Part 104

C. Broad civil rights statute that provides in part: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from

the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . ."

D. Requires reasonable accommodation of disability, but does not require fundamental alteration of structure or program.

E. If used instead of the Individuals with Disabilities Education Act (IDEA) for an issue covered by the IDEA, then exhaustion of administrative remedies is required to same extent as required under IDEA.

F. If used when IDEA not applicable (e.g. for accommodation of student with disability who does not require special education services), then exhaustion of administrative remedies not required.

G. Also protects disabled parents of students in school system, e.g., might require interpreter for deaf patients at school-initiated meetings.

H. Section 504 education policy rulings and complaint investigations made by Office for Civil Rights (OCR) within the United States Department of Education.

NOTE: See Chapter 6 for a discussion of Section 504. See Chapter 8, Section D for information about locating OCR policy rulings.

III. FEDERAL LAW—THE AMERICANS WITH DISABILITIES ACT (ADA)

A. Cite: 42 U.S.C. 12101 et seq.

B. Relevant regulations: 28 C.F.R. Part 35

C. Broad civil rights statute prohibiting discrimination against persons with disabilities in public services and public accommodations, state and local governments and services operated by private entities.

D. Requires reasonable accommodation. Accommodations that would cause "undue hardship" are not required.

E. Complaint investigations regarding ADA violations in education-related matters are made by the Office for Civil Rights (OCR) within the United States Department of Education.

Appendix G: State Protection and Advocacy Systems

Alabama

Alabama Disabilities Advocacy Program
The University of Alabama
P.O. Box 870395
Tuscaloosa, AL 35487–0395
205–348–4928
205–348–9484/TDD
800–826–1675

Alaska

Disability Law Center of Alaska
615 East 82d Avenue, Suite 101
Anchorage, AK 99518
907–344–1002 Voice/TDD
800–478–1234

American Samoa

Protection & Advocacy
P.O. Box 3937
Pago Pago, American Samoa 96799
011–684–633–2441

Arizona

Arizona Center for Disability Law
3131 North Country Club, Suite 100
Tucson, AZ 85716
520–327–9547 Voice/TDD

Arkansas

Advocacy Services, Inc.
Evergreen Place, Suite 201
1100 North University
Little Rock, AR 72207
501–296–1775 Voice/TDD
800–485–1775

California

Protection & Advocacy, Inc.
100 Howe Avenue, Suite 185N
Sacramento, CA 95825
916–488–9950
800–776–5746

Colorado

The Legal Center
455 Sherman Street, Suite 130
Denver, CO 80203
303–722–0300 Voice/TDD
800–288–1376

Connecticut

Office of P&A for Handicapped
and Developmentally Disabled Persons
60B Weston Street
Hartford, CT 06120–1551
860–297–4300
860–566–2102/TDD

Delaware

Disabilities Law Program
913 Washington Street
Wilmington, DE 19801
302–575–0660 Voice/TDD

Florida

Advocacy Center for Persons with Disabilities
Webster Building, Suite 100
2671 Executive Center, Circle West
Tallahassee, FL 32301–5024
904–488–9071
800–342–0823
800–346–4127/TDD

Georgia

Georgia Advocacy Office
999 Peachtree Street NE., Suite 870
Atlanta, GA 30309–3166
404–885–1234 Voice/TDD
800–282–4538

Guam

Guam Protection and Advocacy Reflection Center
222 Chalan Santo Papa, Suite 204
Agana, Guam 96910
011–671–472–8985/86/87
011–671–472–8988/TDD

Hawaii

Protection & Advocacy Agency
1580 Makaloa Street, Suite 1060
Honolulu, HI 96814
808–949–2922 Voice/TDD

Idaho

Co-Ad, Inc.
4477 Emerald, Suite B–100
Boise, ID 83706
208–336–5353 Voice/TDD
800–632–5725

Illinois

Equip for Equality, Inc.
11 East Adams, Suite 1200
Chicago, IL 60603
312–341–0022 Voice/TDD
800–537–2632

Indiana

Indiana Protection & Advocacy Services
850 North Meridian, Suite 2–C
Indianapolis, IN 46204
317–232–1150 Voice/TDD
800–622–4845

Iowa

Iowa P&A Service, Inc.
3015 Merle Hay Road, Suite 6
Des Moines, IA 50310
515–278–2502
515–278–0571/TDD
800–779–2502

Kansas

Kansas Advocacy & Protection Services
501 Southwest Jackson, Suite 425
Topeka, KS 66603
913–232–3469

Kentucky

Office for Public Advocacy
Division for P&A
100 Fair Oaks Lane, Third Floor
Frankfort, KY 40601
502–564–2967
800–372–2988/TDD

Louisiana

Advocacy Center for the Elderly and Disabled
225 Baronne, Suite 2112
New Orleans, LA 70112–2112
504–522–2337 Voice/TDD
800–960–7705

Maine

Maine Advocacy Services
P.O. Box 2007
32 Winthrop
Augusta, ME 04338
207–626–2774
800–452–1948/TDD

Maryland

Maryland Disability Law Center
Central Maryland Office
The Walbert Building, Suite 204
1800 North Charles Street
Baltimore, MD 21201
410–234–2791
410–727–6387 Voice/TDD
800–233–7201

Massachusetts

Disability Law Center, Inc.
11 Beacon Street, Suite 925
Boston, MA 02108
617–723–8455 Voice/TDD

Center for Public Representation
22 Green Street
Northampton, MA 01060
413–586–6024 Voice/TDD

Michigan

Michigan P&A Service
106 West Allegan, Suite 300
Lansing, MI 48933
517–487–1755 Voice/TDD

Minnesota

Minnesota Disability Law Center
430 First Avenue North, Suite 300
Minneapolis, MN 55401–1780
612–332–1441
800–292–4150

Mississippi

Mississippi P&A System for DD, Inc.
5330 Executive Place, Suite A
Jackson, MS 39206
601–981–8207 Voice/TDD

Missouri

Missouri P&A Services
925 South Country Club Drive, Unit B–1
Jefferson City, MO 65109
573–893–3333
800–392–8667

Montana

Montana Advocacy Program
P.O. Box 1680
316 North Park, Room 211
Helena, MT 59624
406–444–3889 Voice/TDD
800–245–4743

Nebraska

Nebraska Advocacy Services, Inc.
522 Lincoln Center Building
215 Centennial Mall South
Lincoln, NE 68508
402–474–3183 Voice/TDD

Nevada

Nevada Advocacy & Law Center, Inc.
401 South Third Street, Suite 403
Las Vegas, NV 89101
702–383–8150
702–383–8170/TDD
800–992–5715

New Hampshire

Disabilities Rights Center
P.O. Box 3660
18 Low Avenue
Concord, NH 03302–3660
603–228–0432 Voice/TDD

New Jersey

New Jersey P&A, Inc.
210 South Broad Street, Third Floor
Trenton, NJ 08608
609–292–9742
800–792–8600

New Mexico

Protection & Advocacy, Inc.
1720 Louisiana Boulevard NE., Suite 204
Albuquerque, NM 87110
505–256–3100 Voice/TDD
800–432–4682

New York

NY Commission on Quality of Care for the Mentally Disabled
99 Washington Avenue, Suite 1002
Albany, NY 12210
518–473–7378
518–473–4057
800–624–4143/TDD

North Carolina

Governor's Advocacy Council for Persons with Disabilities
2113 Cameron Street, Suite 218
Raleigh, NC 27605
919–733–9250 Voice/TDD
800–821–6922

North Dakota

The North Dakota Protection & Advocacy Project
400 East Broadway, Suite 616
Bismarck, ND 58501
701–328–2950
800–472–2670
800–642–6694 (24-Hour Line)
800–366–6888/TDD

Northern Mariana Islands

Northern Marianas Protection & Advocacy System, Inc.
P.O. Box 3529 C.K.
Saipan, MP 96950
011–670–235–7274/3

Ohio

Ohio Legal Rights Service
8 East Long Street, Fifth Floor
Columbus, OH 43215
614–466–7264 Voice/TDD
800–282–9181

Oklahoma

Oklahoma Disability Law Center, Inc.
2915 Classen Boulevard, Suite 300
Oklahoma City, OK 73106
405–525–7755
800–880–7755

Oregon

Oregon Advocacy Center
620 SW Fifth Avenue, Fifth Floor
Portland, OR 97204–1428
503–243–2081
800–452–1694
800–556–5351/TDD

Pennsylvania

Pennsylvania P&A, Inc.
116 Pine Street
Harrisburg, PA 17101
717–236–8110 Voice/TDD
800–692–7443

Puerto Rico

Office of the Governor
Ombudsman for the Disabled
P.O. Box 4234
San Juan, PR 00902–4234
787–721–4299
800–981–4125

Rhode Island

Rhode Island P&A System, Inc.
151 Broadway, Third Floor
Providence, RI 02903
401–831–3150
401–831–5335/TDD
800–733–5332

South Carolina

Protection & Advocacy for People
with Disabilities, Inc.
3710 Landmark Drive, Suite 208
Columbia, SC 29204
803–782–0639 Voice/TDD
800–922–5225

South Dakota

South Dakota Advocacy Services
221 South Central Avenue
Pierre, SD 57501
605–224–8294 Voice/TDD
800–658–4782

Tennessee

Tennessee P&A, Inc.
P.O. Box 121257
Nashville, TN 37212
615–298–1080 Voice/TDD
800–342–1660

Texas

Advocacy, Inc.
7800 Shoal Creek Boulevard, Suite 171–E
Austin, TX 78757
512–454–4816 Voice/TDD
800–252–9108

Utah

Legal Center for People with Disabilities
455 East 400 South, Suite 410
Salt Lake City, UT 84111
801–363–1347 Voice/TDD
800–662–9080

Vermont

Vermont Protection & Advocacy
21 East State Street, Suite 101
Montpelier, VT 05602
802–229–1355

Virginia

Department for Rights of Virginians with Disabilities
Ninth Street Office Building
202 North Ninth Street, Ninth Floor
Richmond, VA 23219
804–225–2042 Voice/TDD
800–552–3962

Virgin Islands

Virgin Islands Advocacy Agency
7A Whim Street, Suite 2
Frederiksted, VI 00840
809–772–1200
809–776–4303
809–772–4641/TDD

Washington

Washington P&A System
1401 East Jefferson, Suite 506
Seattle, WA 98122
206–324–1521 Voice/TDD 2

West Virginia

West Virginia Advocates, Inc.
Litton Building, Fourth Floor
1207 Quarrier Street
Charleston, WV 25301
304–346–0847 Voice/TDD
800–950–5250

Wisconsin

Wisconsin Coalition for Advocacy
16 North Carroll Street, Suite 400
Madison, WI 53703
608–267–0214
608–267–0214/TTY

Wyoming

Wyoming P&A System
2424 Pioneer Avenue, Suite 101
Cheyenne, WY 82001
307–638–7668
307–632–3496
800–821–3091 Voice/TDD
800–624–7648

Native American

DNA People's Legal Services, Inc.
P.O. Box 392
Shiprock, NM 87410
505–368–3216

Additional Contacts

Juvenile Law Center
801 Arch Street, Sixth Floor
Philadelphia, PA 19107
215–625–0551

National Association of Child Advocates
1522 K Street NW., Suite 600
Washington, DC 20005
202–289–0777

National Association of Counsel for Children
1205 Oneida Street
Denver, CO 80220
303–322–2260

National Association of Protection & Advocacy Systems
900 Second Street NE., Suite 211
Washington, DC 20002
202–408–9514
TDD 202–408–9521
E-Mail: HN4537@handsnet.org

PADD
Administration on Developmental Disabilities
Hubert H. Humphrey Building
200 Independence Avenue SW.
Washington, DC 20201
202–690–6905

PAIMI
Center for Mental Health Services
Parklawn Building
5600 Fishers Lane, Room 15–C–26
Rockville, MD 20857
301–443–3667

PAIR
Rehabilitation Services Administration
Switzer Building, Room 3231
330 C Street SW.
Washington, DC 20202–2735
202–205–8719

National Center for Youth Law
114 Sansome Street, Suite 900
San Francisco, CA 94104
415–543–3307

Youth Law Center
114 Sansome Street, Suite 950
San Francisco, CA 94104
415–543–3379

Publications From OJJDP

Corrections and Detention

Conditions of Confinement Teleconference (Video). 1993, NCJ 147531 (90 min.), $14.00.

Desktop Guide to Good Juvenile Detention Practice. 1996, NCJ 161408 (218 pp.).

Effective Programs for Serious, Violent and Chronic Juvenile Offenders Teleconference (Video). 1996, NCJ 160947 (120 min.), $17.00.

Evaluation of the Disproportionate Minority Confinement (DMC) Initiative. $15.00 each, $39.00 for set of five.

- *Arizona Final Report.* 1996, NCJ 161564 (111 pp.).
- *Florida Final Report.* 1996, NCJ 161563 (84 pp.).
- *Iowa Final Report.* 1996, NCJ 161562 (115 pp.).
- *North Carolina Final Report.* 1996, NCJ 161561 (97 pp.).
- *Oregon Final Report.* 1996, NCJ 161560 (71 pp.).

Evaluation of the Impact of Boot Camps for Juvenile Offenders. $19.00 each.

- *Cleveland Interim Report.* 1996, NCJ 160928 (160 pp.).
- *Denver Interim Report.* 1996, NCJ 160927 (108 pp.).
- *Mobile Interim Report.* 1996, NCJ 160926 (119 pp.).

Juvenile Arrests 1996. 1997, NCJ 167578 (12 pp.).

Juvenile Boot Camps Teleconference (Video). 1996, NCJ 160949 (120 min.), $17.00.

Juvenile Detention Training Needs Assessment. 1996, NCJ 156833 (60 pp.).

Juvenile Probation: The Workhorse of the Juvenile Justice System. 1996, NCJ 158534 (6 pp.).

A Resource Manual for Juvenile Detention and Corrections: Effective and Innovative Programs. 1995, NCJ 155285 (164 pp.), $15.00.

Courts

Beyond the Bench: How Judges Can Help Reduce Juvenile DUI and Alcohol and Other Drug Violations (Video and discussion guide). 1996, NCJ 162357 (16 min.), $17.00.

Juvenile Court Statistics 1994. 1996, NCJ 163709 (95 pp.).

Offenders in Juvenile Court, 1994. 1996, NCJ 162423 (12 pp.).

Delinquency Prevention

1996 Report to Congress: Title V Incentive Grants for Local Delinquency Prevention Programs. 1997, NCJ 165694 (100 pp.).

Allegheny County, PA: Mobilizing To Reduce Juvenile Crime. 1997, NCJ 165693 (12 pp.).

Combating Violence and Delinquency: The National Juvenile Justice Action Plan (Report). 1996, NCJ 157106 (200 pp.).

Combating Violence and Delinquency: The National Juvenile Justice Action Plan (Summary). 1996, NCJ 157105 (36 pp.).

Communities Working Together Teleconference (Video). 1996, NCJ 160946 (120 min.), $17.00.

Creating Safe and Drug-Free Schools: An Action Guide. 1996 (134 pp.), Available from the U.S. Department of Education (800–624–0100).

Keeping Young People in School: Community Programs That Work. 1997, NCJ 162783 (12 pp.).

Matrix of Community-Based Initiatives. 1995, NCJ 154816 (51 pp.).

Mentoring—A Proven Delinquency Prevention Strategy. 1997. NCJ 164834 (8 pp.).

Mobilizing Communities To Prevent Juvenile Crime. 1997, NCJ 165928 (8 pp.).

Reaching Out to Youth Out of the Education Mainstream. 1997. NCJ 163920 (12 pp.).

Title V Delinquency Prevention Program Community Self-Evaluation Workbook. 1996, NCJ 160125 (162 pp.).

Treating Serious Anti-Social Behavior in Youth: The MST Approach. 1997, NCJ 165151 (8 pp.).

Youth Environmental Service in Action. 1996, NCJ 159762 (38 pp.).

Youth Environmental Service Technical Assistance Package. 1996, NCJ 159763 (72 pp.).

Youth-Oriented Community Policing Teleconference (Video). 1996, NCJ 160947 (120 min.), $17.00.

Gangs

1995 National Youth Gang Survey. 1997, NCJ 164728 (41 pp.).

Gang Members and Delinquent Behavior. 1997, NCJ 165154 (6 pp.).

General Juvenile Justice

Female Offenders in the Juvenile Justice System. 1996, NCJ 160941 (28 pp.).

Juvenile Justice, Volume III, Number 2. 1997, NCJ 165925 (32 pp.).

Juvenile Offenders and Victims: 1997 Update on Violence. 1997, NCJ 165703 (32 pp.).

Juvenile Offenders and Victims: A National Report. 1995, NCJ 153569 (188 pp.).

State Challenge Activities. 1996. NCJ 163055 (8 pp.).

The Youngest Delinquents: Offenders Under Age 15. 1997, NCJ 165256 (12 pp.).

Missing and Exploited Children

Addressing Confidentiality of Records in Searches for Missing Children. 1995, NCJ 155183 (284 pp.), $15.00.

The Compendium of the North American Symposium on International Child Abduction: How To Handle International Child Abduction Cases. 1993, NCJ 148137 (928 pp.), $17.50.

Court Appointed Special Advocates: A Voice for Abused and Neglected Children in Court. 1997. NCJ 164512 (4 pp.).

Federal Resources on Missing and Exploited Children: A Directory for Law Enforcement and Other Public and Private Agencies. 1996, NCJ 161475 (126 pp.).

In the Wake of Childhood Maltreatment. 1997, NCJ 165257 (16 pp.).

Obstacles to the Recovery and Return of Parentally Abducted Children. 1994, NCJ 143458 (21 pp.).

Portable Guides to Investigating Child Abuse: An Overview. 1997, NCJ 165153 (8 pp.).

Using Agency Records To Find Missing Children: A Guide for Law Enforcement. 1995, NCJ 154633 (20 pp.).

Status Offenders

Curfew: An Answer to Juvenile Delinquency and Victimization? 1996, NCJ 159533 (12 pp.).

Truancy: First Step to a Lifetime of Problems. 1996, NCJ 161958 (8 pp.).

Unlocking the Doors for Status Offenders: The State of the States. 1995, NCJ 160803 (85 pp.), $16.50.

Violence and Victimization

Child Development–Community Policing: Partnership in a Climate of Violence. 1997. NCJ 164380 (8 pp.).

Conflict Resolution Education: A Guide to Implementing Programs in Schools, Youth-Serving Organizations, and Community and Juvenile Justice Settings. 1996, NCJ 160935 (134 pp.).

Conflict Resolution for Youth Teleconference (Video). 1996, NCJ 161416 (150 min.), $17.00.

Epidemiology of Serious Violence. 1997, NCJ 165152 (12 pp.).

Guide for Implementing the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders. 1995, NCJ 153571 (6 pp.).

Reducing Youth Gun Violence: An Overview of Programs and Initiatives. 1996, NCJ 154303 (74 pp.).

State Responses to Serious and Violent Juvenile Crime. 1996, NCJ 161565 (61 pp.).

OJJDP also publishes Fact Sheets, two-page summaries on agency programs and initiatives. Contact JJC for titles and further information.

The *Office of Juvenile Justice and Delinquency Prevention Brochure* (1996, NCJ 144527 (23 pp.)) offers more information about the agency.

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800–638–8736, select option 1 for Fax-on-Demand instructions

Online:

OJJDP Web Site:
http://www.ncjrs.org/ojjhome.htm

E-mail:
askncjrs@ncjrs.org
JUVJUST Mailing List:
e-mail to listproc@ncjrs.org
leave the subject line blank
type subscribe juvjust (your name)

Mail:
Juvenile Justice Clearinghouse/NCJRS,
P.O. Box 6000, Rockville, MD 20849–6000

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Report

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