GOVERNMENT In Brief

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

Volume 12, Number 2

July/August 2000

TOP STORIES...

INSIDE STORIES:

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

FROM WASHINGTON

TENTH ANNIVERSARY OF ADA CELEBRATED
Vice President Kicks off Celebrations

Vice President Gore led White House celebrations of the 10th Anniversary of the signing of the ADA by announcing a series of initiatives aimed at improving the lives of people with disabilities.

The ADA was signed 10 years ago by President George Bush, father of Gore's rival for the Presidency, Texas Governor George W. Bush.

Initiatives include a $50 million proposal to help states offer services to people with disabilities in least restrictive settings; directives to state Medicaid directors on Medicaid coverage for home and community based services to comply with the recent Olmstead Supreme Court ruling; and a new public-private partnership between the Administration and the National Program Office on Self-Determination to transition individuals with disabilities from institutional to community based settings.

Vice President Gore also addressed opening ceremonies at a conference sponsored by the National Council on Independent Living. The Vice President and Mrs. Gore then hosted a reception in honor of the ADA. The reception featured an exhibit on assistive technology and music by Peter Yarrow.

Additional ADA celebrations included a commemoration of the event at the FDR Memorial by President Clinton and the First Lady.

Other initiatives announced by the Vice President include plans to increase home ownership for persons with disabilities; extend work incentives; provide a broader range of housing assistance programs; and promote the development of new assistive technology for people with disabilities. Also announced was a strong Patients' Bill of Rights; a $1,000 tax credit for work-related expenses for people with disabilities and a $3,000 long term care tax credit for Americans with long-term care needs.

"I am proud of the progress we have made at turning the goals of the Americans with Disabilities Act into reality," Vice President Gore said. "I can think of no better way to build on our progress and celebrate this day than by taking steps towards assuring that Americans with disabilities have the opportunity to live and work in their communities if they so choose."

The Vice President said that the initiatives are aimed at bringing people into the community, out of institutional settings. "No one," he said, "should have to live in an institution or nursing home if they prefer to live in the community with the right support."

The Vice President made enforcement of the Supreme Court's Olmstead decision a priority. The Vice President's Office said: "States and disability advocates have confirmed that the lack of (federal) guidance is undermining their ability to rapidly initiate and provide access to essential home and community based services necessary to be in compliance with Olmstead. "

New directives to enforce Olmstead, said Gore's Office, will state that "individuals do not have to be confined to their homes for personal assistance services to be covered under the Medicaid home health benefit, and that to require people receiving these services to be confined to their homes is a violation of the Medicaid statute; States with home and community based services are allowed to pay for personal assistance services while waiver participants are hospitalized or away from home; States can receive Federal funding for targeted case management for individuals leaving institutions for community residences in order to facilitate their access to necessary medical, social, and educational services in the community; and States have the option to provide prevocational, educational, and supported employment services under Medicaid waivers to people of all ages in all target groups."

STATE GOVERNMENT

LEGISLATURE FINALLY AGREES ON FINGERPRINTING

But Not This Year for Developmental Disabilities

For nearly the last decade NYSARC has fruitlessly attempted to gain legislative authorization to obtain the fingerprint records and criminal histories of prospective employees. The need for the information has become more critical as chapters and other mental retardation providers have been forced to dig deeper into the labor pool to keep positions filled in the face of record staff turnover rates.

Especially frustrating is existing, long-standing authority for state-operated programs to check for criminal histories while not-for-profit providers are denied the same authority.

A statewide fingerprint registry is maintained by DCJS (The Division of Criminal Justice Services).

What's been the hang up? Experts point to the State Assembly where civil liberties concerns over access to criminal histories seemed to have dominated the house's position on the issue for years. And again this year, while Senate bill 2102 by Libous passed the Senate, Assembly 6410 by Klein died in the Assembly.

However, events over the recent session could provide NYSARC with a breakthrough. The Assembly and Senate were finally able to agree to legislation authorizing childcare providers (Senate bill 7837 by Vellela, Assembly bill 11525 by Green), school districts and boards of cooperative educational services (Senate bill 1031 by Saland, Assembly bill 1539 by Kaufman) to run criminal background checks on prospective employees.

Conversations with Assembly staff suggest a willingness to finally extend the same authorization to not-for-profit providers of service to persons with mental retardation and developmental disabilities next legislative session.

In a letter to Assembly Speaker Sheldon Silver, NYSARC executive director Marc Brandt, praised the Legislature for giving childcare providers and school districts the authority to perform criminal background checks.

Brandt wrote, "Few would dispute that extending this authority to these entities is long overdue. They are charged with caring for the State's children.....It is encouraging to see both houses move beyond their differences to address this fundamental concern."

Brandt added, "Similarily the parents of our organization have the same concern for their children. With rapid staff turnover in our programs, with recruitment of qualified staff increasingly difficult, it is especially critical for us to be able to check the criminal history of the people we hire. Persons with mental retardation and developmental disabilities are extraordinarily vulnerable. In the wrong hands, they can easily become victims."

Brandt noted that, "We are eager to work with the Assembly to afford persons with mental retardation and developmental disabilities the same protections extended by both houses of the Legislature to children in childcare and our State's schools."

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..... Marc N. Brandt, Executive Director
NYSARC, Inc.

NYSARC has already commenced discussions with other mental retardation providers on next year's approach to fingerprint legislation. For the first time in a decade, there was an air of cautious optimism about the prospects.

"We'll be looking closely at what (background check) was passed this year. It will no doubt be the model for anything we might expect to get next year," said Ben Golden, NYSARC's associate executive director for governmental affairs.

LEGISLATIVE SESSION ENDS WITH MIXED RESULTS

On June 15 the New York State Legislature went home for the year. The relatively early adjournment was hastened by the desire of legislators to begin campaigns in preparation for Fall elections.

For NYSARC, Inc. and other providers and advocates, the session was mixed. The FY 2000-01 State budget stands out as one of the best in memory. The second year of New York State CARES was fully funded; a 5% trend factor was given to most Medicaid programs; and a $750 wage bump was given for direct care and support staff in all other programs.

NYSARC also took an active role in key bills including legislation authorizing state control of certain decisions now made by voluntary agencies; legislation authorizing Article 17-A guardians of persons with mental retardation to withdraw or withhold life support (See Government in Brief; April, 2000 "Cruel Death and New York Law); and, legislation on "preferred source contracting" for work performed by persons with mental retardation and developmental disabilities.

<u>Trust Legislation Flounders</u>

NYSARC worked hard on legislation (Senate bill 5985 by Spano, Assembly bill 8665 by Brennan) to comply with a State Court of Appeals ruling on "OBRA `93" Medicaid trusts, established by Congress as part of the Omnibus Reconciliation Act of 1993 (OBRA `93).

The Court of Appeals ruling barred persons with disabilities from placing the proceeds from a personal injury award into an OBRA `93 trust before government can recoup its past Medicaid costs from the award.

Advocates though believe that the Court of Appeals ruling violates OBRA `93. The law, they claim, allows individuals with disabilities to place proceeds from a personal injury award into an OBRA `93 Supplemental Needs Trust. Only after the death of the beneficiary, can government claim its costs from whatever amount remains.

To enforce the federal law, NYSARC pursued the course recommended by the Court of Appeals: clear authorization by the Legislature allowing persons with disabilities to place proceeds from an award into an OBRA `93 Trust without government confiscation.

"We were reasonably certain our bill would pass the Assembly and that it would hit a wall in the Senate," said Ben Golden, NYSARC's director of governmental affairs. "To drill through that wall, we needed to get the bill through the Assembly with plenty of time to work."

But there wasn't plenty of time. A failed coup attempt against Assembly Sheldon Silver shut that house down for weeks.

The bill passed the Assembly with a mere three days to go in the legislative session.

"That didn't help us," said Golden.

Neither did county opposition to the bill, especially from Nassau, Suffolk and Westchester. All three are Republican strongholds with close ties to the Republican Majority in the State Senate.

"Who in their right mind would settle a case knowing that the counties are waiting to take any settlement away from them? Who would even bother to initiate a case under the circumstances? Counties are shooting themselves in the foot by discouraging cases to proceed from which they eventually derive a financial benefit."
. . . . . Sonia Crannage, Attorney

Counties believe the bill would allow persons with disabilities to keep "windfalls" without having to repay past county Medicaid expenses for their care.

Advocates however argue that county reasoning is false.

"Who in their right mind would settle a case knowing that the counties are waiting to take any settlement away from them? Who would even bother to initiate a case under the circumstances?" said Sonia Crannage, a parent of a daughter with mental retardation and expert attorney in trust law.

"Counties are shooting themselves in the foot by discouraging cases to proceed from which they eventually derive a financial benefit."

Advocates frustrated with the State Legislature are not likely to find any relief from Washington, where OBRA `93 was first enacted.

According to advocates in Washington, Congress could use any attempt to fix the law to gut it altogether. "They don't like OBRA `93," said Martha Ford of the Arc-US.

Preferred Contracting Goes Down To the Wire

New York State's Preferred Source Contracting law allows not-for-profit agencies serving persons with disabilities to provide goods and services to the State without complying with competitive bidding requirements.

Many supported and sheltered work programs owe their existence to the Preferred Source law. When enacted in 1995, it included a five year "sunset" provision. On June 30th the "sunset" was up. Without extending it, many work programs were threatened.

Preferred Source work, however, is a very small proportion of general State procurement, totaling tens of billions of dollars a year. The law governing general State procurement was also set to sunset on June 30, 2000.

Extension of general State procurement authority quickly became a source of bitter controversy, between the State agency responsible for it - OGS (Office of General Services) and the State Assembly.

Issues, among others, included recycling; apportionment of State contracts between various regions of the State; and, work for women and minority owned businesses.

While Preferred Source contracting was not controversial, both sides refused to extend it until the other side "was reasonable" on issues pertaining to general State procurement.

To many advocates it seemed that Preferred Source was being held hostage by the two sides who routinely charged the other side with threatening employment programs for persons with disabilities by not being reasonable on general procurement issues.

As the end of session approached the sides dug in their heels. While the Assembly professed support of Preferred Source Contracting, Assemblywoman Susan John (D-Rochester), head of the Assembly negotiating team on the issue, told NYSARC we are "prepared to let that program expire" unless OGS can strike a reasonable agreement with us on general procurement issues.

Finally, with three days left in the legislative session, a deal was struck. Legislation (Senate bill 8226 by Goodman, Assembly bill 11523 by John) was finally enacted with hours to go. The Governor signed the measure two days after it was passed as Chapter 95 of the Laws of 2000.

The new sunset expires in 2005.

NYSARC had worked closely with the New York State Industries for the Disabled (NYSID) on the extension of the sunset. NYSARC and NYSID informally agreed to work together during the next legislative session to eliminate the sunset altogether and make the program permanent.

Next Legislative Session

In addition to eliminating the Preferred Source contracting provision, key legislative initiatives for next year will again include OBRA `93 legislation; legislation authorizing 17-A Guardians to withhold or withdraw life support; and, once again, legislation enabling providers to check prospective employees for criminal histories

(See "Government In Brief;" this issue: "Fingerprint Breakthrough").

NYSARC is using the Legislature's summer/fall break to obtain information key to advancing legislative initiatives next session. They include, incidents which illustrate the need to check employees for criminal histories; examples of persons with mental retardation who are suffering due to New York's law effectively barring them from withdrawing or withholding life support; and, instances in which personal injury lawsuits or injury settlements are not being pursued because of concern that government will confiscate any proceeds.

COMPTROLLER PREDICTS FUTURE BUDGET GAPS

McCall Critical of FY 2000-01 State Budget

While mental retardation and developmental disabilities advocates and providers celebrated the best budget in memory, State Comptroller Carl H. McCall maintained that the State missed the opportunity to pay down its whopping debt load, creating the likelihood of large budget gaps in the future.

McCall made his remarks in the "2000-01 Budget Analysis, Review of the Enacted Budget" issued by the Office of the State Comptroller in June.

According to McCall "Now at the peak of a national trend of economic growth, this year's budget misses the substantial opportunity we now have to pay down debt and make serious and needed reforms to foster longer term fiscal stability."

"Instead the budget increases general fund spending," McCall added, "at nearly three times the rate of inflation, maintains significant out-year-gaps, and continues the harmful borrow-to-spend practices that have given New York a debt load higher than almost every other state."

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"The budget contains back loaded tax cuts with no plans to pay for them in the out years," said the Comptroller. Back loaded tax cuts are enacted in one year but don't take effect until future years. They have caused budget experts to routinely predict State budget deficits because of future shortfalls in State revenue. So far those deficits haven't materialized, primarily due to the booming State economy.

The Comptroller cited several key reasons to explain why the FY 2000-01 budget was easily balanced:

- Underlying tax collections continue to be robust. Most of the strength is in the personal income tax and is driven, in part, by the boom in incomes led by strong financial markets.

- Growth in entitlement programs continues to be manageable, with public assistance caseloads declining and moderate Medicaid growth.

- The 1999-00 fiscal year closed with a surplus of $1.6 billion of which $1.5 billion was used to offset FY 2000-01 budget costs.

The Comptroller warned that future fiscal years may not benefit from factors contributing to the current good times. "The fiscal health of the State continues to improve as receipts consistently outpace expectations and spending is less than projected. Strength in the financial markets is driving much of the State's economic success - but this growth cannot continue indefinitely."

McCall estimated that future budget gaps will be approximately $3.0 billion in 2001-02 and $4.9 billion in 2002-03.

FROM THE COURTS

GARRETT CASE COULD DECIDE ADA
Fall Date Before The Supreme Court

Are substantial portions of the Americans with Disabilities Act (ADA) unconstitutional?

That's the biggest question before the nation's disabilities community and the Supreme Court is expected to answer it in the Fall. Advocates have been anticipating a constitutional challenge to the ADA ever since states began raising 11th Amendment objections to the law in federal courts.

The 11th Amendment prohibits legal action against state governments in federal courts, unless it is for a violation of the 14th Amendment requiring that all citizens receive equal treatment before the law. Years of case law have upheld the authority to sue states in federal court over civil rights issues, based on a systemic pattern of discrimination against racial minorities pre-dating the Civil War. But can people with disabilities claim a similar pattern of abuse by states?

The Case: *University of Alabama v Garrett*

It's ironic that the ADA's big challenge comes from Alabama where the civil rights movement was so violently tested during the 1960's.

The Garrett case is really two cases combined at the trial level. Patricia Garrett sued the University of Alabama for demoting then firing her after she was treated for breast cancer. Milton Ash, a State correction officer with asthma, sued Alabama's youth corrections agency for failing to enforce anti-smoking rules. Both cases were initiated against Alabama based on the ADA.

The Eleventh Circuit found in favor of the plaintiffs and the State of Alabama took the matter to the Supreme Court. The High Court will hear the case this fall.

Implications

While *Garrett* involves persons with physical disabilities, advocates believe the implications of the Supreme Court's decision, expected to be released in the Spring, could be profound for persons with menta disabilities.

According to the Bazelon Center for Mental Health Law "an adverse decision could reach beyond the ADA's protections governing public employment to eliminate all of Title II, which bans discrimination in access to public services such as education, health and mental health and other programs operated by states and localities. Furthermore....if the court were to rule against the ADA it might also, in a later case, declare Section 504 (of the Rehabilitation Act) unconstitutional." Section 504 has been a longtime bulwark against certain forms of disability based discrimination. It predates the ADA.

Perhaps the single most stunning setback for persons with disabilities, according to the Bazelon Center, would be a nullification of the Supreme Court's own *Olmstead* decision. That recent landmark decision, based on the ADA, gave persons with disabilities the power to force states to place them into community settings if they could show that such placements would benefit them.

Taking away the ability of persons wit disabilities to use the ADA against states, based on the 11th Amendment, would pull the rug out from under *Olmstead*.

Amicus Brief Due

Meanwhile advocates are rallying to get states to sign onto an "Amicus Brief" in support of *Garrett's* plaintiffs.

Numerous advocacy groups in New York State, including NYSARC, worked to encourage State Attorney General Eliot Spitzer to sign onto an amicus brief supporting the constitutionality of the ADA. The brief is being prepared by the State of Minnesota and is due to the Court by August 11.

As part of the effort to convince Spitzer, advocates successfully got the Assembly and Senate to pass resolutions supporting the constitutionality of the law. Both houses passed the resolutions just prior to the State Legislature's adjournment.

Writing to Spitzer , NYSARC executive director Marc Brandt stated: "Should the Supreme Court rule that 11th Amendment immunity applies, the consequences to the ADA and the people with disabilities it protects, would be devastating. (The ADA).....recognized the need to remedy a systemic pattern of discrimination against (people with disabilities).

"The ADA is to people with disabilities what the Civil Rights Act of 1964 is to minorities. It is inconceivable that New York State or any other state, would ever entertain the notion of repealing the Civil Rights Act. Yet, states, led by Alabama and Hawaii, are actively seeking repeal of substantial portions of the ADA."

"On behalf of our Association, I urge you not to join any effort to undermine the ADA but rather to become party to the amicus brief now being prepared by Minnesota supporting the constitutionality of the ADA."

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Initially it appeared that Spitzer was reluctant to support the Minnesota brief. In fact, sources indicated that Spitzer informally supported a ruling against *Garrett* . Such ruling would have simplified the Attorney General's job of defending the State from ADA suits. Had Spitzer opted to formally oppose *Garrett*, the Senate and Assembly resolutions, passed by Republicans and Democrats alike, would have put him in the uncomfortable position of being the odd man out, especially since he is known as a liberal Democrat.

However, in July Spitzer formally agreed to sign onto the suit. Andrew Chilli, director of the Attorney General's Civil Rights Division, thanked NYSARC for its input. Spitzer, he said, was supporting the ADA since "it's the right thing to do."

TEXAS DEATH PENALTY
Federal Court Concludes Mental Retardation Not Considered

Nearly ten years ago a policeman stopped Alberto Valdez for speeding. Valdez panicked, grabbed the policeman's gun and shot him dead.

Valdez was convicted of murder and sentenced to death. Subsequent appeals in Texas courts upheld the conviction and the sentence. Throughout the proceedings, Valdez's mental retardation was never raised as a mitigating factor.

In 1999 the case made its way into federal district court. Noting that the defendant's mental retardation was never raised, the district court ordered the State of Texas to either hold new sentencing proceedings or vacate the sentence and substitute one less harsh. The district court noted that attorneys representing Valdez, Carl Lewis and David Gutierrez, never reviewed Valdez's background, let alone presented evidence of his mental retardation to the jury.

Further, the district court noted that in subsequent appeals, the State court improperly excluded evidence of Valdez's mental condition. After a 1974 auto theft, a court ordered evaluation concluded that Valdez had mental retardation, organic brain damage, poor social skills and impaired judgement. Separate all factors which a jury might conclude accounted for his panic and subsequent shooting of a police officer at the traffic stop, thus mitigating his culpability.

The State of Texas argued that Valdez's attorneys opted not to offer mental retardation as a defense because they had IQ test results of 87, above the cutoff point for mental retardation. The district court rejected the State's argument. It said that said that Valdez' attorneys had an obligation to investigate the matter further.

The district court based its ruling on a 1989 United State Supreme Court ruling in *Penry v Lynaugh*.

In *Penry* the Supreme Court ruled that while mental retardation did not disqualify an individual from receiving the death penalty, "when mitigating evidence of mental retardation ... is presented, Texas juries must ... be given instructions that allow them to (consider) ... that mitigating evidence in determining whether to impose the death penalty."

In the Valdez case, the Supreme Court's mandate was not followed.

WE DON'T HIRE "THOSE KIND OF PEOPLE"

Alleged Remark Backfires In ADA Case

What's we don't "hire those kind of people" really mean when the comment is made about a person with mental retardation? Is it sufficient grounds to prove intentional discrimination against an employee based on their disability?

Donald Perkl, a man with mental retardation and autism, worked as a janitor at Chuck E. Cheese. When Chuck E. Cheese's district manager, Donald Creasy, visited the restaurant he told Brea Wittmer, the restaurant's manager, to fire Perkl because allegedly it was the restaurant's policy not to hire "those kinds of people."

Three weeks later Perkl still had his job, so Creasy himself fired the employee. Perkl then sued CEC Entertainment Inc., owner of Chuck E. Cheese, claiming that it had violated Title I of the Americans with Disabilities Act (ADA) which protects individuals with disabilities from discrimination in employment.

During a subsequent proceeding in Wisconsin federal court Creasy's alleged statement that we don't "hire those kind of people" was closely scrutinized.

Despite his alleged remark, Creasy denied terminating Perkl based on his disability. Instead, he claimed that Perkl's termination was part of the restaurant's business plan to cut costs by reducing staff. Another employee confirmed that Creasy told her the business plan required elimination of Perkl's janitorial position.

But Creasy's comment about not "hiring those kind of people" wouldn't go away. Especially since he made the same comment about another employee with mental retardation. CEC maintained that "those kind of people" doesn't explicitly identify a group and could apply to a variety of persons. It did not, CEC argued, necessarily apply to persons with mental retardation.

But the Court ruled that the remark need not explicitly refer to an individual's protected status. Rather, the Court said, it is reasonable to conclude that since the statement was obviously meant to apply to Perkl, it was reasonable to conclude that "those kind of people" meant persons with mental retardation.

Based on this reasoning, the federal district court upheld the jury verdict in Perkl's favor.

CALIFORNIA SUIT SEEKS PARITY

Pay, Turnover Issue Reaches Boiling Point In Sanchez v Johnson

With unemployment at an all time low, finding and keeping staff is a bigger problem than ever for the nation's not-for-profit providers of service to persons with mental retardation and developmental disabilities. In California it's gotten so bad that providers and advocates are suing the State.

The case, *Sanchez v Johnson*, asserts that California has created a huge wage gap between its own employees and employees of voluntary programs. State employees are paid relatively generous salaries while State reimbursement to voluntary providers severely constricts what they can pay their employees.

Plaintiffs argue that low wages have led to out of control staff turnover in California's voluntary community agencies making it impossible to create new programs, unlawfully forcing persons into institutions for lack of any alternative.

Advocates and providers initiated the *Sanchez* case after years of fruitless effort in the State Legislature to resolve the pay gap - the "parity issue" - between State and voluntary mental retardation workers.

Now, in the first legal case of its kind, they have taken the "parity issue" to court. Many other states embroiled for years in parity disputes are watching closely.

Estimates set a $400 million price tag on achieving "parity" between California's State and voluntary workers. According to the plaintiffs, State salaries average 122% more than State reimbursement rates allow not-for-profits to pay their employees. That's the largest state/voluntary pay gap in the nation. While "parity" has also been an issue in New York State for years, the State/voluntary pay gap is a *relatively* low 25 to 30%.

California programs average 50% per year. In New York State the average is closer to 30%.

The California case is based on a number of federal laws including Section 504 of the Rehabilitation Act, Title XIX of the Social Security Act (Medicaid) and, most importantly, the Supreme Court's recent *Olmstead* decision, based on the Americans with Disabilities Act ADA).

Reliance on *Olmstead* could be trouble. If the Supreme Court rules in favor of the State of Alabama in *University of Alabama v Garrett*, plaintiffs in *Sanchez* could find the portion of their case based on *Olmstead* void (See this issue "Government In Brief": "Garrett Case Could Decide ADA").

Olmstead allows federal court action against states for inappropriate institutionalization. *Sanchez* is just such a suit.

While he has been criticized by California advocates and providers, California Governor Grey Davis has thrown his support to the ADA in the *Garrett* case.

$1 Billion for Decertification

California is under the gun for federal decertification actions against two of its institutions for deteriorating physical plants. The estimated cost of compliance is approximately $1 billion.

California must either come up with the funds to fix its institutions; lose hundreds of millions in federal Medicaid funding for non compliance; or, place individuals into community based programs. All parties agree that community placement is preferable. But, with massive turnover, is it practical?

"The State nickels and dimes providers so much that no one wants to serve anyone," sources close to the case told NYSARC.

"Programs are on the verge of collapsing, especially in the Silicon Valley," where voluntary agencies can't compete with the booming computer industry for employees and the average price of a home is $400,000, hardly affordable for the average voluntary worker. Similar problems plague the rest of the State which is notorious for its high cost of living.

Catch 22

To make their case plaintiffs in *Sanchez* must establish a link between inappropriate institutionalization and low pay to voluntary employees. While the link may appear obvious to some, it could turn on complex economic arguments.

Further, to make their case providers could be forced to admit that their programs are substandard. Otherwise, the court may conclude that State reimbursement is adequate. But few providers are willing to admit to substandard care.

Then again, if they do admit to substandard programs, the Court could conclude that institutionalization is, under the circumstances, not inappropriate.

Sanchez v Johnson is attracting national attention. Providers in almost every state are searching for a solution to their staff recruitment and retention problems. They hope that California will provide an answer.

AROUND THE NATION

BUSH, GORE WEIGH IN ON DISABILITY POLICY

At a visit to a Portland, Maine agency serving persons with disabilities, Republican Presidential nominee, George W. Bush, unveiled his "New Freedom Initiative" outlining his policy objectives for persons with disabilities. Thirteen days later, at a second visit, this time at a Cleveland agency, he elaborated further on the plan.

Central to the Bush plan is broader access to assistive technology, increased funding for special education and additional employment funding.

Bush assistive technology initiatives include:

- Tripling Rehabilitation Engineering Research Centers to $33 million annually, up from $11 million.
- Additional funding of $8 million to eliminate barriers preventing current technologies from helping Americans with disabilities.
- Increase low interest loans tenfold to $40 million to enable more Americans with disabilities to afford assistive technology.

Both Bush and likely Democratic nominee, Al Gore, are pushing hard for additional federal funding for special education. Gore wants an "Education Reform Trust Fund" to pay for the biggest ever increase in IDEA (Individuals with Disabilities Education Act) programs. Gore's Trust Fund, valued at $115 billion, would also help with programs like Universal Pre-Kindergarten as well as special education teacher recruitment and retention incentives.

Gore's plan would establish funding sources to, among other things, defray the cost to school districts of high cost Individualized Education Plans (IEPs).

Not to be left out, the Bush "New Freedom Initiative" also strongly emphasizes special education. Bush has proposed a $5 billion program - "Reading First" - to help teach children to read by the third grade. Bush says the plan is a form of early intervention which will keep children from needing special education.

Both candidates agree that federal funding for IDEA is too low. Both are calling for dramatic increases. The original aim was to have Washington pay 40% of the costs; today it pays approximately 12%. Education advocates relish the competition between Bush and Gore in special education.

"I'm tickled," said Bruce Hunter, chief lobbyist for the American Association of School Administrators.

On employment, the Bush "New Freedom Initiative" includes $20 million to help Americans with disabilities work at home. Further Bush, should he be elected President, promises to issue an Executive Order allowing Americans with disabilities to maintain health benefits, such as Medicaid, if they return to work. He is also promising full enforcement of workplace provisions of the Americans with Disabilities Act (ADA) and the Supreme Court's *Olmstead* decision, requiring deinstitutionalization of persons who can benefit from community placement.

Finally, Bush promises to provide $10 million to improve voting access throughout the nation's polling places.

"Our society and our government must make every effort to enable people with disabilities to lead independent and productive lives," said Bush.

Gore Blasts Proposal

Not surprisingly, Gore discounts the Bush promises. They are, he said, "a continued quest to mask his record of neglect in Texas." As Texas Governor, Gore noted, Bush opposed the plaintiffs in *Olmstead* when it was before the United States Supreme Court.

Bush campaign director Ray Sullivan countered by pointing out that when the *Olmstead* decision was reached, Governor Bush signed an executive order requiring a total review of support systems for community placement.

On the Bush special education proposals, the Gore campaign noted that the Bush plan for increasing funding for special education is vague while the Gore plan calls for the 40% federal funding level originally called for by IDEA.

Of interest to New Yorker's, the Bush plan for increasing access to assistive technology includes increased funding for research at the State University of New York at Buffalo (SUNY). SUNY Buffalo has three assistive technology research centers which receive federal funding through the National Institute on Disability Rehabilitative Research (NIDRR).

RESCARE RAISES BASIC QUESTIONS

Programs Under Intense Scrutiny

After 83 cases of "sub-standard care," the New Mexico Department of Health hit ResCare, the nation's largest for-profit provider of services to persons with mental retardation, with a moratorium on new placements. The State also requested federal court authority to oversee 18 ResCare homes. New Mexico Secretary of Health, Alex Valdez, said the State was trying to prevent "potentially dangerous situations from arising."

New Mexico is not alone.

In Texas ResCare's subsidiary, THM (Texas Home Management, Inc.), has "had sanctions or penalties that are pervasive across the chain," according to that State. From 1994 to 1998, ResCare's Texas group homes received 52 "vendor holds," indicating the State found deficiencies, including physical and verbal abuse, serious enough to terminate programs without immediate improvement.

In Indiana, eight consumers died within nine months in a group of ResCare's homes that parents, advocates and case managers complained were wracked with deficiencies.

In Florida, State investigators found that several ResCare homes posed an "immediate jeopardy" to consumer's safety and health and recommended that Medicaid to those facilities be terminated.

Criminal charges, resulting from the death of a consumer, have been filed against staff at THM. Civil lawsuits have also been filed in Texas. ResCare serves 27,000 individuals in 32 states, the District of Columbia, Puerto Rico and Canada.

ResCare Bubble Bursts

ResCare's explosive growth has been the focus of national attention among developmental disabilities providers, advocates and family members. A for-profit corporation in a field dominated by smaller not-for-profit providers, it made a reputation buying out smaller providers and implementing state-of-the art business practices.

It also attracted the attention of the financial markets and investors. In 1995 the company's stock was selling for about $7 a share. By 1998 it skyrocketed to over $26 per share. The company's soaring growth, profits and stock price appeared to spell the beginning of big for-profit business dominance in the field of developmental disabilities.

A 1993 congressional report warned that "large multi-state, multi-home" corporations were buying up "mom and pop" operations across the country.

According to Bob Gettings, head of the National Association of State Directors of Developmental Disabilities Services, "In many states a well developed provider network simply did not exist so states turned to large companies like ResCare to satisfy the dire need for services .....(as people flooded out of institutions)."

ResCare had key strengths, especially in the area of finance, the smaller agencies, for-profit and not-for-profit, couldn't match.

According to Jeffrey Cross, executive vice president of ResCare's disabilities division, "As states are downsizing and moving into the community, we have access to working capital that smaller providers don't. This significantly reduces risk for states and allows a much faster implementation of community services."

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..... Bob Gettings, Natl. Assoc. of State Directors of Developmental Disabilities Services

Then, as ResCare was hit with problems, a buy-out for the firm fell through and the company's share price plummeted to under $4. The firm also warned of lower earnings. Suddenly ResCare's dominance didn't seem inevitable. Or was it?

The Cost of Profitability

Despite ResCare's problems in Texas, it runs more programs in that State today then ever before.

Texas officials maintain that the State's commitment to shutting down institutions without a network of established community based providers to fall back on leaves ResCare as the only alternative.

ResCare is also skilled at undermining state actions constricting its business. When Texas threatened to close ResCare programs after the death of a consumer, the company responded with a lawsuit, forcing the State to settle and drop demands that ResCare shut its programs.

But as ResCare's problems have become pervasive, advocates are asking what the cost of the firm's profits have been to the people it serves.

"We're in the middle of a rate crisis," said Barbara Maize, executive director of the Contra Costa California ARC. "Most of us have to raise hundreds of thousands of dollars in donations so we're baffled that companies like ResCare can actually make money off these services."

A 1999 report by the Texas Department of Human services asked, "Would these facilities have continued with such a poor history of coming into compliance .... if ResCare had used their profits to improve their existing facilities instead of purchasing additional facilities?"

Some advocates also wonder if ResCare is too competitive for the good of the people it serves. The firm struck an agreement with Indiana for a $129 daily rate to run new programs. No other providers were willing to run the programs at that rate, in part because they included persons with intensive medical needs.

ResCare was upbeat. "This community-based setting will allow your family member to grow as a person and as a member of his or her community," ResCare promised Indiana families. As 116 consumers were shuffled from large ICFs to four person residences though, the roof fell in. Complaints from angry family members poured into Indiana's Bureau of Developmental Disabilities Services and within a year eight consumers were dead.

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. . . . . Barbara Maize, Executive Director
Contra Costa California ARC

Dan Crooke, an ex-ResCare employee who resigned in 1999, cited the company's efforts to hold down costs as one reason for the deaths and associated problems. According to Crooke, people, especially those with intensive medical needs, were moved too quickly. A State surveyor noted, "Work on (consumer) goals and objectives is virtually impossible when homes are not properly staffed."

ResCare has since renegotiated its per diem with Indiana to include a more flexible rate. "We draw a box around essential services and there is no gain for us if we cut back on those services or alter staffing ratios," insists ResCare's Jeffrey Cross.

Nevertheless, reports about staffing inadequacies in Indiana persist. At one home a ResCare administrator told parents the company "can't afford to put two people in a house."

A few months later ResCare informed parents that double shifts were being reduced because "additional staffing simply increases the noise level...". A parent wrote back, "Just who do you think you're kidding....".

The debate over what toll profits take on care will no doubt continue, but according to Dennis Felty, an expert on for-profit human services programs, "you end up allowing the for-profit entity to define the product and the level of profit it can take out for itself."

Advocates ask: after profits are taken out, what's left for the people served?

<u>The Lesson for Voluntary Agencies</u>

NYSARC executive director Marc Brandt sees a lesson for voluntary agencies serving people with mental retardation and developmental disabilities.

"I am skeptical that this is the right field in which to try to make a lot of money," said Brandt. "But it is the right field to institute the sort of cutting edge business practices which ResCare has pioneered in our field."

"We can no longer afford to avoid the most efficient, state-of-the-art business practices when so much money, so many people and so many needs are on the line. We must be as cost efficient as possible. But we must reinvest the money we save back into the services, consumers and families we serve. Those are our shareholders. And good care is their dividend."