

GOVERNMENT *In Brief*



Published by NYSARC, Inc. • (518) 439-8311

Volume 13, Number 1

Library
NYSARC, Inc.
393 Delaware Avenue
Delmar, NY 12054

January/February 2002

TOP STORIES...

MAJOR HEALTH CARE BILL ENACTED

Parent Fees, Developmental Disability Issues At Center Stage

On January 15, the State Legislature passed a massive health care bill which converts Empire Blue Cross/Blue Shield - the largest health care insurer in New York State - to for-profit status and provides \$1.8 billion over the next three years to increase salaries for hospital, nursing home, personal care and some free-standing clinic workers. **Story on Page 2**

2001 BIG YEAR FOR DEATH BANS

Stage Is Set For Supreme Court Hearing

2001 might have been the year the Supreme Court was waiting for to see the emergence of a national consensus against executing persons with mental retardation. **Story on Page 4**

TEXAS GOVERNOR VETOES

DEATH PENALTY BAN

Declaring that existing law already provides sufficient safeguards against executing persons with mental retardation, Texas Governor Rick Perry vetoed legislation specifically banning the practice. Advocates blasted Perry, saying that his veto would only reinforce the State's bloodthirsty reputation. **Story on Page 7**

INSIDE STORIES:

FROM WASHINGTON **Pages 1-2**
Social Security COLA, Special Ed Funding

STATE GOVERNMENT **Pages 2-6**
Health Care Reform Act, HCBS Audit, Budget Prospects

FROM THE COURTS **Pages 6-7**
Tennessee Death Ruling, ADA Settlement

AROUND THE NATION **Pages 7-13**
Texas Vetoes Death Ban, State Death Bans Enacted, High Court Death Penalty Decision, Other Stories

Government in Brief is published as a vehicle to provide up-to-date coverage to NYSARC Chapters regarding current events in the field of developmental disabilities.

FROM WASHINGTON

SOCIAL SECURITY COLA IS 2.6 PERCENT

Social Security recipients, including individuals receiving Supplemental Security Income (SSI) and Social Security Disability Income (SSDI), will get a 2.6% cost of living adjustment (COLA) this year. That's down from last year's 3.5% COLA.

The Social Security Administration adjusts monthly Social Security checks each year to keep pace with the rate of inflation.

The 2.6% increase, tied to changes in the Consumer Price Index, mirrors the 2.6% increase announced by New York State in proposed regulations as the minimum inflationary increase for programs funded by Medicaid in the State such as nursing homes, hospitals and ICFs/MR.

The maximum monthly SSI payment for an individual will rise from \$531 to \$545. For families the increase will be from \$796 to \$817.

CONGRESS FUMBLES SPECIAL ED FUNDING *Federal Promise Still Not Kept*

When The Individuals with Disabilities Education Act (IDEA) was first passed by Congress in 1975 it guaranteed all children with disabilities a free and appropriate public education. It also promised that the federal government would pick up 40% of the cost of the new law.

That never happened. While special education costs skyrocket, the federal share remains stuck at 15%. In 2001, as part of President Bush's massive education reform effort, Congress hoped to finally make good on its twenty six year old funding promise.

Property of The Arc NY

But while Congress finally passed the Bush education reform measure just prior to the end of 2001, after two weeks of negotiations, it failed to increase the level of federal funding for special education.

The battle over special education funding and education reform was included in the reauthorization of the Elementary and Secondary Education Act (ESEA). That bill passed the Senate on December 18 by a vote of 87 - 10. It originally passed the House on December 13 by 381-41.

While members of both parties in both houses agreed that federal aid for special education should be increased, they disagreed on how to do it. Democrats wanted a mandatory schedule of federal aid increases, effectively making special education an entitlement program. Republicans balked at the idea. Instead, they argued, increased federal aid should be put off until 2002 when IDEA comes up for reauthorization. Increasing funds for special education now, they maintained, would impede reform of IDEA when it came up for reauthorization.

In the end HR 1, the "No Child Left Behind Act," won broad support for, among other things, authorizing \$26.5 billion in new federal spending; allowing greater flexibility for spending education money; eliminating 10 obsolete federal education programs; and, spending more money on low income students.

"All the nation's students will have a much greater opportunity than ever before to succeed educationally, do well economically and participate fully in American society," said Senator Edward Kennedy (D-Mass).

The bill also requires testing and assessment measures to make good on the Bush promise to hold educators accountable.

Increased special education funding continues to be on hold. Senator Tom Harkin (D-IA), said he strongly supported the overall education bill. But Harkin, who led the movement to increase special education funding, vowed to pick up that fight again in 2002.

Some members of Congress weren't so conciliatory. "Congress has found tens of billions of dollars to bail out the airlines, help energy companies and give tax breaks to profitable corporations over the last few months," said Representative George Miller (D-Cal.). "But when children with special needs show up, we shut the door."

Nationally, about 6 million children receive special education services. Next year's reform of IDEA is

expected to wrestle with issues such as funding for Catholic schools, Early Intervention and home schooling.

STATE GOVERNMENT

MAJOR HEALTH CARE BILL ENACTED Parent Fees, Developmental Disability Issues At Center Stage

On January 15, the State Legislature passed a massive health care bill which converts Empire Blue Cross/Blue Shield - the largest health care insurer in New York State - to for-profit status and provides \$1.8 billion over the next three years to increase salaries for hospital, nursing home, personal care and some free-standing clinic workers.

Announcement of the deal, worked out secretly between Governor Pataki and Dennis Rivera, head of the giant health care worker's union - "1199" - triggered an explosion of controversy and was roundly blasted in papers like the New York Post and New York Times. When the Governor urged immediate passage, legislators, who hadn't seen a word of the huge bill or any of the hundreds of details in it, also erupted, angry at being shut out of the process.

Critics said the bill was an election year deal aimed at pulling the political rug out from under any Democratic challenger to Governor Pataki by creating an alliance between him and the enormously powerful, traditionally Democratic 1199 union. Good government advocates screamed that proceeds from the sale of Blue Cross/Blue Shield stock would be used as a "pay-off" to 1199 to buy the election.

To raise funds, the bill also imposes another major increase in the cigarette tax, taxes nursing homes and assumes that the federal Medicaid matching rate will jump from its historic level of 50% to 53%.

Lawmaking in Albany has long been described as "three men in a room," in reference to the secret meetings between the Governor, Assembly Speaker and Senate Majority Leader which decide key issues. But this made the secrecy of the past pale by comparison. "No men in a room," quipped Deputy Assembly Majority Leader, Ron Canestrari (D-Cohoes).

The few days between the Governor's unveiling of the bill and its passage were marked by stop and go progress as it seemed to fall apart one minute and come together the next. Initially, Assembly Speaker Sheldon Silver appeared to back away from the measure, saying that while he supported better wages for health care workers, he thought

the proposal needed more time. Ultimately, Assembly Democrats embraced the measure because, according to some commentators, they were hard pressed not to let Rivera and 1199 down.

Developmental Disability Issues, Parent Fees, Become Major Sticking Points

Issues detrimental to persons with mental retardation and developmental disabilities emerged as major sticking points in the bill, threatening at times to derail it.

Initial drafts imposed parental fees for Early Intervention services; slashed rates for Part Time Clinics serving persons with mental retardation and developmental disabilities by 35%; cut State payments for pharmaceuticals critical to consumers; and, reduced clinic payments for persons dually eligible for Medicaid and Medicare.

In protest, NYSARC and other major provider groups, including UCP, quickly joined in a telephone blitz to local State legislators. As advocates swung into action the proposal seemed to falter. Appearing irritated, Governor Pataki said, "everyone knows from budget negotiations that when interest groups get to take a shot at particular elements, they will do it."

The reductions against persons with mental retardation and developmental disabilities became the focus of much media attention in, among other sources, the New York Times and The New York Post. Special concern was paid to the imposition of parent fees for Early Intervention. Both Senate Majority Leader Joseph Bruno and Assembly Speaker Sheldon Silver expressed strong reservations with the fees. Dropping it became a condition for the bill's passage.

Legislators Approve Bill Then Read It

On Monday, January 14, Assembly Speaker Silver appeared to reject the measure declaring it closed door, backroom politics, without enough time for review and input by Assembly members. A few hours later, the Assembly struck a deal with the Governor and Senate. By Tuesday afternoon, January 15, the Legislature was moving toward passage of the bill that night. And by around three o'clock Wednesday morning the Assembly had approved Assembly bill 9610 by 102 - 34 and the Senate had passed Senate bill 6084 by 54-4.

When it was over, few members had gotten to even read the bill which was printed and handed to them as they walked into the Assembly and Senate chambers. Many were furious.

The Health Care Reform Act of 2002 was completed.

Items Of Support To NYSARC Approved, Deleted

All objectionable items to mental retardation and developmental disability advocates were eliminated from the final bill. No parent fees, cuts to part-time Article 28 clinics, pharmaceutical cuts or cutbacks in fees to dually eligible individuals getting clinic services were enacted.

Further, some items supported by advocates for persons with mental retardation and developmental disabilities were enacted. They included:

- Language preventing private health insurers from excluding Early Intervention services from their coverage and protecting families by prohibiting insurers from charging Early Intervention visits against annual or lifetime caps.
- A salary increase for "non-supervisory" workers at freestanding Article 28 diagnostic treatment centers which provide services to persons with developmental disabilities. The amount of the increase is not yet known. Lump sum amounts were appropriated in the bill and will be divided among clinics based on their portion of total (statewide) Medicaid visits.
- The Medicaid buy-in long sought by advocates for persons with disabilities. Working persons with disabilities can buy into Medicaid coverage if they are making up to 250% of the federal SSI poverty level, with a maximum of \$10,000 in resources.

The Centerpiece of The Bill

After passing the bill, the Governor and legislative leaders lauded the measure for finally providing funds necessary to recruit and retain necessary health care staff. Most though believe that the funding falls far short of the amount required to fix that problem, while others maintain that the bill is at heart a political, not programmatic, fix.

While specific numbers have not been developed, the salary hike given to healthcare workers - the centerpiece of the bill - appears to amount to 5%, 4% and 4% over three years, depending on region and setting - hospital, nursing home, personal care or clinic.

In total \$1.8 billion (including federal share) over 3 years is provided for "non-supervisory health care workers or any worker with direct care patient responsibility." Pay increases will be reflected in Medicaid rate adjustments and will drive a local share.

Other Benefits include expanded breast and cervical cancer screening (about \$10 million over the next three years).

Major Sources of Funds, Fiscal Gimmickery?

The bill authorizes an IPO, Initial Public Offering, to enable Empire Blue Cross/Blue Shield to sell stock and convert to for-profit status. That will raise over \$1 billion. Many blasted that as money to seal a deal with 1199.

\$1.8 billion of the bill depends on Congress increasing the New York State's federal Medicaid share to 53%. But many doubt that Congress will approve of the increase now that the federal government is back into deficit spending. "This is far from a sure thing. It's really a big question," said Cindy Mann of the Kaiser Commission on Medicaid.

The offices of New York's US Senators Schumer and Clinton also said that securing the higher Medicaid matching rate will be an uphill fight. Aides to several members of New York's Congressional delegation expressed surprise that the Governor would count on a source of funding so much in doubt.

Of the overall process of passing the Health Care Reform Act of 2002, Thomas Carroll, president of Change-New York, a conservative lobbying group that monitors State government, said "I've seen a lot of unseemly things in Albany, but I have never seen anything this politically cynical, this breathtakingly bad. There was no reason for urgency at all, but they did not want any scrutiny, any input, any public debate."

In either case, the passage of the Health Care Reform Act of 2002 effectively enacts nearly 30% of the entire State budget. That should make it easier for the Legislature to pass the remaining 70%, due to be presented to the public on Tuesday, January 22. Then providers serving persons with mental retardation and developmental disabilities will see what they get.

It has been rumored that OMRDD funding increases are based on additional federal Medicaid dollars. It is currently unknown how much of that money is predicated on the controversial assumption that the federal government will increase its Medicaid matching rate to New York to 53%.

NYSARC executive director Marc Brandt noted that "while some have become impatient with Governor Pataki over recent days, he has always been committed, sensitive and compassionate to persons with mental retardation and

developmental disabilities and their families. We have heard hopeful indications that his compassion will be reflected in the up-coming budget request."

2001 FINALLY TAKES SDMCs STATEWIDE Initiative Pushed By NYSARC In 1997

After years of limited use in a handful of counties, Surrogate Decision Making Committees (SDMC), established by the State Legislature in 1986, finally became operational in all New York State counties.

SDMCs are administered by the State Commission on Quality of Care for the Mentally Disabled. The volunteers and professionals who comprise SDMCs make major medical decisions on behalf of persons without the capacity to make their own decisions or without an authorized surrogate available to act on their behalf.

In 1997, SDMCs were limited to 21 of the State's 61 counties. Fiscal constraints kept the State from installing the Committees elsewhere. As a consequence, many persons with mental retardation required lengthy court approvals for medical procedures as routine as tooth extractions or as critical as invasive diagnostic procedures to detect cancer.

Acutely aware of the unnecessary danger and pain created by these delays, NYSARC began to push the Legislature to bring SDMCs statewide in 1996. In 1997 NYSARC, joined by advocates from United Cerebral Palsy Associations of New York State, took the issue directly to the Governor. Within weeks, the Governor made NYSARC's request part of his FY97-98 budget recommendations.

"In counties without SDMCs, it was an absurd and awful experience for many persons with mental retardation to find themselves dragged through the courts before being able to receive critical medical care," said NYSARC's director of governmental affairs, Ben Golden. "Where SDMCs were in place, the wait was practically eliminated. It was inexcusable not to have SDMCs throughout the State."

At public hearings held in 1984, witnesses told the Commission on Quality of Care about individuals waiting weeks for court's to approve dental care. Dental care is considered major medical care when it requires general anesthesia, as it does for many individuals with behavioral disorders. Delays of several months were reported for surgical procedures. A psychiatric facility averaged 57 days to process necessary court documents.

Now the average wait has been reduced to 13.6 days, according to the Commission on Quality of Care. Much faster approvals can be obtained on an expedited basis if a physician indicates that the need for care is imminent. Almost all decisions can be reached on the day of the nearing, though SDMCs reserve the right to request additional information.

Statewide expansion of SDMCs was officially complete on June 1, 2001 when SDMCs began operating in Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara and Orleans counties.

"We were delighted with Governor Pataki's responsiveness to the issue," said NYSARC executive director, Marc Brandt. "The program has saved thousands of individuals with mental disabilities a great deal of pain and suffering."

HCBS WAIVER PROGRAM GETS RAVE REVIEW IN 2001 Federal Audit Pays High Compliments

New York State's Home and Community Based Waiver (HCBS) program received high praise from the federal government in 2001 after an extensive audit by Health Care Financing Administration (HCFA). HCFA is the federal agency charged with overseeing Medicaid and Medicare.

HCFA stated that New York's HCBS Waiver program "more than substantially met its obligations and assurances" to provide quality care.

The HCBS program, first introduced in New York State in 1994, allows providers and consumers to tailor Medicaid services to meet individualized needs. In the past Medicaid services for persons with mental retardation and developmental disabilities were widely criticized as unnecessarily costly and rigid.

The HCBS waiver program has also enabled New York State to convert non-Medicaid programs to Medicaid and claim additional federal matching dollars.

The federal audit reviewed all HCBS Waiver programs in all 50 states from 1994 to 1999. According to the HCFA report New York State has "achieved an admirable record of quality services" and that "the growth of the Waiver and reduction of institutional placements is evidence of New York's success in developing a services system that supports people in the most integrated settings."

According to the State's Office of Mental Retardation and Developmental Disabilities "the State also received praise for its spirit of cooperation, overall operations and superior performance.... These include quality and oversight, opportunities for choice within an individualized service system, openness of communication with all constituents of the system....."

New York's HCBS Waiver program, with 37,000 enrollees, is larger and more complex than all of the other waiver programs across the nation. The program generates hundreds of millions in federal funding to pay for services.

According to OMRDD the flexibility of the Waiver program has allowed New York State to develop alternatives to nursing home and institutional placement.

In 1998 all HCBS Waiver programs across the nation totaled about \$4 billion. New York State's program, totaling nearly \$800 million, accounted for 20% of the total, far more than any other state.

OMINOUS STATE BUDGET PROSPECTS Mental Retardation Providers Upbeat, Mental Health Sees Disaster

Facing a \$9 billion State budget gap and the fallout from September 11, advocates for human services programs across the State are waiting anxiously for the Governor to release his FY 2002-2003 budget request to the State Legislature.

Advocates and providers of services to persons with mental retardation and developmental disabilities however are hopeful that expanded use of federal Medicaid funds will help avoid deep cuts in their programs - funded through the Office of Mental Retardation and Developmental Disabilities (OMRDD) - and perhaps provide increases in critical areas such as salaries for direct care workers.

For now though no one knows how much of the speculation about OMRDD's budget will become reality when Governor Pataki releases his budget shortly. "We'll see," said NYSARC's executive director, Marc Brandt.

However, for advocates for persons with mental illness, hopes are not high. Coming on the heels of nearly a decade of lean budgets, heavy staff turnover and the recent "barebones budget" a bad budget for mental health, according to advocates, could mean outright disaster.

"New York's mental health needs have never been greater," said Harvey Rosenthal, executive director of the New York Association of Psychiatric Rehabilitation Services. "This is the time to bolster our mental health services, not gut them."

The events of September 11 created an upsurge in demand for mental health services, according to experts.

In the last budget, Governor Pataki recommended a 2.5% pay hike for mental health workers, funded through savings generated by closing certain psychiatric centers. But legislators, concerned about the loss of jobs back in their districts, blocked the proposed closures.

The Governor also recommended a 10% Medicaid fee increase to make up for years of under-funding in outpatient clinics. But the barebones budget killed that. According to Rosenthal the final spending plan amounted to a \$40 million reduction.

And finally, the Legislature failed to extend the 1993 Community Reinvestment Act which had been the sole source of new funds for the mental health system. The Reinvestment Act transferred institutional savings to community mental health services. The Act expired last fall.

Mental health services did receive \$26 million in federal emergency aid after September 11. However the funding was earmarked for certain programs and could not be used to address systemic issues, such as low pay for direct care workers and staff turnover between 37 and 50%.

Governor Pataki's State Budget Division spokesman Kevin Quinn offered mental health advocates qualified support. Quinn said the Governor "will continue to be a strong ally and advocate for New Yorkers with mental illness while keeping in mind the fiscal challenges the State faces."

FROM THE COURTS

TENNESSEE COURT ENFORCED STATE EXECUTION BAN Judge Emphasizes "Evolving Standard of Decency"

The Tennessee Supreme Court ruled that executing persons with mental retardation is "cruel and unusual punishment" barred by the US Constitution as well as the Constitution of the State of Tennessee. The Tennessee ruling is in addition to an existing ban in that State against executing persons with mental retardation.

Writing for the Court, Justice Riley Anderson wrote that such executions violate "the evolving standards of decency that mark the progress of a maturing society both nationally and in the State."

Judge Riley's remarks were another indication of a growing national consensus against executing persons with mental retardation. Experts believe that the United States Supreme Court will be looking for such a consensus when it hears the case of Daryl Atkins and decides whether or not executing persons with mental retardation violates the Constitution's ban on "cruel and unusual" punishment (See this issue, "Government In Brief;" 2001 A Big Year For Death Bans)

The Tennessee ruling came on an appeal by Heck Van Tran, 35, who was sentenced to death for killing three people during a 1987 Memphis restaurant robbery.

Van Tran's lawyers argued that his execution would violate Tennessee law since his IQ is below 70. Tennessee law prohibits execution of individuals with mental retardation if their condition manifests itself prior to age 18. A lower court will determine if Van Tran meets that criteria.

WAL-MART HIT IN DISABILITY SUIT Cobleskill Distribution Center Cited

Two men with disabilities from Schoharie County, upstate New York, were part of a multi-million dollar settlement with Wal-Mart for the retail giant's violations of the ADA. The company agreed to a \$6.8 million settlement with the Equal Opportunities Employment Commission (EOEC). The settlement concludes 13 lawsuits in 11 states. It was one of the largest settlements ever under the ADA.

The settlement was announced in a Sacramento federal court.

The two Schoharie County men, Carl Burch, who has back problems, and John Bendall, who is partially blind, will receive nearly \$350,000 between them after having been subject to discriminatory hiring practices by Wal-Mart. Both men applied for jobs at a Schoharie County distribution center and were asked if they required job accommodations for disabilities on a pre-employment screening form.

The EOEC charged that the form was "an illegal screening device that Wal-Mart has not established to be job related and required by business necessity" and was, therefore, a violation of the ADA. The form was used at Wal-Mart stores from 1994 to 1996 and at its distribution centers from 1994 to 1998. Allegedly, job applicants were

disqualified as employees because of disabilities detected by the form.

Under the settlement Wal-Mart will pay \$3.8 million to 21 job seekers. The company will also create a \$3 million fund for other applicants with disabilities who can show that they were turned down for Wal-Mart jobs between 1994 and 1998.

As part of the settlement Wal-Mart will adopt new hiring policies to comply with the ADA and give preference to hiring individuals who have been victims of discrimination.

AROUND THE NATION

TEXAS GOVERNOR VETOES DEATH PENALTY BAN Reinforces State's "Bloodthirsty Image" Advocates say

Declaring that existing law already provides sufficient safeguards against executing persons with mental retardation, Texas Governor Rick Perry vetoed legislation specifically banning the practice. Advocates blasted Perry, saying that his veto would only reinforce the State's bloodthirsty reputation.

Perry made his announcement at a press conference, flanked by prosecutors and the families of murder victims.

"This legislation is not about whether to execute mentally retarded murderers. We do not execute mentally retarded murderers (in Texas) today," Perry said. Rather, he said, the legislation was "about who determines whether a defendant is mentally retarded in the Texas justice system."

The proposed ban, sponsored by State Senator Rodney Ellis, would have allowed Texas juries to declare whether or not an individual had mental retardation. The jury's decision could have been appealed to judges, who would consult expert witnesses. Expert witnesses, proponents maintain, may be critical because mental retardation is more complex than an IQ score.

But Governor Perry rejected that approach, warning it would undermine the Texas jury system. It "basically tells the citizens of the State (who are to be jurors) 'We do not trust you to get it right,'" the Governor said.

Governor Perry suggested that Texas juries don't sentence people with mental retardation to death. "The strong moral sentiments against executing the mentally retarded are something I share with most Texans. These are the very same Texans who serve on juries," the Governor said.

But advocates maintain that since 1982 Texas has executed six persons with mental retardation. Perry countered that all six individuals "knew what they were doing was wrong. These individuals don't fit the profile of the loving, impaired individuals that many of us know with mental retardation." The Governor cited the case of Oliver Cruz. " (Cruz) Kidnaped a woman jogger off the street, raped and killed her.... He scored 15 points higher than what proponents of the bill consider mentally retarded," Perry said.

Advocates maintain that factors other than IQ must be weighed, as the legislation the Governor vetoed would have required.

Senator Ellis said: "Frankly I'm embarrassed for Texas...Texas will continue to be remembered as bloodthirsty and callous. Governor Perry had an opportunity to show that we are not only tough on crime, but fair and compassionate. He missed that opportunity."

A 1989 United States Supreme Court ruling on Texas murderer John Paul Penry required juries to consider mental retardation as a mitigating factor. While Governor Perry cited this as the basis for current protections, State Senator Ellis said "in my view mental retardation should not be a mitigating factor, it should be a defining issue."

Ellis and other opponents of current Texas law also point to the case of Mario Marquez, whose 1995 death warrant

was signed by then Governor George W. Bush. Marquez had the adaptive skills of a 7 year old. His trial counsel testified at a clemency hearing that he did not present any evidence of Marquez's mental retardation because of a legal flaw in the Texas death penalty statute.

Marquez was executed on January 17, 1995.

STATE DEATH PENALTY
STATUTES COMPARED

States differ in their approach to banning execution of persons with mental retardation. A key issue is how states define mental retardation. Below is a state by state comparison - except for North Carolina (information not available) - of state laws banning execution of persons with mental retardation.

State	Definition of Mental Retardation	Qualified Examiners
Arizona	A condition based on a mental deficit that has resulted in significantly subaverage general intellectual functioning existing concurrently with significant limitations in adaptive functioning, where the onset of the forgoing conditions occurred before the defendant reached the age of eighteen.	Requires the trial court in a capital case to appoint a licensed psychologist to conduct a prescreening evaluation to determine the defendant's IQ.
Arkansas	Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning, and manifested in the developmental period. The age of onset is 18. There is a rebuttable presumption of mental retardation when the defendant has an IQ of 65 or below.	There is no information on this aspect of the statute.
Colorado	Any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirements for documentation may be excused by the court upon a finding that extraordinary circumstances exist. The court does not define extraordinary circumstances. The law does not give a numerical IQ level.	There is no information on this aspect of the statute.
Connecticut	Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. (as defined in Conn. Gen. Stat. § 1-1g (2001))	There is no information on this aspect of the statute.
Florida	Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.	Court-appointed experts in the field of mental retardation shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing.

State	Definition of Mental Retardation	Qualified Examiners
Georgia	"...Significantly subaverage intellectual functioning resulting in or associated with impairments in adaptive behavior which manifests during the developmental period."	Court-appointed licensed psychologists or psychiatrists; or physicians or licensed clinical psychologists chosen and paid for by the defendant.
Indiana	An individual before becoming 22 years of age manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior that is documented in a court-ordered evaluative report.	State does not specify if the court can appoint psychologists or psychiatrists. Attorneys should probably obtain this information from trial court at pre-trial.
Kansas	An individual having significantly subaverage general intellectual functioning to an extent that substantially impairs one's capacity to appreciate the criminality of one's conduct or conform one's conduct to the requirements of law. The statute does not define adaptive behavior or the age of onset. However, Kansas law defines these terms. Adaptive behavior refers to the effectiveness of personal independence and social responsibility expected of that person's age, cultural group and community. The age of onset must be prior to 18 years old.	There is no information on this aspect of the statute.
Kentucky	A significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period. The age of onset is 18 years old. Significantly subaverage general intellectual functioning is defined as an IQ of 70 or below."	There is no information on this aspect of the statute.
Maryland	An individual who has significantly subaverage intellectual functioning as evidenced by an IQ of 70 or below on an individually administered IQ test, and impairment in adaptive behavior. The age of onset is before the age of 22.	There is no information on this aspect of the statute.
New Mexico	Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An IQ of 70 or below on a reliably administered IQ test shall be presumptive evidence of mental retardation.	There is no information on this aspect of the statute.

State	Definition of Mental Retardation	Qualified Examiners
Nebraska	Mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An IQ of 70 or below on a reliably administered IQ test shall be presumptive evidence of mental retardation.	There is no information on this aspect of the statute.
New York (except for murder by a prisoner)	The statute uses the most recent American Association on Mental Retardation definition (1992). The NY statute does not list specific levels of intelligence, nor does it go into detail regarding adaptive skills.	No specifics noted - "Psychiatrist, psychologist or other trained individual."
South Dakota	Mental retardation means significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas. An IQ exceeding 70 on a reliable standardized measure of intelligence is presumptive evidence that the defendant does not have significant subaverage general intellectual functioning. Mental retardation must have been manifested and documented before the age of 18 years.	A psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the state's attorney, for the purpose of rebutting evidence offered by the defendant.
Tennessee	(1) Significantly subaverage general intellectual functioning as evidenced by a functional IQ of 70 or below; (2) deficits in adaptive behavior; (3) the mental retardation must have been manifested during the developmental period or by age 18. The state does not define "deficits in adaptive behavior." The statute clearly provides that adaptive behavior and intellectual functioning are independent criteria.	There is no information on this aspect of the statute.
Washington	The individual has (1) significantly subaverage general intellectual functioning; (2) existing concurrently with deficits in adaptive behavior; and (3) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period. The age of onset is 18 years of age. The required IQ level is 70 or below.	A court-appointed licensed psychiatrist or psychologist experienced in the diagnosis and evaluation of mental retardation. This leaves open the issue of whether or not the defendant may hire his own expert.
Federal Government	In 1994, Congress adopted legislation to ban the execution of individuals with mental retardation. The statute stated that a sentence of death shall not be carried out upon a person who has mental retardation. The statute does not define mental retardation, or discuss at what state in the criminal proceedings the determination of mental retardation must be made. Earlier, Congress had also provided a form of an exemption for this issue in the Anti-Drug Abuse Act of 1988 (pub. L. No. 100-690).	

WOMAN WITH DOWN SYNDROME
FORCIBLY HOSPITALIZED
Court Rules City Did Not Violate ADA

Myra Anthony called 911, complained her husband beat her, that he had a gun and a knife and that she was 5 years old. When police arrived Anthony, who has Down syndrome, was incoherent and alone in her apartment. She explained that she dialed 911 after selecting it randomly in the phone book.

Believing that she posed a danger to herself, police handcuffed Anthony and took her for evaluation at a hospital psychiatric ward where doctors found her delusional and paranoid. After she was released, Anthony sued the City of New York claiming discriminatory treatment in violation of the ADA.

Anthony charged that the presumption that she could not handle her own affairs was based on her Down syndrome and was therefore discriminatory.

Anthony lives with a half sister, is able to dress herself, prepare meals and eat with supervision.

A New York Federal court agreed that Anthony's disability was covered under the ADA. But the Court also stated "it was objectively reasonable for the officers to conclude from the totality of the circumstances that Anthony posed a danger to herself and that they were justified in removing her from (her half sister's) apartment and taking her to the hospital."

Summary judgement was granted to the defendants and the case was dismissed.

WESTCHESTER COUNTY
REACTS TO BUDGET EMERGENCY
Cites September 11,
Services for Children with Disabilities

Facing dire State economic forecasts, increased security costs from the threat of terrorism, and sharply rising costs for preschool children with disabilities, Westchester County Executive Andrew Spano proposed a 9.5% property tax increase in the county's proposed 2002 budget.

"This is directly related to September 11," Mr. Spano said. "It affects our economy, which effects our sales tax and hotel taxes."

"We're getting less money from the State, not that I'm blaming them, they have got their own problems, but it's money we're not getting." Spano added.

Most of the additional tax revenue, Mr Spano said, is for the increased cost of State and federally mandated programs including services for preschool children with disabilities and Medicaid. This year Westchester County's budget is slated to increase by \$55.4 million.

According to NYSARC's Executive Director, Marc Brandt, "how we treat our most vulnerable citizens during the worst of times, not the best, defines who we are as a nation, a state and country. County dislike of preschool programs predates the events of September 11. It's a bit disingenuous for Westchester to lump it in with other complaints that are legitimately related to 9/11."

The proposed budget also includes \$13.4 million for security related to the September 11 attacks, including 55 new policemen for the Westchester County Airport. Additional airport security is necessary to comply with new, stringent Federal Aviation Agency airport security standards.

MEDICAID CUTS HIT MASS BUDGET Elderly, Persons with Disabilities Hit

Reflecting the economy's squeeze on state budgets, Massachusetts announced Medicaid cuts aimed at physician services for persons with disabilities and the elderly. Specifically, the cuts will reduce payments to physicians seeing individuals who are dually eligible for Medicaid and Medicare.

The move is expected to save the State \$24 million.

Speaking for Massachusetts' physicians serving the elderly and persons with disabilities, Dr. Francis X. Rockett, president of the Massachusetts Medical Society, said that with the rising cost of doing business "....doctors who are willing and able to cover these patients are not going to be able to keep their practices open, and patients are not going to be able to find other doctors to see them."

Doctors say that fees paid under Medicare and Medicaid don't even cover their cost of doing business. While they hope to convince Massachusetts Acting Governor Jane Swift to veto the proposed cuts, they don't believe she will do it. "Given the financial times we're dealing with, it's a reasonable policy," said Rich McGreal, spokesman for the Medicaid program.

Low Medicaid rates have been an issue in New York State for years. Many advocates are concerned that the State's budget, due to be released by Governor Pataki on January 22, may cut the State's Medicaid rates even further.

INSTITUTIONAL APOLOGISTS DECRY STATE BUDGET Voices of Retarded Weary of Illinois Fiscal Crisis

Weary of their State's budget crisis, Illinois advocates for institutional care warned state policy makers not to balance the Illinois budget on the backs of institutions caring for persons with mental retardation.

The Voices of The Retarded (VOR), a group which has long advocated for institutional care for persons with mental retardation, has stirred controversy in the past for opposing initiatives aimed at advancing community based alternatives. According to the organization "state officials continue to be bombarded with false allegations that large facilities ("institutions") are horrible places that cost too much. Anyone who has visited these facilities in the last 20 years can attest that they are not 'warehouse' settings and, instead, provide high quality 24 hour support."

The organization said that "community based programs are not always less expensive. Care for facility residents whose needs are intensive, will be costly no matter the setting.... (some studies) have even found (community based care) more expensive. Quality and safety concerns regarding community based settings have also been raised across the country."

The organization blasted community based advocates and warned Illinois officials not to listen to them. Reformers, it said, "are no longer 'unwilling accomplices.' They are deliberate in their efforts to rob from Peter to pay Paul. In the process, policymakers become the unwilling accomplices looking for easy answers to hard fiscal questions. In the end, people with disabilities will pay the price."

Commenting on the VOR remarks, NYSARC executive director, Marc Brandt, said "they've got a reputation for being 50 years behind the times. The stone age philosophy of the group was abandoned decades ago. After a quarter century of experience it is clear to everyone but them that good institutional care is inferior to good community care any day of the week."

VOR's statement was jointly developed with Rita Burke president of the Illinois League of Advocates for The Developmentally Disabled. Burke, representing the League, issued a dissenting opinion when Illinois developed a plan to place individuals in the community as required by the US Supreme Court in the *Olmstead* decision.

Burke said "any language (in the plan) that suggests that all people can be served in the community, or that institutions serving those in need of institutional care should be closed, is not subscribed to by the Illinois League of Advocates for the Developmentally Disabled nor by me as their representative."

"Some people not only harken back to the past," said Brandt of Burke's remarks, "but belong in it."

NATION'S GOVERNORS WANT MORE MEDICAID Big Lift To NY Developmental Disabilities Programs

For years New York State officials have complained that the State has been shortchanged by a federal Medicaid contribution which doesn't recognize the State's real needs for the Medicaid population. The federal government currently reimburses the State 50% of its Medicaid costs.

That problem could be temporarily solved if the nation's Governors have their way.

Attempting to inject their priorities into the ongoing national debate over an economic stimulus package, the National Governor's Association (NGA) proposed a time limited increase in the federal contribution to state Medicaid costs. The NGA touts the plan as an "economic stimulus option" aimed at pumping funds into the sagging economy and shoring up soaring state Medicaid costs. The Governors note growth in Medicaid spending, coupled

with lagging state revenues, is "forcing drastic cuts in state budgets across the country."

Under one version of the plan, New York's federal Medicaid share would grow from 50% to 60% of its total costs. That could mean an additional \$3 billion in federal revenue to the State and as much as \$400 million in additional funding for programs serving persons with mental retardation and developmental disabilities.

Recently, New York passed major legislation (see this issue, "Government in Brief": "Major Health Care Bill Enacted") which assumes that the State's Federal Medicaid share will rise to 53%.

Medicaid now pays for over 90% of services to persons with mental retardation and developmental disabilities in New York State.

According to the National Association of State Budget Officers (NASBO), states face an aggregate current year budget shortfall of \$15 billion, reflected in every region of the nation. Examples include: New York and California, \$3 billion; Ohio, \$1.5 billion; and Massachusetts, \$1.1 billion. Other states facing serious budget problems include Kentucky, which has a \$429 million gap, and Illinois estimates a \$450 million shortfall.

New York's \$3 billion shortfall is expected to increase by another \$6 billion in the next state fiscal year.

The NGA said that "States cannot provide services for new people coming on to the Medicaid rolls in their current financial situation. It is as simple as that. At a time when states have been asked to assume an unprecedented role in our national security efforts, we are also dealing with declining state revenues that have gotten worse since September 11. If Congress is serious about a stimulus package they need to help the states. A temporary increase in the federal share for Medicaid is the right step to take now."