People with Disabilities and Their Federal Rights--Still Waiting After All These Years (aka Discrimination of People with Disabilities and Their Federal Rights - Still Waiting after All These Years)

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DISCRIMINATION OF PEOPLE WITH DISABILITIES AND THEIR FEDERAL RIGHTS—STILL WAITING AFTER ALL THESE YEARS
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I. INTRODUCTION

Twenty years ago the federal government began a process which has revolutionized the relationship between people with disabilities and our legal system. As a result, people with disabling conditions now have the clearly established federal right not merely to be treated the same way as people without disabilities, but to be afforded functionally equivalent treatment in most walks of life. The effects of that federal policy are only now beginning to have an impact in New Mexico.

Federal legislation enacted in the early 1970s and the resulting case law already provide people with disabilities and their advocates varied and effective tools to help them pursue the goal of achieving equivalent opportunity; the Americans with Disabilities Act, which is discussed extensively elsewhere in this publication, will soon become the most effective tool to date. One reason why the effects of federal disability policy are being felt now in New Mexico is because the number of people and organizations advocating to promote the legal rights of people with disabilities has grown rapidly in recent years. In effect, New Mexico has reached a "critical mass," demonstrating a far greater willingness and ability to use the legal system to promote the interests of people with disabilities.¹ This article will discuss some of the patterns of discrimination still encountered by people with disabilities living in New Mexico, and some of the strategies they are employing and are likely to employ in the future in their efforts to reduce that discrimination.

II. THE EVOLUTION OF FEDERAL POLICY

During the first half of the 1970s, Congress enacted a number of statutes designed to enable people with disabilities to participate more
fully in the mainstream of American culture. The Developmental Disabilities Services and Facilities Construction Amendments of 1970,\(^2\) for the first time, provided federal funding to finance community-based living arrangements, employment, and support services for people with developmental disabilities which had historically been provided only in institutions. Amendments to the Social Security Act, passed shortly thereafter, authorized direct cash payments to poor people with virtually any type of disability in order to facilitate their ability to live outside of institutions.\(^3\) The Rehabilitation Act of 1973\(^4\) mandated increased government services to people with severe handicaps and also prohibited discrimination against people with disabilities by the federal government and by all those receiving federal funds. The Education of the Handicapped Act of 1975\(^5\) required that all children with disabilities receive a free appropriate public education in the most integrated setting consistent with each child’s needs. The Developmentally Disabled Assistance and Bill of Rights Act of 1978\(^6\) was designed to minimize needless admissions to institutions and established a federally financed system to protect the legal rights of people with developmental disabilities.

During those same years, federal courts held that the Due Process and Equal Protection Clauses entitle people with disabilities to previously unrecognized constitutional rights to actually receive treatment when held in an institution,\(^7\) to protection from harm when in government operated facilities,\(^8\) to an equal opportunity to receive an appropriate public education wherever they might live,\(^9\) to procedural and substantive due process whenever facing involuntary civil commitments,\(^10\) to time limitations on all involuntary commitments,\(^11\) and to liberty itself.\(^12\) Following the pattern of judicial activism manifested during the 1960s in many school desegregation cases, federal courts also became more willing to play an active role in the remediation of systemic violations of the federal rights of people with disabilities, particularly for those living in the custody of the government. In 1971, United States District Court Chief Judge Frank Johnson began a process in Alabama which eventually resulted in virtual federal judicial control of the operation of state mental institutions, signaling to the public health system that the judiciary was, for the first

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3. Id. § 1382 (1988).
time, willing to challenge its traditional monopoly on authority. This judicial activism directed toward the public health system eventually resulted in a backlash when, in 1984, the Supreme Court dramatically limited the traditional power of federal courts to enjoin the activities of state and local governments in response to judicial intervention by a federal court into the operation of an institution.

In New Mexico, evidence of the significance of disability issues in federal jurisprudence can be found by examining the largest class action civil rights cases brought against the state in the last ten years. In each of these cases, remedial orders were issued which include some requirement regarding the provision of proper services to people with disabilities. The July 1990 passage of the Americans with Disabilities Act, with its sweeping application and comprehensive scope, insures that there will be still more civil rights litigation in New Mexico regarding disability issues.

III. THE REHABILITATION ACT

Congress first enacted legislation on behalf of people with disabilities more than seventy years ago with the passage of the Vocational Rehabilitation Act in 1920. The legislation provided for training, counseling, and placement services for people with physical disabilities. The purpose of the Act was to enable people to become employable after undergoing rehabilitation; most of those served by the program were either veterans or persons injured in industrial accidents. The program became permanent with the passage of the Social Security Act of 1935.

Due primarily to the many veterans injured in the second world war, Congress amended the Vocational Rehabilitation Act in 1943. It authorized the provision of medical, surgical, and other physical restorative services, and also expanded eligibility to include persons with psychiatric disabilities or intellectual impairments, such as mental retardation. The statute redefined "vocational rehabilitation" to include any services necessary to enable an individual with a disability to engage in a paying job. In 1954

13. Judge Johnson effectuated the process over the course of three decision. In Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), Judge Johnson recognized that the medical care given at the institution was inadequate but gave the state the opportunity to correct the problem. In the second decision, Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971), the judge found that the state did not effectively correct the problem of inadequate health care and ordered a hearing to decide what the minimum constitutional standards would be regarding this issue. Finally, in Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), aff'd sub nom., Wyatt v. Alderholt, 503 F.2d 1305 (5th Cir. 1974), Judge Johnson set down minimum constitutional standards that had to be met by the state within six months.


and again in 1965, amendments were enacted to further expand the scope of services provided and to facilitate the operation of workshops, rehabilitation centers, and similar specialized facilities intended to provide employment to people with disabilities. In 1967, more amendments were enacted requiring each state to provide services to all qualified individuals with disabilities, without regard to their place of residence. That same year the Vocational Rehabilitation Administration was renamed the Rehabilitation Services Administration ("RSA"). The Vocational Rehabilitation Act of 196819 authorized states to recruit and train persons with disabilities to undertake public service employment and again expanded the definition of rehabilitation services to include services to families and to encourage a broader range of employment opportunities for participants.20

With the passage of the Rehabilitation Act of 1973, Congress mandated a fundamental change in the mission of the RSA. For the first time, participants could be admitted to vocational rehabilitation services even if no "vocational outcome" seems likely when they apply for the program.21 The 1973 legislation also required the RSA to place a greater emphasis on rehabilitating individuals with severe disabilities.22 During the hearings which led to passage of the Rehabilitation Act of 1973, there was virtually no debate about section 504 of the Act, which provides, "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."23 This non-discrimination clause, similar to language in legislation prohibiting race discrimination, engendered no controversy prior to its passage. However, the process of adopting regulations to enforce section 504 proved to be highly controversial. A coalition of disability advocates, members of Congress, and HEW employees promoted the adoption of regulations with strong affirmative requirements mandating "equivalent" treatment of people with dissimilar characteristics.24

When the regulations were finally released in May of 1977, four years after passage of the legislation, the section describing the "discrimination" prohibited by the Act was fourteen paragraphs long. It expressly prohibits the failure to provide a person with a disability "with an aid, benefit, or service that is not as effective as that provided to others . . . ."25 Accordingly, under section 504 the relative "effectiveness" of the aid, benefit, or service being provided to a person with a disability is the proper measure of whether or not discrimination is occurring. As a result,

22. Id.
the focus of the inquiry in a case brought under section 504 is not simply upon the behavior of the person alleged to have discriminated, but rather upon the effect of that behavior upon the person with a disability. This necessarily fact-intensive question of the effect of an action upon a unique individual inevitably results in real disputes between employers and their employees, service providers and their clients, and business people engaged in commerce and their potential customers. Although the Americans with Disabilities Act of 1990 has codified this construct of “effectiveness,” only the evolution of a substantial body of case law will inform people with disabilities and their adversaries of precisely what conduct will and will not be permitted under the Act.

In a recent decision in a federal class action, United States District Court Judge James A. Parker has ruled that the New Mexico Department of Health is systematically violating section 504 of the Rehabilitation Act by failing to provide to people with severe disabilities opportunities equivalent to those given people with less severe disabilities. In an action on behalf of the class of persons who live or have in the past lived in the state’s training schools for persons with developmental disabilities, the court held:

The record reflects that New Mexico’s community service system discriminates against persons with severe handicaps. . . . The community programs provided by the [Departments of Health and of Human Services] are generally not available to persons with severe handicaps . . . [C]ommunity programs are not available in New Mexico for persons who have challenging behavior, physical handicaps or special medical needs.26

Judge Parker further reasoned that defendants’ failure to integrate residents who were severely disabled into community programs that presently serve people who are less severely disabled violates section 504.27 To remedy this exclusion of people with severe disabilities, Judge Parker ordered the state to transfer into community programs all residents of the training school whose treatment teams have recommended community living for them. It was also ordered that a reevaluation of other institutional residents be made to determine, without regard to the current availability of services, which of them should also be referred for community living. This decision has resulted in extensive implementation planning by state officials and seems likely to bring about a major transformation of New Mexico’s system of providing services to people with developmental disabilities.

The same logic which led Judge Parker to find a section 504 violation regarding persons with developmental disabilities could also be applied to other service systems and to persons with other forms of disability. For instance, the state’s provision of vocational rehabilitation services to

27. Id. at 1299.
people with mental disabilities might be challenged as not as "effective" as the services being provided to people with physical disabilities. The disproportionate number of abused and neglected children with emotional impairments who are placed by welfare officials in congregate facilities, rather than community-based foster homes, could similarly constitute a violation of section 504. People with psychiatric disabilities held in institutions might bring a challenge asserting that they have a right to community living equivalent to that of the people with developmental disabilities who undertook the *Jackson* litigation.

In order to avoid such litigation, the time is ripe for New Mexico's state government to undertake comprehensive planning to assure that citizens with various types and levels of disability receive the "equivalent" services to which they are entitled. A good starting point for such planning can be found in the recommendations of the Statewide Evaluation of Needs, Services and Efficacy for Serving Persons with Disabilities in New Mexico which was undertaken in 1987 on behalf of the State Division of Vocational Rehabilitation. The recommendations include: acquisition of more complete information regarding the availability and quality of services, and the adequacy of distribution of those services; the establishment of state plans and service delivery systems for specific populations of people with disabilities, as well as better planning for children, people with disabilities who live in rural areas, and under-served disability groups. Unless New Mexico adopts a systematic approach to providing equivalent opportunities to people with disabilities, differences in the relative effectiveness of services provided to people with various levels and types of disabilities will be a basis for future court challenges.

IV. DUE PROCESS

Under the English common law, a government, or sovereign, has no duty to provide for the well-being of its citizens. The burgeoning numbers of homeless people in the United States demonstrates this principle, which was recently articulated by the United States Supreme Court in *DeShaney v. Winnebago County Department of Social Services.* Chief Justice Rehnquist, for the *DeShaney* majority, stated, "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life . . . ." The Chief Justice further explained:

> [W]hen the state takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . . The affirmative duty to protect arises not from the states' knowledge of the individual's predicament or from its expressions of

30. Id. at 196.
This principle results in an incongruous state of affairs, especially for people with disabilities. The government may knowingly ignore a citizen whose very life is at risk as long as the government takes no action to limit that person's liberty. Yet, if the government takes custody of a person under its parens patriae powers and places her in a treatment program or a habilitation center in order to preserve her existence, then it becomes obligated to keep her safe from unreasonable risks to her safety, to adequately feed and clothe her, to provide decent shelter and adequate medical care, to impose only necessary restraints upon her, and to provide her with needed training. Nevertheless, once that individual is subsequently discharged from the facility, she again has no right to any assistance from the government and can be neglected, even unto death. In the context of disability law, this leads to a conundrum.

During the past thirty years, the number of people held by the government in institutions for the mentally retarded has been reduced by more than half. Approximately 213,000 individuals with mental retardation were institutionalized in the United States in 1960, while only 91,000 were held in institutions in 1988. The question of what protection the Due Process Clause affords to those approximately 120,000 people who are no longer held in government facilities was raised in 1988. The United States Court of Appeals for the Third Circuit ruled that the answer, according to the United States Supreme Court, is none.

In 1988, in the case of Philadelphia Police & Fire Association for Handicapped Children v. City of Philadelphia, the United States District Court for the Eastern District of Pennsylvania ruled that substantive due process required the maintenance of community-based services being provided to people with developmental disabilities in Philadelphia at the same level as was provided the previous year, notwithstanding the economic problems faced by the city. Late in 1988, the government appealed that decision to the Third Circuit. In 1989, the court of appeals noted that the district court rendered its decision prior to the Supreme Court ruling in DeShaney. In reversing the district court, the court of appeals stated that:

[unfortunately, that broad, harsh decision eliminates all support for the district court's position, and we are constrained by it to hold that Philadelphia and the Commonwealth's cutbacks in services have not violated the class' substantive due process rights.]

31. Id. at 199-200.
35. Id.
The Third Circuit, basing its decision upon *DeShaney*, ruled that the Due Process Clause would not protect the Philadelphia plaintiffs unless and until the Government's failure to provide them with needed services at home caused them to be placed in government custody. Given the overwhelming evidence that people who live in the community are safer, healthier, and better off in innumerable ways than those who live in institutions,\(^\text{37}\) this state of affairs is patently absurd.\(^\text{38}\)

Regardless of whether people with disabilities living in government financed community programs in New Mexico are entitled to due process, there is no dispute that people held in institutions directly operated by the government are entitled to procedural and substantive due process. The Supreme Court in *Youngberg v. Romeo*\(^\text{39}\) established the standard courts must follow in determining the type and quality of services that must be provided to people in institutions. The essence of the central holding in that case, simply put, is that whatever a qualified professional prescribes as the appropriate services for an institutionalized resident must be accepted by a federal court as sufficient unless the court is persuaded that the disputed decision departs substantially from prevailing professional standards.\(^\text{40}\) Traditionally, courts have viewed *Youngberg* as establishing a ceiling upon what they can order institutions to provide. Recently, however, disability advocates have used that decision to improve the quality and type of services institutional residents may obtain by petitioning a federal court.

In *Clark v. Cohen*,\(^\text{41}\) the Third Circuit Court of Appeals held that it is within the power of a federal court to order that a plaintiff be transferred from an institution to a community living arrangement when: 1) the treatment team, exercising its professional judgment, recommended community living; and 2) when various bureaucratic and economic obstacles prevented the implementation of the treatment team's recommendation.\(^\text{42}\) Similarly, the Fourth Circuit Court of Appeals has also affirmed a district court order requiring a plaintiff to be transferred from an institution to a community living arrangement when the transfer was recommended by the government's own qualified professionals.\(^\text{43}\) The same principles were later applied in the same case to the entire class of individuals similarly situated to the named plaintiff, Thomas S., in 1988.\(^\text{44}\) The district court held that, under the *Youngberg* principles, the

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38. A case currently pending in the New Mexico Court of Appeals, LaBalbo v. Hyme, No. 11,904, (N.M. Ct. App. filed Dec. 2, 1988), has raised the question of whether New Mexico state law considers the entire community service system for persons with developmental disabilities to be merely a surrogate for the state engaged in state action, thereby entitling residents of the community programs to due process. The case has been under advisement for two years.
40. *Id.* at 324.
42. *Id.*
decisions of the treatment teams were presumptively valid, and that the state's failure to implement the teams' decisions violated due process.\textsuperscript{45}

The same principles have been recently applied in New Mexico in \textit{Jackson v. Fort Stanton Hospital & Training School}.\textsuperscript{46} Relying on \textit{Clark v. Cohen} and the \textit{Thomas S.} decisions, Judge Parker held that the state's failure to implement the recommendations of their own treating professionals violates the due process rights of the plaintiffs and ordered the prompt implementation of the treatment teams' recommendations. The court also found that the current lack of minimally adequate community based services (itself a violation of section 504) has interfered with the "unsullied" exercise of professional judgment by treating professionals and ordered reevaluation of institutional residents currently without recommendations for community living. Finally, the court permanently enjoined treatment teams from taking into account the current availability or unavailability of community services when making future recommendations.\textsuperscript{47}

The same logic which resulted in the \textit{Jackson} decision could be applied by other courts in New Mexico. In 1980, Northern New Mexico Legal Services brought a federal class action on behalf of persons with developmental disabilities who were being housed at the state hospital in Las Vegas, New Mexico. They alleged that the plaintiffs' substantive due process rights were being violated insofar as the state hospital is designed to serve people with psychiatric, not developmental, disabilities. As a result, the plaintiffs were not receiving the habilitation services they needed even though the state's treating professionals recognized the necessity of the services. In 1982, the parties entered into a consent decree requiring the State Department of Health to provide habilitation services consistent with the least drastic means principle and to make "every reasonable effort" to arrange community placements for the plaintiffs.\textsuperscript{48}

Nevertheless, ten years later there are still a number of people with developmental disabilities housed at the state hospital, notwithstanding recommendations by their treatment teams to transfer the patients to programs designed to serve people with developmental disabilities, including community-based programs. Were the rationale applied by the court in \textit{Jackson} also applied in this situation, a holding of a substantive due process violation would be likely.

In 1987, the New Mexico legislature created a task force to study the problems faced by people with both developmental disabilities and psychiatric disorders. The task force concluded that "New Mexico does not have a service system for persons with mental retardation and psychiatric disorders."\textsuperscript{49} The task force also found that "individuals who do not fit into the service models available are more likely to be institutionalized

\textsuperscript{45} Id. at 1200.


\textsuperscript{47} Id.

\textsuperscript{48} Montano v. Goldstein, No. CIV-80-254 C (D.N.M. Sept. 15, 1982).

\textsuperscript{49} MULTI-DIAGNOSIS TASK FORCE REPORT TO THE 2D SESSION OF THE 38TH LEGISLATURE, at 8 (1988).
than their less disabled peers . . . ." 50 A combination of the state’s continuing failure to develop appropriate service models for people with both developmental and psychiatric disabilities, and the continued excessive institutionalization of such people after their treatment teams recommend community living, leaves the state at risk for challenges in court.

A related problem exists at the Forensic Treatment Unit at the state hospital in Las Vegas. According to the hospital’s administrator, approximately half of the persons placed in the facility for treatment to attain competency to stand trial in criminal cases have a developmental disability or similar form of neurological impairment which cannot be effectively treated at a psychiatric hospital. New Mexico, however, does not have any other facility to house persons whose incompetency to stand trial stems from a neurological impairment. The qualified mental health professionals, both within the judicial system and at the state hospital, recommend that these people should not be housed in a psychiatric facility; however, these recommendations have gone unheeded.

Similarly, a number of children housed in the custody of the Youth Authority, the state’s delinquency agency, have been diagnosed as having a mental disorder and their qualified mental health professionals have recommended treatment in a residential treatment center, a psychiatric hospital, or some other treatment facility. Nevertheless, as a result of New Mexico’s inadequate service system for children with mental disabilities, these children remain at the Boys’ School in Springer or the Girls’ School in Albuquerque, where the needed services are not available. A number of the abused and neglected children in the custody of the Human Services Department who have been evaluated by the government’s psychologists and psychiatrists are also not provided with the kind of residential treatment services or other treatment programs prescribed by those qualified professionals due to the unavailability of the services.

Unlike Joshua DeShaney, all of these children are currently in the custody of the government, and, according to the analysis of the Supreme Court, have the federal right under Youngberg to receive appropriate medical care and other mental health services. Unfortunately, administrative and legislative efforts by advocates to enhance services for these children have been unsuccessful in recent years. For example, Senate Bill 63, which would have expanded services at the Youth Authority’s Secure Treatment Center in Albuquerque, was vetoed early in 1990 by Governor Bruce King. The state government’s continuing failure to provide people in their custody the services prescribed by their own treating professionals exposes the state to the possibility of more civil rights litigation regarding these substantive due process violations.

V. THE EDUCATION OF THE HANDICAPPED ACT

Children with disabilities who live in New Mexico have the clearly established federal right to free, appropriate public education. The origins

50. Id. at 5.
of this right can be found in the case of *Pennsylvania Association for Retarded Citizens v. Pennsylvania*,\(^1\) in which children with developmental disabilities proved they were denied adequate services and needlessly segregated. The following year the same principles were applied to children with *any* kind of handicap in *Mills v. Board of Education.*\(^2\) The court in *Mills* also held that the cost of services is not a justification for denying equivalent educational opportunity to children with disabilities. These principles were later embodied in the Education of the Handicapped Act of 1975.\(^3\) The purpose of the legislation is to assure that all children with disabilities receive a free appropriate public education.

The same principles have been adopted in New Mexico. New Mexico law requires that “[a]ll school age persons in the state shall have a right to a free public education . . . .”\(^4\) This same right is expressly applied to children with disabilities housed in state institutions under the authority of the Department of Health.\(^5\)

New Mexico has a long history of resisting compliance with federal special education legislation. In fact, for a number of years New Mexico was the only state in the union which did not accept federal funds for special education services, evidently in order to avoid the obligations imposed upon states receiving the funds. The state reversed course and chose to apply for the federal special education funds only after it was successfully sued for systematically violating the related federal rights of children with disabilities.\(^6\) After the conclusion of the *New Mexico Association for Retarded Citizens* litigation, the New Mexico State Board of Education promulgated standards regarding special education programs which require that the placement of children with disabilities “be in the least restrictive educational setting which results in the exceptional child’s maximum interaction with non-exceptional children in curricular or non-curricular settings.”\(^7\)

IDEA\(^8\) requires that each state assure that proper procedural safeguards will be available so that the parent of a child with a disability can obtain due process of law if they are not satisfied with the services delivered

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\(^{1}\) 334 F. Supp. 1257 (E.D. Pa. 1971). The federal court held that the state owes children with mental retardation an “appropriate” program of education and training. The court also held that there is a presumption that it is preferable to place children with handicaps in a regular classroom instead of segregating them. *Id.* at 1260.


\(^{3}\) 20 U.S.C. §§ 1400-1485 (1975). Congress recently amended the EHA with the passage of the Individuals with Disabilities Act of 1990, which expanded the definition of eligible children and added more required services. The statute, P.L. 101-476, also renamed the title of the legislation to “The Individuals with Disabilities Education Act” (“IDEA”), reflecting the general shift away from the term “handicapped” to describe people with disabilities.


\(^{5}\) Id. § 22-12-4(c).


\(^{7}\) *New Mexico State Bd. of Educ., Educational Standards for New Mexico Schools* § B.2.10.1 (1989).

\(^{8}\) *See supra* note 53.
to the child. The essence of the scheme is that parents, as advocates for their children, have the substantive right to obtain an appropriate education for their child, and that parents, not children, have the authority to initiate formal appeals of educational decisions. Whenever the parents are not known or available, or if the child is a ward of the state, an individual who is not employed by educational agencies must be assigned to act as a surrogate for the parents. Notwithstanding this requirement, the State of New Mexico has established no uniform process for the appointment of such surrogate parents. As a result, children in the custody of the state are denied the most fundamental element of their due process rights; they have no one to be a vigorous and completely loyal advocate to initiate and pursue due process proceedings whenever appropriate services are not delivered. This problem was recently brought to the attention of the United States Department of Education and an informal investigation is now under way in New Mexico. Litigation regarding this issue seems likely if proper procedures are not soon adopted. Children in the custody of the Human Services Department and the Youth Authority would be the primary beneficiaries of a proper process for appointment of surrogate parents.

Another violation of IDEA likely to be the subject of dispute in the near future is the failure of state bureaucracies to provide integrated educational services to children living in state run institutions. The vast majority of children held at state operated residential facilities such as the Los Lunas Training School, the State Hospital, the Secure Treatment Center, and the UNM Mental Health Center do not attend public schools. This issue was raised in the Jackson v. Fort Stanton litigation, but Judge Parker held that the doctrine of exhaustion of administrative remedies requires each individual child to pursue formal due process administrative proceedings before the court will intervene on their behalf. Because the administrator of the Los Lunas facility had admitted that equivalent services are available in public schools for children living at the Los Lunas Training School ("LLH&TS"), the court found that the Department of Health should be required "to fully explain their efforts in assuring an 'appropriate education' for those residents at LLH&TS who receive their educational services at the institution." The handwriting is on the wall; children living in institutions who receive only segregated educational services should, in at least some cases, receive their education in the public school system.

VI. FAIR HOUSING AMENDMENTS ACT OF 1988

Title VIII of the Civil Rights Act of 1968, (commonly called the Fair Housing Act) was enacted with the intention of prohibiting discrimination
against people of minority races in housing matters. Twenty years later, the same protection was extended to people with disabilities.\textsuperscript{63} It is now unlawful for public or private entities to discriminate against people with disabilities in the sale, rental, or advertising of dwellings; in the implementation of land use and zoning laws; and in the enforcement of restrictive covenants or deeds.\textsuperscript{64}

The intent of the Fair Housing Amendments Act is to assure that people with disabilities enjoy equivalent opportunities to obtain and live in housing. People with communicable diseases, such as Acquired Immune Deficiency Syndrome ("AIDS"), people with physical disabilities, and people with mental disabilities all fall within the class of protected individuals who may now use the procedures of title VIII to protect themselves from discrimination. Further, the providers of housing may be compelled to permit people with disabilities to have an equivalent opportunity to use and enjoy dwelling places. This legislation has been the subject of litigation in New Mexico twice during the past three years. In 1989, a group of Albuquerque residents went to state district court seeking an injunction prohibiting people with psychiatric disabilities from establishing a home for themselves in the Northeast Heights.\textsuperscript{65} Attorneys from the Albuquerque City Attorney's Office represented the city's interests, asserting that all zoning regulations and city ordinances were complied with when the University of New Mexico Mental Health Center initiated the operation of the home. Nancy Koenigsberg, an attorney with the New Mexico Protection and Advocacy System, represented residents of the home during the proceedings. The court concluded that no violation of any city regulation or ordinance occurred and that there was no basis in law for allowing the neighbors to interfere in the operation of the home.

More recently, a group of residents of the Bellamah neighborhood in Albuquerque organized in an effort in late 1990 to halt the opening of a similar home in their neighborhood. They held public meetings, distributed fliers in the neighborhood, gave interviews to the mass media, and retained a lawyer to bring a lawsuit in an attempt to keep people with psychiatric disabilities from living in a home sponsored by Transitional Living Services ("TLS"), a non-profit corporation providing residential and other services to people with psychiatric disabilities. TLS joined with the Protection and Advocacy System and the Mental Health Law Project of Washington, D.C. to bring a federal action under the Fair Housing Act to enjoin the efforts of neighborhood residents to keep people with disabilities out of their neighborhood. That case was settled under an agreement which enjoins people in the neighborhood from interfering with the establishment and operation of the home, which is now in full operation.\textsuperscript{66}

\begin{thebibliography}{9}
\bibitem{64} \textit{Id.} §§ 3604-3605.
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The protection of the Act is available to individuals, as well as groups. Issues regarding physical accessibility to housing for people with mobility impairments and discrimination against people with certain forms of disabilities, such as AIDS and psychiatric disabilities, appear likely to be the subject of future litigation.

VII. ACCESS TO COURT

Congress shall make no law . . . abridging . . . the right of the people . . . to . . . petition the government for a redress of grievances.67

No person shall . . . be deprived of life, liberty, or property without due process of law . . . .68

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.69

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.70

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.71

Read together, the above amendments to the United States Constitution make it clear that effective and meaningful access to the courts is a right the federal government intends for each person to enjoy. Indeed, the United States Supreme Court has called the right of access to the courts “the fundamental Constitutional right.”72 In 1914, the United States Supreme Court declared that the hallmark of due process is “fundamental fairness” whose essential characteristic is “the opportunity to be heard.”73 The Supreme Court has also expressly held that the right of access to the court is inherent in our first amendment right to petition government for the redress of grievances,74 and that the due process clause is another basis for a person’s right of access to the courts.75 Nonetheless, the right of meaningful and effective access to the courts is denied to many people with disabilities living in New Mexico. This inability to obtain access to justice is the most significant form of discrimination encountered by people with disabilities.

The correlation between disability and poverty is very high. In fact, there is a considerable likelihood that a person with a disability will be

67. U.S. Const. amend. I.
68. U.S. Const. amend. V; see also N.M. Const. art. II, § 18.
69. U.S. Const. amend. VI; see also N.M. Const. art. II, § 14.
70. U.S. Const. amend. VIII; see also N.M. Const. art. II, § 13.
71. U.S. Const. amend. XIV; see also N.M. Const. art. II, § 18.
poor. As a result, people who are substantially impaired by a disability usually cannot afford to retain a lawyer in the customary way. Public legal assistance programs such as Legal Aid and court appointments within quasi-public systems are the only ways most people with disabilities ever obtain legal assistance. Paradoxically, people with disabilities often have greater needs for legal assistance than do people with no disability.

In addition to the customary needs for legal services which people with disabilities share in common with people who have none, many people with disabling conditions face an array of legal problems not faced by people without disabilities. For instance, people with disabilities may encounter guardianship proceedings; commitment hearings; Social Security disability benefit disputes; administrative hearings regarding vocational rehabilitation, special education, or Medicaid services; children's court cases challenging their abilities as parents; and, in the case of a few people with psychiatric disabilities, an allegation of a criminal offense. In New Mexico, a variety of schemes exist which are intended to provide counsel for people with disabilities. Universally, these schemes provide such miserly compensation for the lawyers assigned to represent the client with a disability that the systems discourage vigorous advocacy by the lawyers who undertake such representation. As an example, lawyers in Albuquerque willing to represent citizens facing civil commitment proceedings (which can result in up to six months of involuntary detention) receive just $59 to defend the case. Worse yet, throughout New Mexico there is no official mechanism for providing representation to people faced with guardianship proceedings (which can result in a lifelong "placement" in highly restrictive settings such as the Los Lunas Training School or the state run nursing home at Fort Bayard).

Furthermore, most people with mental disabilities who are charged with crimes ranging from petty misdemeanors such as trespass and disorderly conduct through capital murder are determined by the court to be indigent and are, therefore, represented by public defenders. On any given day between forty and sixty public defender clients with mental disabilities are housed at the Forensic Treatment Unit at the state hospital under orders requiring the facility to provide them with treatment. One such individual was housed at the Forensic Unit for over eight years. Additionally, the Bernalillo County Detention Center operates a "psychiatric services unit" which houses many individuals whose competency to stand trial is in doubt. Other jails throughout the state also house people whose competency to stand trial is in question, sometimes for


77. In 1990 the New Mexico Protection and Advocacy System obtained a small grant from the New Mexico Bar Foundation to provide representation to a small number of people facing guardianship proceedings. Funding was not continued in 1992.

over a year. The unique needs of these clients present special challenges for their criminal defense lawyers.

As a result of the very high caseloads faced by Public Defenders, adequate time and energy to vigorously pursue the interests of these public defender clients is often not available. Criminal defense lawyers representing persons with mental disabilities face unique questions of fact and law that often require extensive investigation, expert advice, and economic costs. The amount of time required to litigate those issues fully and fairly is often quite extensive.

New Mexico's public defender system, as currently constituted, does not provide effective assistance of counsel to many persons with mental disabilities charged with crime in New Mexico. Hundreds of people with mental disabilities are now incarcerated within the Department of Corrections. These include some who are viewed by the mental health professionals employed by the Department of Corrections as "grossly incompetent" to be prosecuted at the time they arrived in the prison system. Although persons charged with crime are entitled to effective assistance of counsel at all "critical stages" of a prosecution, the excessive caseloads faced by public defenders in New Mexico and the complexity and time consuming nature of competency proceedings often render ineffective the assistance offered to people with disabilities charged with a crime.

People with disabilities facing civil commitment proceedings in New Mexico are also often denied meaningful access to the courts. Under the provisions of the New Mexico Mental Health and Developmental Disabilities Code, people facing involuntary commitment to treatment facilities have a right to a hearing within seven days of their detention and to periodic judicial review of their commitment. Notably, in the Fourth Judicial District, where the New Mexico State Hospital is located, these hearings are scheduled a mere fifteen minutes apart. It is not uncommon for the commitment defense lawyers to speak to their clients for the first time just prior to the hearing. Also, defense counsel have actually waived the presence of their client at those hearings based solely upon the unverified representation by hospital staff that their client was

79. Id. Public Defenders in New Mexico's Second Judicial District have caseloads which are more than double the national standards. Lawyers in the misdemeanor division must represent over 800 persons per year, according to New Mexico Public Defender Department statistics. Id.


81. Interview with Dr. Roberta Stellman, contract psychiatrist for the New Mexico Department of Corrections and Richard Serna, Administrator, Department of Corrections Mental Health Services (Jan. 10, 1991).


84. Id. § 43-1-11.
too upset that day to appear for the hearing. Finally, in some cases defense counsel fail to interview the expert witness for the hospital, review the medical record, object to the introduction of incompetent evidence, while offering no evidence in their client's defense nor even any argument on behalf of their client.\(^8\)

The commitment hearings themselves take place in a conference room on the grounds of the state hospital. Respondents are sometimes brought to the hearing room without shoes, having been offered no opportunity to groom and dress themselves in a manner appropriate for an appearance in court. An employee of the state hospital schedules the proceedings as a court's docket clerk customarily would, functioning generally as an adjunct member of the court's staff. This blurring of the roles of the court and the hospital (the petitioner in the action) results in some commitment proceedings in Las Vegas being little more than a formality. Overall, the system whereby people with mental disabilities are committed to New Mexico's State Hospital violates the due process rights of the persons facing commitment.

The state hospital also violates the right of meaningful access to the courts for people with mental disabilities during their confinement. People who are held in government operated treatment facilities have a federal right to legal services provided at government expense to protect their substantive rights while they are detained.\(^8\) Because of the nature of mental disabilities, meaningful access to the court pro se is often not possible for persons who cannot obtain the services of a lawyer. The Tenth Circuit Court of Appeals has ruled that people held in mental hospitals and similar facilities have a federal right to the services of a lawyer, at no expense, who will investigate the facts and the law regarding their allegations of civil rights violations and who will complete and file a proper civil rights complaint whenever such a complaint is justified.\(^8\)

No such system is available in New Mexico, and thus New Mexico continues to deny access to the courts to residents of state operated institutions.

VIII. CONCLUSION

Over the past twenty years, the federal government has adopted strong policies promoting effective access to governmental services and maximizing opportunities for the integration of people with disabilities. For a variety of reasons, New Mexico has not yet incorporated these values into its social and political structures. As a result, many current developments in New Mexico resemble conditions that were present in places like Wisconsin, Michigan, Pennsylvania, and, most importantly, Washington, fifteen or twenty years ago. Indeed, the discussions now frequently

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\(^8\) Observation of numerous commitment proceedings at the state hospital, interviews with lawyers employed by the Department of Health, and with the staff of the Protection and Advocacy System.

\(^8\) Ward v. Kort, 762 F.2d 856 (10th Cir. 1985).

\(^8\) Id. at 860.
heard at national conferences and meetings regarding disability issues held around the country and in Washington are often about ways to improve upon systems that do not even exist yet in New Mexico.

The inescapable fact is that New Mexico is not yet in step with the policies Congress has adopted regarding people with disabilities. Further, it is doubtful that New Mexico will get in step any time soon. In the meantime, the strength and momentum of the disability rights movement in New Mexico continues to grow. Accordingly, it appears inevitable that in the future there will be even more disputes, including lawsuits, regarding the rights of people with disabilities living in New Mexico.