

GOVERNMENT

In Brief



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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

HOUSE PASSES WORK INCENTIVES IMPROVEMENT ACT

On November 18, the US House of Representatives approved H.R. 1180, The Ticket to Work and Work Incentives Improvement Act, by a vote of 418 - 2. The next day the Senate followed suit and approved the bill by a vote of 95-1. President Clinton is expected to sign measure at a special White House Ceremony on December 13.

The Arc of the United States lauded the final passage of the long sought legislation. It stated: "passage of the work incentives bill is a major victory for the Arc and the disability community. For two long years the bill twisted in the wind final passage gives both Democrats and Republicans something of which to finally be proud."

Most notably, the bill would encourage states to allow individuals to enjoy increased earnings without losing their Medicaid eligibility. To do this, states have two options. They could offer individuals who make over 250% of poverty to buy-in to the Medicaid program or they can cover persons who continue to work but lose SSI or SSDI for reasons of improved medical conditions.

States opting into the program can charge individuals a full premium for continued Medicaid coverage or use a sliding scale for individuals falling between 250% and 450% of poverty. Sliding scale fees are limited to 7.5% of income. States must charge individuals making over \$75,000 full premiums unless they use state funds.

Current Medicaid income limits are blamed for discouraging persons with disabilities from accepting higher paying jobs for fear of losing Medicaid benefits. Persons with disabilities often with intense medical

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needs, are especially vulnerable without health insurance and Medicaid is their primary health insurer.

To encourage states to participate in the program, The Ticket to Work and Work Incentives Act includes a number of state grants. One provides support services to individuals making over 250% of poverty. Another funds state sponsored outreach and education about the Medicaid buy-in program as well as helps to defray state administrative costs of the program.

"These grant programs are incentives for the states to adopt the Medicaid buy-in portion of the legislation," said Department of Health and Human Services Secretary, Donna Shalala.

Another key provision in the legislation waives eligibility reviews for Social Security Disability Income (SSDI) recipients in the event their income rises. This provision is not effective until January 1, 2003.

Additionally, former SSDI and SSI recipients would not be required to reapply for benefits in the event they accept a job and it does not work out.

The bill also provides vouchers or "tickets to work" to exchange for job development services from local vocational rehabilitation providers.

Finally, individuals who receive Title II benefits will be able to maintain Medicare coverage for an additional four and one-half years, for a total of eight years after the individual's trail work period ends.

Conference Committees To Resolve Differences

Prior to passing a final bill, each house of Congress passed its own version of the Work Incentives Improvement Act.

The Senate version of the legislation - S.311 - passed by a vote of 99-0 in June. The House version passed by a vote of 412-9 on October 18. Differences between the House and Senate bills were then ironed out in conference committee.

Among the key differences was a cap on earnings, above which an individual would not be allowed the Medicaid buy-in option. Accounts of the cap differed. According to one it included only individual earnings over \$35,000. According to another it included individuals making over 250% of poverty. The House promoted the cap while the Senate did not. A key House sponsor, New

York's Representative, Rick Lazio, criticized the Senate bill as unaffordable.

However, Senator William Roth, said a cap would undermine the purpose of the law. With the cap, individuals would "fall off the benefits cliff we are trying to eliminate," he says.

The final bill eliminated the cap, except that persons making over \$75,000 are ineligible for buy-in premiums unless states pay for them with their own money.

Bill Helps Tight Job Market

US businesses are eager to see the bill signed into law. With unemployment at the lowest levels in nearly a generation, the legislation would expand the available pool of labor. Three quarters of the nation's 15 million persons with severe disabilities are unemployed. Depending on the estimate, the bill could bring anywhere from 35,000 to five million of those individuals into the workforce.

The National Business and Disability Council, which maintains a database of workers with disabilities and serves 200 of the nation's major corporations, has seen a 50% jump in requests for workers since June.

Other sources however remain skeptical that the legislation will do much to ease employment shortages.

"It's being presented as if people with disabilities are now going to be able to go to work. But the services that severely disabled people need aren't covered under Medicaid state plans," said Richard DiPeppe, director of a Norfolk, VA independent living center. What is truly needed according to DePeppe is a national attendant-care program to provide crucial work related supports.

SENATOR CHAFEE DIES

Senator John Chafee, a four term Republican United States Senator and outspoken advocate for persons with mental retardation and developmental disabilities, died on October 24.

A statement released by the Arc of the United States said: we "are heartbroken to learn that Senator John Chafee, Republican from Rhode Island and long-time champion of people with mental retardation, died last evening of heart failure at the Bethesda Naval Hospital in Maryland. The Senator was 77."

According to Paul Marchand of the Arc of the United States Senator Chafee's death is a huge loss to the disability community. Marchand noted that Chafee was a critical member of the Senate Finance Committee and will be replaced by Senator Paul Coverdale (R-GA). Coverdale, unlike Chafee, does not have a reputation as an ally of persons with disabilities.

Said President Clinton: "He embodied the decent center which has carried America from triumph to triumph for 200 years....He always put his concern for the American people above partisanship."

Despite the rightward drift of the Republican party, Chafee was a steadfast supporter of environmental causes, abortion rights, gun control and expanded health care coverage. He also voted to acquit President Clinton following the Senate's impeachment trial.

Chafee was a strong advocate for persons with mental retardation and other developmental disabilities. He maintained a close working relationship with the Arc of the United States. His many accomplishments included:

- Sponsorship of the "Chafee Bill" throughout the 1980s which dramatically refocused Medicaid from an institutional to community based finance system. While the bill was never signed into law, it influenced state and national policy throughout the nation, gradually reshaping Medicaid into a far more community friendly system.
- Strong opposition to congressional efforts to block-grant Medicaid and preserve its status as an entitlement program. Senator Chafee provided the key vote against the effort on the Senate Finance Committee, thus maintaining federal protection of vulnerable populations including persons with mental retardation and other developmental disabilities.
- Essential support for the Children's SSI program which congress sought to dismantle. The Arc of the US and other advocates credit Chafee for helping to ensure the program's survival.
- Most recently, Senator Chafee was the only Republican to cross party lines and vote with Democrats against a managed care patient protection bill considered by advocates to be more of a protection for the insurance industry than consumers.

Among his many accolades from advocates for persons with disabilities, The Arc of the United States

awarded Senator Chafee with the Franklin Smith Award for Distinguished National Service in 1998.

"His death is a terrible loss for all persons with mental retardation and other developmental disabilities and their families. It is especially difficult during a period when the trend is to view social causes, no matter how worthy, as a drain on national resources. We have lost our strongest champion when we needed him most."

Marc N. Brandt
NYSARC Executive Director

Chafee was born in 1922. He served with the Marine Corps in both World War II, where he saw action on Guadalcanal, and in Korea. He was a graduate of Yale and then Harvard Law School. He was married and had five children. In March he announced that he would retire from the Senate and not seek a fifth term.

Chafee was mourned by Republican conservatives and Democratic liberals alike. Senate Majority Leader Trent Lott (R-MS) praised Chafee for working "to bring both sides together for a common goal."

California's Democratic Senator Barbara Boxer praised him for his good work on "the environment, (furthering the right of women to choose abortion) and sensible gun control."

Speaking for NYSARC, Inc., executive director Marc Brandt said: "while we are far away from Washington, it was very reassuring to know that Senator Chafee was in the United States Senate. His death is a terrible loss for all persons with mental retardation and developmental disabilities and their families. It is especially difficult during a period when the trend is to view social causes, no matter how worthy, as a drain on national resources. We have lost our strongest champion when we needed him most."

ANTI-RESTRAINT BILL GAINS GROUND Hearing Held

Senate bill S. 736, The Freedom from Restraint Act, gained ground as a result of General Accounting Office (GAO) findings that during 1998 24 people died and 1000 were injured after being subjected to restraints in facilities serving persons with mental disabilities.

"The GAO describes a problem far more serious than we suspected," said Sen. Joseph Lieberman (D-Conn), the prime sponsor of the measure.

Lieberman asked the GAO to investigate the matter after the *Hartford Courant* documented 142 deaths over the last ten years, twenty-six percent of whom were children. Senate hearings on the bill may be held this fall.

The bill requires providers funded through Medicaid and Medicare to routinely report on the use of restraints and to regulate such procedures through patient's rights guidelines. Programs in New York State serving persons with mental retardation and other developmental disabilities are almost exclusively funded through Medicaid.

The bill covers physical and chemical restraints as well as seclusion. It allows imposition of restraints only: 1) to ensure the physical safety of the individual under care or others who come in contact with that individual; and, 2) upon the written order of a physician specifying the duration and circumstances under which restraints are used - except in the case of an emergency.

Additional legislation, S.750 sponsored by Senator Christopher Dodd (D-Conn) also seeks to impose limitations on the use of restraints.

The GAO report, *Mental Health: Improper Restraint or Seclusion Use Places People at Risk* is free. Copies can be obtained by calling (202) 512-6000 or by downloading the report from the Internet through www.gao.gov.

The report recommends that the federal Health Care Financing Administration (HCFA) expand its recent guidelines governing use of restraints in institutions to include all community based programs.

"Children are subjected to restraint and seclusion at higher rates than adults and are at particular risk.....Children are smaller and weaker than adults and so staff, use to overpowering adults, may apply too much pressure or force when restraining children."

**Leslie Aronowitz
GAO Associate Director**

Hearings Held: Reporting Data Incomplete

Hearings regarding the proposed Senate legislation were held on October 26 before the Senate Finance Committee.

In his testimony before the Committee, Leslie G. Aronowitz, the Associate Director for Health Financing and Public Health Issues for the GAO noted: "Children are subjected to restraint and seclusion at higher rates than adults and are at particular risk.....Children are smaller and weaker than adults and so staff, use to overpowering adults, may apply too much pressure or force when restraining children."

Among other examples of such injury among children, Aronowitz cited a 16 year old girl who died in California from respiratory failure while her face was shoved against the floor by four staff members.

Aronowitz said that a major obstacle to regulating the use of restraint and seclusion is the failure of most of the federal and state governments to comprehensively track the use and consequences of such techniques.

Aronowitz also noted that while ICFs/MR are required to routinely provide detailed reports on restraint and seclusion, programs funded through the Home and Community Based Services (HCBS) waiver are not subject to those reporting requirements.

He noted that the GAO report was based on piecemeal information provided by federally funded Protection and Advocacy (P&A) agencies across the nation. Since P&A agencies depend on outside information, experts believe their reporting to the GAO is sketchy at best. To underscore that point, Aronowitz noted that only five states account for two thirds of reported deaths. No deaths were reported in 28 states. Comprehensive information, he said, would likely show a far bleaker picture.

Aronowitz singled out Delaware, Massachusetts, New York and Pennsylvania as states that have adopted effective strategies to curb the unnecessary use of restraints and seclusion. He specifically lauded procedures in New York requiring comprehensive reporting to the Commission on Quality of Care.

STATE GOVERNMENT

AG ADVOCATES POLLING ACCESS

New York Attorney General, Elliot Spitzer, says the State's polling places are not in compliance with the Americans with Disabilities Act (ADA).

Spitzer was working with officials throughout the State to fix the problem prior to election day in November, according to his office.

Richard Zachmeyer, head of the Catskill Center for Independence in Oneonta, agrees that Spitzer is on the right track. "We're talking about the most basic right that we have as citizens of this country," Zachmeyer said.

Zachmeyer and Spitzer conducted a study of three counties - Delaware, Schoharie and Otsego - and found only 10% of polling places compliant with federal and state access requirements.

As Election Day neared, Spitzer's Office was busy contacting county election officials to make sure polling places were compliant with the ADA and other access vs. Officials in Schoharie County even conducted a joint mock election with that county's independent living center.

Polling places are often located in older buildings, such as schools or church basements, built well before access for persons with disabilities became an issue. Sidewalk curbs, no elevators, no ramps, narrow stairways and doors make access for persons using wheelchairs, crutches or walkers impossible.

On Election Day, Spitzer's Office surveyed accessibility of polling places in New York City, Binghamton, Poughkeepsie, Rochester, Syracuse, Yonkers and Long Island.

"At a time when we are trying to encourage persons with disabilities to be part of the mainstream of society, it is simply unconscionable that so many polling places are inaccessible," Spitzer said.

CSEA AND MENTAL HEALTH ADVOCATE A Unique Alliance

The Civil Service Employees Association (CSEA) and the Mental Health Association (MHA) of New York State

are joining forces, according to spokesmen for both groups.

CSEA is the State's largest union representing State employees. The MHA represents not-for-profit agencies serving persons with mental illness. Previously at odds with one another the two organizations have decided that now is the time to put their past differences aside.

"We have worked side by side toiling to assist people with psychiatric disabilities," Glazer said in praise of Donahue. "We have done this in an era when state government has neglected their needs."

**Joseph Glazer
MHA President**

"It's long past time for state workers and non-profit workers to join forces," said CSEA president Danny Donahue at a joint news conference with MHA officials. "We want to make the mental health services this state needs the number one priority in the next legislative session," Donahue added.

"The lions are all lining up on one side," said Joseph Glazer, president of the MHA.

Once the MHA and CSEA fought over deinstitutionalization. MHA strongly advocated depopulating the State's psychiatric centers while CSEA favored some institutionalization. With the population of the State's psychiatric institutions down to a mere 6,000 persons, that bone of contention is almost eliminated.

As a symbol of their new found solidarity, the MHA honored Donahue with its annual President's Award.

"We have worked side by side toiling to assist people with psychiatric disabilities," Glazer said in praise of Donahue. "We have done this in an era when State government has neglected their needs."

Both groups appeared bitter over the politics that swirled around the enactment of "Kendra's Law" which provides more leeway for involuntary admissions. "We were actually offended over the political hay that was made over Kendra's Law at the same time they were cutting money for services to actually address the law," said CSEA spokesman Stephan Madarasz. "It's almost worse than doing nothing."

State Office of Mental Health (OMH) officials rejected the notion that the State's mental health system is inadequate. As for existing service gaps, Roger Klingman, a spokesman for OMH, said that the State would use managed care to resolve them.

At the joint CSEA, MHA news conference, voluntary mental health providers called for more State funding for services for persons with mental illness, especially funding to enhance salaries of low paid not-for-profit employees. MHA representatives indicated that their employees deserved pay comparable to the much higher salaries of State mental health employees.

"This is the sign of a sick society," Donahue pointed out, though he did not indicate whether he would support the call for higher salaries for not-for-profit workers.

NEW YORK CREDIT RATING UP Are Late Budgets Good?

New York State, once tied for the worst credit rating in the nation with Louisiana, is now tied with California and Hawaii for the second worst credit rating in the nation, according to Standard and Poor.

Governor Pataki hailed the improved status and noted it justified the "brutal" 1999 budget fight between himself and the Democratic Assembly. That fight dominated the State Capitol until August.

"These battles," said the Governor, "over the course of the last five years have not been in vain. They've been for a sound purpose and that's to restore a bright future for the people of this State."

Standard and Poor analysts agreed that late budgets have helped the State by holding State spending to prior fiscal year levels until well into the next State fiscal year. Some observers believe that this observation by Standard and Poor may take more pressure off lawmakers to pass on-time budgets.

Standard and Poor upgraded its rating of the State's General Obligation bonds from "A" to "A+" largely because of an unusually high reserve fund, \$2.7 billion. Most states rated by Standard and Poor have a "AA" rating. New York State had an "A-" until it was upgraded to "A" in 1997 and moved out of its last place tie with Louisiana.

"Certainly the State is in better financial condition than it's been in quite some time," said Standard and Poor analyst Collen Woodell. She noted that increasing

financial reserves is a "pretty different pattern" than has been seen in the State for quite some time.

Standard and Poor said a further upgrade is unlikely unless New York State fundamentally reforms its debt and borrowing practices. They also cited the need for the State to improve its ability to forecast revenue prior to enacting the State budget.

GOVERNOR RECOMMENDS \$125 MILLION FOR MENTAL HEALTH Advocates Agree System Badly Underfunded

Governor Pataki was praised by mental health advocates for his plan to spend an additional \$125 million on services for persons with mental illness. Experts agree that the State's mental health system is badly underfunded and contains huge gaps which allow many persons with mental illness to walk the streets without essential treatment.

Advocates have long criticized State policies which they claim couple budget cuts with massive deinstitutionalization of State psychiatric centers, placing individuals into the community without critical psychiatric services.

That point was dramatized last January when Andrew Goldstein, a man suffering from schizophrenia, pushed Kendra Webdale in front of a subway train. Her death led to Kendra's Law. Goldstein's schizophrenia would not have posed a threat, say advocates, had a system to treat him been in place.

Kendra's Law makes it easier to involuntarily commit persons with mental illness.

Critics maintain the State's community mental health system is a patchwork of services with eligibility standards and treatment requirements that vary from one locality to another. Individuals routinely fall through the cracks.

Instead, they want a user friendly, seamless continuum of services. Such system would, they believe, prevent individuals like Goldstein from having dangerous breakdowns because, for example, of a failure to take medication.

To begin to develop the new system, much of the Governor's \$125 million proposal - \$52 million - will be used to fund case management to monitor psychiatric patients in the community and make sure they get the help they need. Another \$20 million will go to support

supervised housing units. Additional funds will be used to provide services to children and families.

The key though is case management. According to Arvey Bluestone, director of the department of psychiatry at Bronx Lebanon Hospital, a good case manager "knows where the patient is at all times, makes sure the patient gets to appointments for medication, and if the person starts to decompensate, gets them to an acute psychiatric unit."

FROM THE COURTS

COURT RULES EPILEPSY NOT COVERED BY ADA

Advocates feared that a US Supreme Court decision rendered last spring in *Sutton v United Air Lines* would weaken ADA protections for persons with epilepsy. They were right.

To qualify under the ADA the High Court had previously ruled that an individual's disability must limit a major life activity. In *Sutton* the High Court took that ruling one step further. It ruled that before evaluating a disability to determine if it does limit a major life activity, consideration must be given to remedies available to mitigate the effects of the disability.

The High Court said that evaluating individuals in their "hypothetical uncorrected state is an impermissible interpretation of the ADA." Since the effects of epilepsy can be corrected with medication, it is not certain whether an individual with the condition is protected under the ADA.

Advocates wondered how lower courts would rule given the Supreme Court decision. In *Todd v Academy Corp* they quickly found out. The US District Court judge in that case, David Hittner, threw out an ADA discrimination suit brought by a plaintiff with epilepsy. According to Hittner "the Supreme Court made it abundantly clear that a person be presently - not potentially or hypothetically - substantially limited (to be considered disabled)."

Hittner added that since the plaintiff's medication significantly corrected the effects of the plaintiff's epilepsy he did not meet the Supreme Court's test. And while the judge acknowledged that medication itself could potentially impair a major life function, in this case it did not.

"Although thinking and learning are major life functions," Hittner wrote, "and epilepsy and anti-epileptic

drugs have been known to potentially create limitations on these particular life functions, it is not clear from the evidence presented that this plaintiff has experienced a substantial limitation on those functions."

Hittner noted that prior to the Supreme Court's *Sutton* decision, Todd would have qualified under the ADA.

TESTIMONY ALLOWED, CONVICTION UPHELD Mental Retardation Not A Bar To Testimony

A longstanding issue for crime victims with mental retardation has been the admissibility of their testimony against assailants. On occasion their accounts of criminal acts against them have been discounted or thrown out because of doubts about their mental competency.

The issue appeared again in Georgia. Frederick Dumas was convicted of aggravated sodomy. Dumas appealed his conviction based on the charge that his victim, a 22 year old man with mental retardation, was not competent to testify against him.

Specifically, the defendant claimed that his victim did not understand the gravity of taking an oath and the definition of an oath.

However, the appeals court upheld the conviction. Key to the Court's decision is a Georgia law stating "in criminal cases involving child molestation...any child shall be competent to testify and his credibility shall be determined as provided for in Article 4 of the chapter." The victim, the prosecutor argued, should be given the same right to testify accorded a child under Georgia law since he functions with the mental capacity of a 7 year old. The Court agreed.

The Georgia law specifies that a child need not have a technical understanding of an oath, but rather understand the difference between truth and falsehood. Specifically, the child must understand that an oath requires an individual to give correct answers.

The Court accepted testimony of family members confirming that the victim knew the difference between right and wrong; had the ability to reason; knew how to tell the truth; and, was remorseful when wrong.

Unless individuals have the ability to testify against an assailant, the ability of the Courts to protect them is limited. Thus, questions regarding admissibility of testimony based on mental retardation has long been a central criminal justice issue for advocates.

**STATES RIGHTS VS.
DISABILITY LAWS
NOT COVERED BY ADA
A Constitutional Limit to
Enforcement?**

Over the past few years a rising tide of political conservatism has either curtailed or threatened programs serving persons with disabilities. Notable have been Congressional attempts to radically restructure key programs such as Medicaid and Children's SSI.

Conservative trends however go beyond fiscal restraint to encompass a broader emphasis on states rights. States rights has the unsavory reputation as a battle cry against moral or legal mandates to extend equitable treatment to vulnerable groups of individuals, especially minorities.

According to some experts, states rights is rearing its head in cases revolving around the Eleventh Amendment of the United States Constitution. That amendment limits suits that individuals can bring against states in federal courts, potentially including suits based on the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act and the Individuals with Disabilities Education Act (IDEA).

The limitation is broadly referred to as *Sovereign Immunity*. Generally, Sovereign Immunity can be waived or abrogated only to enforce constitutional rights or if states have agreed to waive immunity for the purpose, for example, of accepting federal funds. It is a complex and obscure topic. Key cases to date have dealt with such seemingly remote matters as the right of Indian tribes to sue state governments over regulation of Indian gaming activities.

However, cases before the Supreme Court could, depending on how the Court rules, substantially expand the practical implications of Sovereign Immunity to a variety of federal laws. Three such suits were brought against Alabama and Florida under the federal Age Discrimination in Employment Act. While a decision hasn't been reached, there is considerable opinion that the Supreme Court will throw the suits out based on Eleventh Amendment immunity.

Will the Court move on to invalidate suits against states dealing with other kinds

of discrimination?

Clearly, cases dealing with persons with disabilities in controversial areas falling under IDEA and the ADA are likely to go before the High Court. At lower level courts, a drift toward greater deference to Sovereign Immunity appeared in a number of recent rulings. Notable are two rulings of the United States Eighth Circuit Court in *Alsbrook v City of Maumelle* and *Bradley v Arkansas Dept of Education*.

In *Alsbrook* the Eighth Circuit ruled Congress unconstitutionally applied the ADA's Title II to the states. Title II applies the ADA to the operations of state and local governments.

The *Alsbrook* case arose when an individual sued the State of Arkansas because it refused to waive a requirement preventing him from becoming a law enforcement officer based on a vision impairment. The Eighth Circuit reversed a lower court opinion requiring the State to grant the waiver. The Court noted that "reasonable accommodations" required by Title II in the ADA are not defined. Therefore the requirement is open ended, possibly going far beyond the protections necessary to safeguard an individual's constitutional rights.

Such all encompassing mandates, the Court ruled, do not abrogate Eleventh Amendment immunity. Thus states - at least in the 8th Circuit - are protected from certain suits requiring reasonable accommodation.

Again, in *Bradley v Arkansas Dept. Of Education*, the Eighth Circuit ruled that a suit based on Section 504 of the Rehabilitation Act could not proceed against that state. In *Bradley* the parents of a child with Autism sought certain services for their child. The Eighth Circuit however ruled that the State could not be sued based on Section 504 since that law does not sufficiently identify the abridgement of constitutional rights it was enacted to remedy.

In the end the parents in *Bradley* won their case, not based on Section 504 but rather based on IDEA. Here the Court also found that the requirements of IDEA went far beyond what is necessary to protect an individual's constitutional rights. On that basis alone, IDEA is therefore insufficient to abrogate Eleventh Amendment immunity. Nevertheless, the *Bradley* case

against the State was allowed to move forward. The Court ruled that the State, by accepting federal grant funding appropriated under IDEA, had effectively agreed to waive its immunity from suit under IDEA.

In one recent New York case, a judge ruled that applying ADA employment provisions to states is flagrantly unconstitutional. In *Kilcullen v. New York State Department of Transportation*, a federal judge ruled that the ADA's reasonable accommodations requirements constitute a "significantly disproportionate" remedy to the constitutional grievances they seek to redress.

Specifically, the Court wrote: "reasonable accommodations imposes an obligation significantly greater than that of making minor cost modifications." Therefore, the Judge ruled, Congress has no authority to waive state immunity through the ADA. On these grounds an ADA employment suit against New York State on behalf of a man with epilepsy and learning disabilities was thrown out.

In other non-disability related cases, Supreme Court decisions show a strong trend toward giving greater weight to state immunity. In three recent cases, the High Court, by 5-4 rulings, declared that states had immunity against financial judgements in certain business and labor suits. For disability advocates, the concern is that sentiments favoring broad state immunity could spread, especially given widespread popular hostility to IDEA special education mandates and, perhaps to a lesser degree, the ADA.

Certainly there are key jurists who believe that Eleventh Amendment immunity is a viable remedy to laws that, in their opinion, go too far. While it was a victory for persons with disabilities, in a dissenting opinion on *Cedar Rapids Community School District v Garret F.* Supreme Court Justice Clarence Thomas wrote that states cannot be burdened with financial liabilities imposed by IDEA without having previously agreed to waive their Eleventh Amendment immunity.

IDEA, Thomas wrote, "blindsides unwary states with fiscal obligations they could not have anticipated." *Garret F.* required the state to provide intensive in-class medical services to a student with disabilities.

Most Courts still do not share Thomas' viewpoint. But whether that remains the prevailing opinion is uncertain. State immunity or Sovereign Immunity is an important concept. And for advocates what makes it more important is that "state" also means any instrumentality of a state including, for example, a county government or school district - two governmental units which are intimately involved with people with disabilities and their families.

In a key ADA case before the Supreme Court, *Pennsylvania Department of Corrections v. Yesky*, the High Court stated that yet to be considered is whether

the ADA constitutes a constitutional waiver of state immunity. Experts believe that day is coming, though they note it is the rare exception, not the rule, to find Court decisions placing obstacles like Sovereign Immunity in the path of individuals seeking to use federal disability laws to redress grievances.

Yet, advocates will be watching closely to see to what extent these court decisions become trends rather than isolated events. And bearing in mind the theory that court decisions are ultimately the result of political decisions, advocates should closely watch the next presidential

election carefully. It is the next president who will nominate the federal judges - conservative, liberal or moderate - who will determine the course of the Judicial branch of government for years to come and whether or not Eleventh Amendment immunity becomes a practical impediment to the enforcement of landmark laws like the ADA and IDEA.

States rights advocates have rarely been friends to vulnerable and disadvantaged groups. To the extent that they use Eleventh Amendment immunity to advance states rights, people with disabilities could lose the protection of laws they have worked decades to gain.

AROUND THE NATION

**MAN WITH 51 IQ SLATED TO DIE
But Is It Really A Record?**

In 1992 Alabama executed a man with an IQ of 55. That broke the record set by the State of Georgia when it executed a man with an IQ of 59 in 1986.

Repulsed by the spectacle, Georgia joined a dozen other states and the federal government and outlawed the execution of persons with mental retardation.

Now Illinois is considering the execution of a man with an IQ of 51. 51 is right on the borderline between mild and moderate mental retardation. According to Charles Ewing, a professor at the State University of Buffalo at New York, an individual with an IQ of 51 would have the intellectual capacity of "between a 2nd and 6th grader, probably closer to a 2nd or 3rd grader."

Anthony Porter, the condemned man, was charged in a 1982 double murder on Chicago's South Side. At the time he was 27 and had a long record for, among other things, robbery and assault.

Porter's lawyer, Daniel Sanders, argues that Illinois Governor Jim Edgar should commute Porter's death sentence. Sanders notes that Porter suffered damage from an early brain injury which left him "childlike in some cases...(with) gross social coping deficits...(and with cognitive deficits generally) seen only among very young children."

Complicating the issue is that Porter scored 70 and 71 on earlier IQ tests.

The Cook County State's Attorney's office charge that Porter's sudden IQ drop was faked to create a public outcry against his execution. A memo from Cook County Attorney, Dick Devine, states that Porter's IQ is "conveniently" four points lower than the record low IQ for an executed individual. The issue of Porter's IQ is scheduled to come before the Illinois Supreme Court.

Cook County attorneys also charge that psychologist Kurt Moehle, whose testing of Porter indicated a 51 IQ, is helping Porter perpetrate a fraud. County Attorneys state that Moehle was grossly negligent by failing to administer the Minnesota Multiphasic Personality Inventory (MMPI). They insist the test can determine if Porter is a malingerer.

Moehle responded to that charge by stating that Porter is "too dumb frankly" to take the MMPI.

Additionally, experts will testify on whether Porter is able to understand the nature of his crime and punishment. Illinois law requires that persons slated for the death penalty understand the nature of the punishment before it can be carried out.

The State of Illinois has dealt with this issue before. In 1989 Gov. Jim Thompson vetoed legislation to prohibit execution of persons with mental retardation. Thompson said that while mental retardation should be considered, it should be only one of a number of factors to commute an individual's sentence.

COUNTY PROPERTY TAX LEVY UP FOR VOTE

Voters in Ohio's Hamilton County will be asked to vote on an increase to a unique property tax levy funding mental retardation services.

Currently, the owner of a home valued at \$100,000 pays \$73 for every one thousand dollars of assessed valuation. A "yes" vote to issue #13 would boost that payment by \$23, to \$96 a year. A portion of the increase would fund additional services to persons with mental retardation and developmental disabilities.

Hamilton County incorporates the City of Cincinnati and the surrounding area.

County officials are promoting the increase, saying that it is essential to fund an anticipated rise in service needs over the next five years. In part they say the additional demand is driven by improved medical technology which has allowed infants with developmental disabilities to survive and has allowed adults with developmental disabilities to live longer lives.

The County also notes a substantial increase in persons who are medically fragile.

Demand for additional services is already passing past predictions. In 1994 the County predicted that it would serve some 9,100 persons by 1999. It is actually serving about 10,300 individuals. And it expects that number to increase by another 33% during the five year period of the levy.

Services funded through the levy include pre-school, infant and toddler services, family support services and specialized services such as speech, OT and PT.

The County is pushing hard for the increase. A spokesperson for Hamilton County said: "Opportunities that the children and adults have as participants in Hamilton County is outstanding....As residents of Hamilton County, we should feel blessed."

SECURE PROGRAM CRITICIZED

In 1991 Betty Jane Antus, a person with mental retardation and a personality disorder, set a fire which killed two persons in a North Seattle group home. She was sentenced to 21 years in prison. Shortly thereafter,

Washington State's Community Protection program was created.

Today Community Protection, a privately run program, cares for some 206 potentially dangerous persons in tightly supervised group homes across the State. The program costs the State \$18 million a year. That works out to \$80,000 per person annually or about \$225 a day.

Despite elaborate lock and alarm systems the program has become a lightning rod for criticism.

Some claim the program's vague placement criteria mixes dangerous and vulnerable persons with mental retardation and developmental disabilities. Josh Stevens was placed into the program for starting a fire. Stevens had no criminal record. His roommate however did have a record and sexually molested Stevens.

Others question whether the program violates individual civil rights. "We do have people out there who are essentially under involuntary commitment," said Ed Holen, executive director of the State's Developmental Disabilities Council. "They haven't been charged. They haven't been prosecuted. That's not fair and it certainly violates the person's civil rights."

Despite around the clock supervision, notable breakdowns have occurred. A young Spokane man was enrolled because of aggressive behavior. One night he managed to sneak out for a midnight bike ride and was found beaten to death the following morning.

Between January and July of this year at least 36 other escapes were reported.

Some question whether the program's cost - three times greater than keeping someone in prison - is worth it.

"We're paying \$80,000 so people won't get hurt," said State representative Darlene Fairley. "Well obviously it hasn't worked and we have in essence thrown money away."

Like other programs serving persons with mental retardation and developmental disabilities, staff wages are a big issue. Most employees receive less than \$10 per hour and providers, including Acres-Allvest - the largest, recruit mental laborers to provide direct care. One employment ad asked: "Tired of warehouse work?"