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Unfinished Business

The Enforcement of Civil Rights for People with Disabilities

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The Disability Rights Movement has stirred this country to recognize that people with disabilities are due equal opportunity, access, and civil rights protections. This movement has been the impetus for a number of federal civil rights laws to ensure equal opportunity for people with disabilities.[1] Yet, while the modern disability rights movement is well over forty years in the making, equal access for people with disabilities is still part of our nation's unfinished business. Here we look at some continuing barriers faced by people who have disabilities and who are trying to achieve the benefits of community living, accessibility, and accommodation as well as experiencing the rights of personal choice and empowerment; and we identify advocacy strategies for moving to reality the dream of equality for people with disabilities. The Protection and Advocacy (P&A) System has a special vantage point for considering these issues.

The 1975 amendments to the Developmental Disabilities Assistance and Bill of Rights Act created the P&A System with authority "to pursue administrative, legal and other appropriate remedies or approaches to ensure the protection of, and advocacy for the rights of individuals ... with developmental disabilities."[2] From the Developmental Disabilities Act evolved seven related P&A statutes specifically enacted to protect the civil, legal, and human rights of people with disabilities.[3] These statutes confer to the P&As significant authority to access facilities that serve people with disabilities, such as psychiatric facilities, group homes, day centers, and schools; speak privately with the residents; and access records when conducting investigations upon probable cause of possible abuse and neglect.[4] This broad authority is unique among civil legal aid agencies and has proven critical to exposing incidents of abuse and neglect.

Fulfilling the promise of the ADA's integration mandate requires continuous aggressive advocacy to ensure that the Justice Department and other federal agencies continue to prioritize community integration and enforcement of civil rights of people with disabilities.

As the numbers of people residing in institutions decline, and integrated community living for people with disabilities increases, homes, board-and-care homes, and other congregate living arrangements require oversight when state regulators do not act. The shift from institutions to community living also places increasing importance on the protection and enforcement of rights in the community for public accommodation, housing, employment, education, transportation, and access to all other publicly available services, activities, and programs. P&A agencies and other disability rights advocates are using the tools and strategies derived from federal disability rights laws to fulfill the promises and complete the legacy of change. We highlight some examples of unfinished business and give particular attention to the legacy of change for low-income persons with disabilities.

The Americans with Disabilities Act and the Integration Mandate

The Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors.[5] Section 504 mandates that no qualified individual with a disability shall 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 or conducted by a federal agency.[6] The Rehabilitation Act was the precursor to the Americans with Disabilities Act (ADA), enacted in 1990 "to provide a clear and comprehensive

1 See generally Civil Rights Division, U.S. Department of Justice, A Guide to Disability Rights Laws (July 2009).

2 Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15043(a) (2011). The National Disability Rights Network is the nonprofit membership association of the federally mandated Protection and Advocacy (P&A) Systems and Client Assistance Programs.

3 These additional programs include the Client Assistance Program, 29 U.S.C. § 732 (2011); Protection and Advocacy for Individuals with Mental Illness, 42 U.S.C. §§ 10801–10807, 10821–10827 (2011); Protection and Advocacy for Individual Rights, 29 U.S.C. § 794e(2011); Protection and Advocacy for Assistive Technology, 29 U.S.C. § 3004 (2011); Protection and Advocacy for Beneficiaries of Social Security, 42 U.S.C. § 1320b-21 (2011); Protection and Advocacy for Traumatic Brain Injury, 42 U.S.C. § 300d-53 (2011); and Protection and Advocacy for Voting Access, 42 U.S.C. § 15461 (2011).

4 See *supra* note 3.

5 Rehabilitation Act of 1973 § 794, 29 U.S.C. §§ 701–796, (2011).

6 29 U.S.C. § 794(a) (2011).

national mandate for the elimination of discrimination against individuals with disabilities."[7] The ADA encompasses employment (Title I); state and local government services, activities, and benefits (Title II); public transportation (Title II); public accommodations (Title III); and telecommunications (Title IV).[8]

The unjustified institutionalization of people with disabilities constitutes illegal discrimination on the basis of disability and violates Title II of the ADA and its implementing regulations, the U.S. Supreme Court ruled in *Olmstead v. L.C.* in 1999.[9] This right conferred by Title II of the ADA, often referred to as the "integration mandate," is not unqualified.[10] To comply with *Olmstead* a state must rebalance its long-term service and support systems, primarily funded through Medicaid, from ones that rely on segregated institutions to ones offering a wide array of quality home-based and community-based options that meet the needs of all individuals with disabilities.

Fourteen years since the *Olmstead* decision, many states are slowly moving to a wider array of home-based and community-based services to reduce unnecessary institutionalization.[11] The federal government has facilitated this change with new Medicaid home-based and community-based service options and financial incentives to states.[12] Even with these incentives, however, only through systemic litigation are states more often pushed toward *Olmstead* compliance.[13] In concert with other civil rights and public interest law organizations and the U.S. Department of Justice, P&As have filed a number of cases across the country. Since the *Olmstead* decision, positive court rulings on the scope of the ADA integration mandate have been issued.[14] Settlements usually include a wide range of remedies, such as development of scattered-site housing, expansion of community mental health crisis services and Assertive Community Treatment teams, more access to case management, respite, personal care and peer-support services, and supported integrated employment.[15]

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Federal courts have interpreted the ADA to suggest that when a state offers a benefit, a reduction in that benefit may violate the integration mandate if it places people at risk of institutionalization.[16] However, despite the success of these arguments over the past decade, states continue to challenge these cases vigorously. Guardians and family members of residents often seek to thwart the closure of segregated facilities. In motions to intervene or in fairness hearings, they argue that the state is required to provide institutional services to individuals who do not want to live in the community. This argument is premised on language in *Olmstead* that there is no "federal requirement that community-based services be imposed upon those who do not desire them."[17] Nonetheless, courts have consistently held that opposition to community placement does not provide an enforceable right to keep a facility open.[18] Most courts have not granted guardians' requests to intervene to stop a closure, but objecting families are allowed to be heard

7 Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (2011).

8 42 U.S.C. §§ 12111–12117 (Title I), §§ 12131–12165 (Title II), §§ 12181–12189 (Title III); 47 U.S.C. §§ 225, 611 (Title IV).

9 *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999).

10 *Id.* at 603.

11 In the 1999 fiscal year Medicaid noninstitutional long-term services-and-supports expenditures as a percent of total Medicaid long-term services-and-supports expenditures were roughly 20 percent and by 2011 had risen to 68 percent (see Steve Eiken et al., Medicaid Expenditures for Long Term Services and Supports in 2011, at 4 fig.2 (Oct. 2013). The percentages vary with the disability population served and with states. Systems targeting older adults and people with physical disabilities continue to spend most dollars on nursing homes.

12 Medicaid.gov, Community-Based Long-Term Services and Supports (n.d.) (Centers for Medicare and Medicaid Services' *Olmstead* policy updates and resources).

13 See Elizabeth Priaulx, National Disability Rights Network, Docket of Cases Related to Enforcement of the ADA Title II "Integration Regulation" (April 11, 2014).

14 See, e.g., *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199 (D. Or. 2012) (certified class of individuals who have intellectual or developmental disabilities and who, with support of state, are employed or have been referred for employment in segregated settings called sheltered workshops; first court to rule that *Olmstead* applies not just to residential settings but to state employment programs as well); *Disability Advocates Incorporated v. Paterson*, 598 F. Supp. 2d 289, 333–16 (E.D.N.Y. 2009), vacated on procedural grounds; *Disability Advocates Incorporated v. New York Coalition for Quality Assisted Living Incorporated*, 675 F.3d 149 (2d Cir. 2012) (Americans with Disabilities Act (ADA) integration mandate applies to private nursing facilities and nongovernmental organizations if state relies on such entities, in more than an incidental way, as part of its system for supporting individuals with disabilities).

15 See Civil Rights Division, U.S. Department of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (June 22, 2011) (Number 15 of Questions and Answers on the ADA's Integration Mandate and *Olmstead* Enforcement).

16 See, e.g., *M.R. v. Dreyfus*, 663 F.3d 1100 (9th Cir. 2011), en banc review denied, *M.R. v. Dreyfus*, 697 F.3d 706 (9th Cir. 2012); *Pashby v. Cansler*, 279 F.R.D. 347 (E.D.N.C. 2011) (preliminary injunction), aff'd, *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013).

17 See *Olmstead*, 527 U.S. at 602. See, e.g., *Sciarrillo ex rel. St. Amand v. Christie*, No. 2:13-cv-03478-SRC-CLW (D.N.J. 2013) (plaintiffs, filing on behalf of residents of facility scheduled to close, argue that premature discharge into community would constitute discrimination based on disability in violation of ADA).

18 See *Ricci v. Patrick*, 544 F.3d 8, 21 (1st Cir. 2008) (allowing Massachusetts to close facility despite resident objection); *Richard C. v. Houstoun*, 196 F.R.D. 288, 291–92 (W.D. Pa. 1999) (rejecting plaintiffs' interpretation of *Olmstead* to require continued institutionalization when three *Olmstead* factors for determining whether community is appropriate setting are not met); but see *Illinois League of Advocates for Developmentally Disabled v. Quinn*, No. 1:13-cv-01300, slip op. (N.D. Ill. June 20, 2013) (allowing parents and guardians of residents at two Illinois institutions to intervene to seek preliminary injunction stopping facility closure; this case is distinguishable because closure was not prompted by court action but by governor's attempt to "rebalance" Medicaid spending toward home-based and community-based services so more is spent on community-based long-term supports).

at fairness hearings.[19] New challenges to the integration mandate may be on the horizon as a number of states develop community-based housing that is disability specific, located in special gated communities, and can discourage integration.

Fulfilling the promise of the ADA's integration mandate requires continuous aggressive advocacy to ensure that the Justice Department and other federal agencies continue to prioritize community integration and enforcement of civil rights of people with disabilities. Most important is for advocates to ensure quality of community life for people with disabilities to be free of abuse and neglect and free from environmental safety issues.[20]

Abuse and Neglect

Horrific conditions and inhumane treatment of people with disabilities was the genesis of the P&A System nearly forty years ago. P&As continue to have a critical responsibility to protect people in institutions from abuse and neglect.[21]

FINANCIAL EXPLOITATION

What can be difficult to detect is financial exploitation of people with disabilities. Persons who are receiving social security disability insurance or Supplemental Security Income (beneficiary), and whom the Social Security Administration deems incapable of managing or directing the management of their benefits, will be appointed a representative payee to manage their cash benefit payments.[22] More than seven million beneficiaries are assigned a representative payee, according to the Social Security Administration.[23] The representative payee may be a family member, friend, guardian, organization, or state or private agency.[24] Due to the nature of the disabilities that may result in the appointment of a representative payee, these beneficiaries are more vulnerable to financial exploitation and less likely to complain of financial mismanagement. Many payees fail to manage finances appropriately or ensure payment for basic necessities of their beneficiaries. Effective monitoring of representative payees is crucial to ensure that benefits are being used for the personal care and well-being of the beneficiary.

A widely reported example of financial exploitation was discovered in 2009 in Atalissa, Iowa, where 21 men with intellectual disabilities were neglected and abused by their payee, Henry's Turkey Service, which also served as their landlord and employer.[25] Two-and-a-half years later in Philadelphia, Pennsylvania, four people with intellectual disabilities were discovered locked in the basement of the home of a woman who acted as their representative payee. The landlord uncovered the abuse, dubbed the "Tacony Dungeon," after hearing dogs barking and found further that one man was chained to the boiler.[26]

Following discovery of the abuse in Iowa, the Social Security Administration moved quickly to determine whether other organizational payees were exploiting beneficiaries and turned to the National Disability Rights Network and the P&A agencies to review organizational representative payees. In Philadelphia the Social Security Administration launched a pilot that has changed how individuals applying to be representative payees are screened.

These powerful protections combined with P&A access aim to enforce compliance and prevent discrimination against individuals with disabilities in the programs and services of the correctional facility.

However, with seven million beneficiaries appointed representative payees, the risk is great for financial exploitation. Advocates must vigilantly monitor the well-being of beneficiaries and promote proper and ongoing training about the fiduciary responsibilities of representative payees. Civil legal aid programs are well positioned to coordinate with their state P&A, Adult Protection Services, and other state and local protective and regulatory agencies to identify and prevent financial exploitation and other broad categories of abuse.

CONDITIONS IN PRISONS, JAILS, AND JUVENILE DETENTION FACILITIES

Diversion of people with disabilities from the correctional system into a system of

19 See, e.g., *Brown v. Bush*, 194 F. App'x 879 (11th Cir. 2006) (affirming denial of intervention and allowing objectors to participate at fairness hearing to consider whether court should approve settlement that included closing two facilities); *United States v. Virginia*, No. 3:12-cv-059 (E.D. Va. Aug. 23, 2012) (order approving consent decree). See also *Williams v. Quinn*, No. 05 C 4673, 2014 WL 184948 (N.D. Ill. Jan. 10, 2014).

20 See generally National Disability Rights Network, Keeping the Promise: True Community Integration and the Need for Monitoring and Advocacy (Nov. 2011). See also Home and Community Based Setting Requirements for Community First Choice and Home and Community-Based Services Waivers, 79 Fed. Reg. 2948 (Jan. 16, 2014) (to be codified at 42 C.F.R. pts. 430–31, 435–36, 440–41, 447).

21 See 42 U.S.C. § 290ii (2011). See, e.g., Protection and Advocacy System, Investigation Report of Conditions at the Wyoming Life Resource Center (2d in Series, Nov. 4, 2013); *Joshua Wolfson, Investigation Finds Wyoming Disability Center Concealed Restraint Chair Use*, Casper Star-Tribune Online, Nov. 13, 2013.

22 See generally description of Social Security Administration, When People Need Help Managing Their Money (n.d.).

23 Social Security Administration, Social Security: A Guide for Representative Payees 4 (Jan. 2009).

24 *Id.*

25 Clark Kauffman, *State Closes Bunkhouse that Housed Mentally Retarded Workers*, DesMoines Register.com (Feb. 8, 2009).

26 Kathy Matheson, Associated Press, *Federal Charges Announced in Tacony Dungeon Case*, 6ABC.com (Jan. 23, 2014).

treatment and services is the ideal goal, but the reality is that prisons have become our nation's largest mental health facility for both children and adults.[27] People who are of color and have disabilities face the highest risk of incarceration.[28] Inhumane conditions and lack of appropriate mental health treatment injure both the inmates and, potentially, the communities to which they return. The inhumane conditions have a special poignancy in the case of pretrial detainees who may never be convicted of any crime but who cannot make bail for lack of money and are incarcerated for long periods.

Inmates with disabilities are housed in a wide array of facilities managed and operated by any number of different entities and governed by a variety of state and federal laws and regulations.[29] In many of these "public entities," inmates with disabilities are protected from discrimination under Title II of the ADA and Section 504 of the Rehabilitation Act.[30]

These powerful protections combined with P&A access aim to enforce compliance and prevent discrimination against individuals with disabilities in the programs and services of the correctional facility. P&A agencies and others have done much to protect the rights of inmates with disabilities; they have represented individuals in myriad disability discrimination claims, ranging from simple architectural and physical access issues to assistive technology (e.g., wheelchairs, hearing aids, and shower chairs) to access to prison and jail programming required for release, such as interpreter services for sex offender therapy for individuals who are hard of hearing.[31] P&A agencies also monitor prisons' and jails' basic environmental conditions (food, water, temperature) and the implementation of laws applicable to all inmates such as the Prison Rape Elimination Act, prevention of inappropriate use of suffocating isolation, and educational service rights.[32] Civil legal aid programs can partner with state P&A agencies to share information and educate inmates and their families on rights protections while a person is incarcerated and to file complaints with the Justice Department's Civil Rights Division.

Fair Housing Amendments Act of 1988

The Fair Housing Amendments Act of 1988 extended the principle of equal housing opportunity to people with disabilities.[33] Before the 1988 enactment, people with disabilities faced discrimination and exclusion from housing. As found in the legislative report, "people who used wheelchairs [were] denied the right to build simple ramps to provide access" to their homes; some people were "perceived as dangerous because of erroneous beliefs about their abilities"; people with intellectual or developmental disabilities were excluded from housing "because of stereotypes about their capacity to live

Congress intended the Fair Housing Amendments Act to be "a clear pronouncement of a national commitment to end the unnecessary exclusion of people with disabilities from the American mainstream."

27 See, e.g., Gary Fields & Erica E. Phillips, *The New Asylums: Jails Swell with Mentally Ill*, Wall Street Journal, Sept. 25, 2013.

28 See The Sentencing Project, Incarceration (n.d.), citing Thomas Bonczar, Prevalence of Imprisonment in the U.S. Population, 1974–2001 (2003).

29 These entities include state, county, and local governments, private contractors, the U.S. Bureau of Prisons and the U.S. Department of Homeland Security. Prisoners in the federal system have filed conditions lawsuits as "*Bivens*" actions alleging violations of the Eighth Amendment. Those in pretrial detention are protected by the due process clause of the Fourteenth Amendment.

30 20 U.S.C. §§ 701–796; 42 U.S.C. §§ 12131–12165.

31 P&A programs are mandated to provide civil legal services and do not handle defense or criminal matters on behalf of prisoners.

32 For conditions in U.S. prisons and jails, see, e.g., CNBC, Billions Behind Bars: Inside America's Prison Industry (2014); Andrew Cohen, *One of the Darkest Periods in the History of American Prisons*, Atlantic, June 9, 2013.

33 Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3631 (2011).

independently"; and people with AIDS were "evicted because of an erroneous belief that they pose a health risk to others."[34] Congress intended the Fair Housing Amendments Act to be "a clear pronouncement of a national commitment to end the unnecessary exclusion of people with disabilities from the American mainstream."[35]

Over two decades since enactment, the U.S. Department of Housing and Urban Development (HUD) reported in 2011 that disability discrimination was the most common basis of complaints, making up to 48 percent of all housing discrimination complaints received.[36]

A comprehensive advocacy effort to enforce strict compliance with the Rehabilitation Act requirements for anyone relegated to segregated settings or subminimum wages is essential.

One specific provision of the Fair Housing Amendments Act requires that certain accessibility features be included in the design and construction of all covered multifamily dwellings.[37] But the most recent national data reveal that thousands of people with disabilities need basic home modifications to make their homes accessible.[38] HUD conducted a "paired test" study of discrimination against housing applicants with disabilities in the Chicago area in the early 2000s and found that "[m]ore than a third of rental homes and apartments that are advertised … are in buildings that are inaccessible for wheelchair users even to visit."[39] These startling statistics demonstrate that the promise of the Act for equal access to housing for people with disabilities remains unfulfilled. However, coupled with the ADA and the Rehabilitation Act, the Fair Housing Amendments Act is a potent enforcement tool for achieving compliance and can be readily utilized by housing advocates.[40]

Preparation for Employment

As set forth in the purpose of the Rehabilitation Act, states are to operate statewide comprehensive, coordinated, effective, efficient, and accountable programs of vocational rehabilitation, which is (A) an integral part of a statewide workforce investment system; and (B) designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that such individuals may prepare for and engage in gainful employment.[41]

Vocational rehabilitation programs, however, often fail to maximize the employment potential of people with disabilities.

SCHOOL-TO-SHELTERED-WORKSHOP PIPELINE

All too often students with disabilities go directly into sheltered workshops when they exit the education system—a trend that has been termed the school-to-sheltered-workshop pipeline.[42] Vocational rehabilitation agencies are required to be actively involved in transition planning with

34 Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, at 18 (1988).

35 *Id.*

36 See U.S. Department of Housing and Urban Development, Annual Report on Fair Housing: Fiscal Year 2011, at 19 (n.d.). See also Sara Pratt et al., U.S. Department of Housing and Urban Development, Discrimination Against Persons with Disabilities: Testing Guidance for Practitioners 1 (July 2005).

37 42 U.S.C. § 3604(f)(3)(C).

38 Based on data from a special onetime supplement on disability and housing modifications to the 1995 American Housing Survey (summary tables from Michael Shea et al., U.S. Department of Housing and Urban Development, Housing Choice Voucher Tenant Accessibility Study: 2001–2002 (Jan. 2004)).

39 Margery Austin Turner et al., Discrimination Against Persons with Disabilities: Barriers at Every Step 51 (May 2005).

40 See, e.g., *United States v. Housing Authority of Baltimore*, No. 04-cv-03107 (D. Md. 2004), and *Bailey v. Housing Authority of Baltimore*, No. 02-CV-225 (D. Md. 2004) (consent decree approved Sept. 2004) (see U.S. Department of Justice, Housing and Civil Enforcement Cases (n.d.)).

41 29 U.S.C. § 720(a)(2) (2012).

42 For an extensive discussion of the school-to-sheltered-workshop pipeline, see Ronald M. Hager, *Stemming the School-to-Sheltered-Workshop Pipeline*, 47 Clearinghouse Review 380 (March–April 2014). This term has been used by National Disability Rights Network for about a year; it relates to the school-to-prison pipeline concept (see Jason Langberg & Peggy Nicholson, *Racial Justice and the School-to-Prison Pipeline*, 47 Clearinghouse Review 204 (Sept.–Oct. 2013); Ronald K. Lospennato, *Multifaceted Strategies to Stop the School-to-Prison Pipeline*, 42 Clearinghouse Review 528 (March–April 2009).

school districts but seldom get involved until students with disabilities are close to the end of their time in school.[43]

The U.S. Department of Education's Office of Special Education Programs has written a policy letter that could help to stem the school-to-sheltered-workshop pipeline; the letter emphasizes that the least restrictive environment requirements are an integral part of the Individuals with Disabilities Education Act.[44] Although the Act does not prohibit placement in segregated employment, the least restrictive environment provisions do apply to the employment portion of a student's program, just as they apply to any other part of the student's program. Consequently, before a student with a disability can be placed in a segregated employment program, the individualized education program team must consider any supplementary aids and services needed to enable the student to participate in an integrated program.

VOCATIONAL REHABILITATION SERVICES

State vocational rehabilitation agencies may not use federal funds to help a person find permanent employment in segregated settings and are required to conduct an annual review and reevaluation of people who are referred to, or who choose to, work in segregated settings. State vocational rehabilitation agencies must also conduct an annual review when a person achieves employment following participation in a vocational rehabilitation program but is paid a subminimum wage. These annual reviews must occur for the first two years after vocational rehabilitation–funded services end and then annually if a review is requested.[45] The Rehabilitation Services Administration does not track compliance with this requirement, though clearly laid out in the regulations, when the Rehabilitation Services Administration collects annual data from the state vocational rehabilitation agencies. In fact, there is no record of annual reviews taking place.[46] Without proper compliance, individuals with disabilities may be prevented from maximizing their employment potential within integrated, competitive wage settings.[47]

Federal regulations presume that all people with disabilities, including people with significant or the most significant disabilities, otherwise eligible for vocational rehabilitation services are capable of working in an integrated setting if vocational rehabilitation provides them with the appropriate supports and services.[48] To overcome this presumption, clear and convincing evidence must demonstrate that a person cannot benefit from vocational rehabilitation services—in terms of an employment outcome—because of the severity of the person's disability.[49]

Despite these clear requirements, swift conclusions are often made about individuals' employability without an adequate opportunity for them to demonstrate their skills in a variety of settings that are of interest to them or without the benefit of assistive technology, and this may, in fact, expand the number of job opportunities open to them. A comprehensive advocacy effort to enforce strict compliance with the Rehabilitation Act requirements for anyone relegated to segregated settings or subminimum wages is essential.

Children and Youth

In a series of three reports starting in 2009, the National Disability Rights Network documented the abusive use of restraint and seclusion by school districts across the country.[50]

RESTRAINT AND SECLUSION IN PUBLIC SCHOOLS

In 2009 the Education Department's Office for Civil Rights collected data from 7,000 school districts in the United States, and over 50,000 incidents of restraint were reported.[51] Although students with disabilities under the Individuals with Disabilities Education Act and Section 504 represented 14 percent of the students in the data collection, they made up nearly 76 percent of the students who were physically restrained by adults in their schools.[52] These shocking figures reflect that students with disabilities are disproportionately the victims of these practices.

Federal law does not set explicit limits on restraint and seclusion by schools. The Education Department's Office of Special Education Programs, which oversees the implementation of Individuals with

43 34 C.F.R. § 361.22(b) (2013). The vocational rehabilitation agency should "participate actively throughout the transition planning process, not just when the student is nearing graduation" (66 Fed. Reg. 4424 (Jan. 17, 2001)).

44 *Letter from Melody Muskgrove, Director of Special Education Programs, U.S. Department of Education to Spitzer-Resnick, Swedeen, and Pugh*, 52 Individuals with Disabilities Education Law Reporter 230 (Office of Special Education Programs June 22, 2012).

45 National Disability Rights Network, Segregated and Exploited: The Failure of the Disability Service System to Provide Quality Work 18 (Jan. 2011).

46 *Id.*

47 *Id.* at 19.

48 34 C.F.R. § 361.42(a) (2013).

49 *Id.* E.g., an ineligibility decision cannot be based solely on the results of a single IQ test; a series of situational or supported assessments conducted by appropriate service providers would be better clear and convincing evidence. The "demonstration of 'clear and convincing evidence' must include, if appropriate, a functional assessment of [an individual's] skill development activities, with any necessary supports (including assistive technology) in real life settings" (*id.*).

50 National Disability Rights Network, School Is Not Supposed to Hurt: The U.S. Department of Education Must Do More to Protect School Children from Restraint and Seclusion (March 2012); School Is Not Supposed to Hurt: Update on Progress in 2009 to Prevent and Reduce Restraint and Seclusion in Schools (Jan. 2010); School Is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools (Jan. 2009).

51 See U.S. Department of Education, Civil Rights Data Collection (n.d.).

52 *Id.* See also U.S. Department of Justice Civil Rights Division & U.S. Department of Education Office for Civil Rights, Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 3 n.6 (Jan. 8, 2014).

Disabilities Education Act, states, "While [the Individuals with Disabilities Education Act] emphasizes the use of positive behavioral interventions and supports to address behavior that impedes learning, [the Individuals with Disabilities Education Act] does not flatly prohibit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities."[53] The secretary of education has confirmed this position and further noted that Section 504 "does not expressly authorize us to ban … electric shock, other painful and aversive procedures, seclusion, and unnecessary restraint, and food deprivation."[54] Nonetheless the Education Department agrees that there "is no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques."[55]

Advocacy strategies to challenge the use of restraint or seclusion of students are available. One such strategy hinges on the prevention focus of the Individuals with Disabilities Education Act. A functional behavioral assessment can be an effective tool to identify why a student is exhibiting problematic behavior.[56]

Even though a functional behavioral assessment is explicitly referred to only in the Individuals with Disabilities Education Act regulations governing discipline after significant misconduct has already occurred, when any student with a disability is exhibiting behavior considered significant enough to warrant the use of restraint or seclusion, a functional behavioral assessment should be conducted to determine the causes of the behavior.[57]

Children with disabilities compose the group represented at the highest rates in the juvenile justice system with as many as 80 percent having some form of disability.

Next, a behavior intervention plan based on the assessment should be developed and applied proactively to the student's inappropriate behavior. When behavior impedes a child's learning or that of others, the individualized education program team must consider the use of positive behavioral interventions and supports and other strategies when developing the individualized education program.[58] The individualized education program must include all special education and related services and supplementary aids and services to be provided to, or on behalf of, the child, based on peer-reviewed research to the extent practicable.

SCHOOL-TO-PRISON PIPELINE

Children and youth with disabilities are removed from school and enter the juvenile justice system at alarming rates.[59] Data indicate that a specific subgroup of children of color—those who are also children with disabilities—receive disparate treatment from their peers in both settings. The United States incarcerates more of its youth than any other country. Children with disabilities compose the group represented at the highest rates in the juvenile justice system with as many as 80 percent having some form of disability.[60] Years after the passage of "No Child Left Behind," low graduation rates and high dropout rates plague these youths, but the school-to-prison pipeline need not be a foregone conclusion.[61] Advocates can use data to determine systemic trends to educate lawmakers and the public, locate youth for individual representation, and lead systemic change with powerful tools such as the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act to change damaging and unfair policies and practices. This combination of individual and systemic advocacy and the support of policymakers, local stakeholders, and the public is already seeing results and demonstrating that we can shut down this pipeline.

53 *Letter from Office of Special Education Programs, U.S. Department of Education to Anonymous*, 50 Individuals with Disabilities Education Law Reporter 228 (Office of Special Education Programs March 17, 2008).

54 Letter from Arne Duncan, Secretary of Education, to Nancy R. Weiss, University of Delaware's Center for Disabilities Studies National Leadership Consortium on Developmental Disabilities (Jan. 26, 2010) (internal quotations omitted).

55 U.S. Department of Education, Restraint and Seclusion: Resource Document 2 (May 2012).

56 *Id.* at 17. A functional behavioral assessment is an assessment that attempts to determine what purpose the behavior serves for the student and to find alternative ways for the student to fulfill the same need; "[a functional behavioral assessment] is used to analyze environmental factors … that contribute to a student's inappropriate … behaviors. [Functional behavioral assessment] data are used to develop positive behavioral strategies …" (*id.*).

57 34 C.F.R. § 300.530(f)(1)(I) (2013); 20 U.S.C. § 1414(b)(2) (2011). See also Alice K. Nelson & Carol Quirk, *Litigating Behavioral-Services Cases*, 48 Clearinghouse Review 30 (May–June 2014).

58 U.S. Department of Education, *supra* note 55, at 18. A behavior intervention plan should (1) address the characteristics of the setting and events; (2) remove antecedents that trigger dangerous behavior; (3) add antecedents that maintain appropriate behavior; (4) remove consequences that maintain or escalate dangerous behavior; (5) add consequences that maintain appropriate behavior; and (6) teach alternative appropriate behavior, including self-regulation techniques, to replace the dangerous behavior.

59 Daniel J. Losen & Jonathan Gillespie, Civil Rights Project/Proyecto Derechos Civiles, Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School 36 (2012).

60 Barry Holman & Jason Ziedenberg, Justice Policy Institute, The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities (n.d.); Jennnie L. Shufelt & Joseph J. Cocozza, National Center for Mental Health and Juvenile Justice, Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study (2006).

61 For the "school-to-prison pipeline" terminology, see *supra* note 42.

CHILD WELFARE SYSTEM

Similar to the school-to-prison pipeline, children with disabilities in the foster care and child welfare system are subject to disparate treatment. However, this group of children and youth is little studied and, it appears, often overlooked. Advocating placement in less restrictive settings, quality education, and appropriate mental health treatment, P&As and other civil law advocates have served children removed from their natural homes due to parental abuse and neglect. In a 2013 survey of educational services for children with disabilities in the child welfare system, the National Disability Rights Network found that, due to a lack of placement and service options, these youths continue to be inappropriately placed in settings designed for individuals with completely different needs. Children who have not broken any laws are placed in juvenile detention facilities because there are no other open beds, P&A agencies reported. In some jurisdictions, caring parents are still required to relinquish guardianship to the state in order to obtain publicly funded services for their children.[62] Hundreds of youth from one state are placed in out-of-state residential facilities, making it nearly impossible for their parents to visit them or maintain community ties.[63]

By definition, these children are trapped in a system with few options except for what the state provides, and appropriate educational programming is lacking. In some facilities, depriving children of education is still used as punishment for disability-related behavior, and educational credit is often denied to children housed in state-run residential facilities, even those housed there for months and years.

To change this cycle, data collection is essential. The opportunity for placement in a quality neighborhood school that meets individual educational needs is far greater when children are in family-based foster care instead of institutions. Advocates should ask whether sufficient community support exists for child welfare clients with disabilities to avoid institutional placement and whether their state still uses custody relinquishment as a method for obtaining services. Some states have adopted laws and policies regarding credit transfer and other methods to help prevent school disengagement. As noted above, powerful tools such as the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act can be utilized for individual and systemic advocacy. To facilitate systemic change, advocates should distribute information and discuss effective models with community stakeholders, including statewide surrogate parent programs.

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P&A agencies and a broad coalition of civil rights advocates continue to advance the ideals of equal opportunity, access, and rights protections for children and adults with disabilities. They apply the combined strategies of compliance enforcement of civil rights laws; litigation and nonlitigation enforcement mechanisms; policy advocacy at the local, state, and federal levels; and public education. The advocacy tools are in place. Freedom from neglect and abuse, equal access, and the freedoms of personal choice and empowerment can move from the ideal to the reality.

62 National Disability Rights Network, Foster Despair: Improving Access to Education Services for Youth with Intellectual Disabilities in State Custody (Nov. 2013).

63 *Id.*

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