

Mental Health Law: 42 U.S.C. Sec. 6010 Held Not to Create Substantive Rights in Favor of Mentally Retarded. *Pennhurst State School v. Halderman*, 101 S. Ct. 1531 (1981).

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since passed, but the burden of corporate responsibility is neither new nor oppressive. The court in *Misericordia* relied on fifteen years of prior decisions and legal scholarship in shaping its opinion. Its conclusion was a logical outgrowth of the public's perception of the hospital as the primary dispenser of all but the most routine medical services. People have come to expect a degree of protection from the providers they patronize. This decision does not place a greater burden upon hospitals than they themselves should have assumed in their own bylaws and under state regulations and the rules of voluntary associations. In making this determination the court did not abrogate an existing principle of tort or agency law, but simply found another path to what it perceived to be a just result. This result places the burden of risk management upon the hospital, the party which is now best able to protect the patient from harm.

JACQUELINE HANSON DEE

MENTAL HEALTH LAW — 42 U.S.C. § 6010 Held Not to Create Substantive Rights in Favor of Mentally Retarded. *Pennhurst State School v. Halderman*, 101 S. Ct. 1531 (1981). Although in the last decade courts across the country have endorsed a right to treatment and to community services under a variety of statutory and constitutional theories, none of these holdings has been affirmed by the United States Supreme Court. Therefore, the Supreme Court's decision in *Pennhurst State School v. Halderman*¹ was awaited by mental health advocates with great interest and some anxiety. The Court, however, limited its holding to a statutory interpretation, namely that section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act² did not create in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment, and effectively sidestepped the constitutional issues. Such a narrow decision may well leave existing, favorable constitutional precedent intact.

1. 101 S. Ct. 1531 (1981).

2. 42 U.S.C. §§ 6001-6081 (Supp. V. 1975).

I. THE DECISION

Terri Lee Halderman, a minor retarded resident of a large state institution for the mentally retarded, filed suit in the United States District Court for the Eastern District of Pennsylvania on behalf of herself and all other residents of the facility against the facility, its superintendent and various state officials responsible for its operation.³ The complaint alleged that conditions at Pennhurst State School and Hospital were unsanitary, inhumane and dangerous and that these conditions denied the class members due process and equal protection of the law in violation of the fourteenth amendment, inflicted on them cruel and unusual punishment in violation of the eighth and fourteenth amendments, and denied them certain rights conferred by the Rehabilitation Act of 1973,⁴ the Developmentally Disabled Assistance and Bill of Rights Act,⁵ and the Pennsylvania Mental Health and Mental Retardation Act of 1966.⁶

The district court found that various rights of the mentally retarded were violated by the conditions at Pennhurst, including a federal constitutional right to be provided with "minimally adequate habilitation"⁷ in the "least restrictive environment,"⁸ and ordered that Pennhurst eventually be closed. The Court of Appeals for the Third Circuit substantially affirmed the district court's remedial order but avoided the constitutional claims by resting its decision on a construction of the Developmentally Disabled Assistance and Bill of Rights Act,⁹ a federal-state grant program whereby the federal government provides financial assistance to participating states to aid them in creating programs to care for and treat the develop-

3. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977).

4. 29 U.S.C. §§ 701-794 (1976).

5. 42 U.S.C. §§ 6001-6081 (Supp. V 1975).

6. PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969 & Supp. 1981).

7. 446 F. Supp. at 1314-18. There is a technical difference between "treatment," which applies to mental illness, and "habilitation," which consists of education and training for the mentally retarded. This article, like the court opinions, will use the terms interchangeably.

8. *Id.* at 1319-20.

9. Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 95-100 (3rd Cir. 1979) (en banc).

mentally disabled.¹⁰ The court of appeals held, *inter alia*, that section 6010¹¹ of the Act granted mentally retarded persons a

10. 101 S. Ct. at 1536.

11. The complete text of § 6010 provides:

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with development disabilities that —

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and —

(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary . . . as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such

right to "appropriate treatment, services, and habilitation" in "the setting that is least restrictive of . . . personal liberty" and that mentally retarded persons had an implied cause of action to enforce that right.¹²

The Supreme Court granted certiorari to consider several questions, including whether section 1983 provided a private remedy to enforce the Developmentally Disabled Act.¹³ In *Pennhurst State School v. Halderman*, the Court held that section 6010 did *not* create in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment.¹⁴ Because it found that section 6010 did not create substantive rights, the Court found it unnecessary to address any other issues.¹⁵ The federal constitutional claims and other questions not addressed by the Third Circuit, as well as the state law issue, were remanded for consideration in light of the Supreme Court's decision.¹⁶

II. HISTORICAL BACKGROUND

While the *Pennhurst* decision appears to be limited in scope, it must be viewed in the context of the recognition and enforcement of a "right to treatment."

"Legal recognition of the fact that mentally impaired persons are entitled to the same judicial rights and remedies as other persons has occurred only recently."¹⁷ The past decade

facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.

Section 6010 was amended in 1978 to add the following concluding paragraph: "The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons." Pub. L. No. 95-602, § 507, 92 Stat. 3007 (1978).

12. 612 F.2d at 97 n.16. The court applied the four-factor test of *Cort v. Ash*, 422 U.S. 66, 78 (1975): (1) Whether the plaintiffs are especial beneficiaries of the statute; (2) Whether there is any indication of legislative intent to create a private remedy; (3) Whether a private remedy would further the policies of the statute; and (4) Whether the cause of action is one traditionally relegated to the states.

13. 100 S. Ct. 2984 (1980).

14. 101 S. Ct. at 1536.

15. *Id.*

16. *Id.* at 1546.

17. Dowben, *Legal Rights of the Mentally Impaired*, 16 Hous. L. Rev. 833, 900

has seen landmark judicial decisions establishing the rights of mentally ill and developmentally disabled persons to equal educational opportunity,¹⁸ to protection from harm,¹⁹ to procedural and substantive protections in the civil commitment process²⁰ and to protections against hazardous or intrusive procedures.²¹ Equally important have been the right to treatment and its frequent corollary, placement in the least restrictive setting.

Dr. Morton Birnbaum, in his seminal article, regarded recognition and enforcement of the right to treatment as "a necessary and overdue development of our present concept of due process of law."²² His due process theory relies on a quid pro quo:²³ The individual is deprived of his liberty in return for medical treatment which will enable him to regain his liberty. If the confinement is custodial rather than therapeutic, the "inmate" should be released. Dr. Birnbaum believed that public reaction to such releases would force state legislatures to increase appropriations for institutions and thereby improve the often inadequate care and treatment.

Early cases recognizing the right to treatment involved involuntarily committed mental patients.²⁴ The constitutional bases for the decisions included the equal protection clause and the eighth amendment prohibition against cruel and unusual punishment as well as the fourteenth amendment. The most influential of these decisions was *Wyatt v. Stickney*,²⁵ a class action on behalf of patients involuntarily confined in Al-

(1979).

18. *E.g.*, *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

19. *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), *consent judgment approved sub nom.* *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975).

20. *E.g.*, *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) (subsequent history omitted).

21. *E.g.*, *Scott v. Plante*, 532 F.2d 939 (3rd Cir. 1976); *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979).

22. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 503 (1960).

23. See Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 COLUM. J.L. Soc. PROB. 193 (1980).

24. See, *e.g.*, *Covington v. Harris*, 419 F.2d 617 (D.D.C. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.D.C. 1966).

25. 325 F. Supp. 781 (M.D. Ala. 1971).

abama mental institutions. The definition of the patients' right which emerged was the right "to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental conditions."²⁶ The *Wyatt* decision, based upon the due process clause, subsequently was affirmed by the Fifth Circuit.²⁷

Although a few courts have refused to recognize a constitutional right to treatment,²⁸ other federal courts have adopted the reasoning of *Wyatt* and even extended it: (1) to include mentally *retarded* residents of state institutions and (2) to include the right to placement in the least restrictive environment.²⁹

The lower court decisions in *Pennhurst* reflected a growing conviction among mental health advocates that care should be "provided in the community rather than in an institution, unless individual circumstances absolutely necessitate institutionalization."³⁰ While the district court based its opinion on a constitutional right, the Third Circuit opinion had a statutory basis.³¹

The development of a statutory theory was the result of the increasing number of state and federal laws which had been passed incorporating the essence of the earlier judicial decisions and orders.³² Enforcement of a statutory right, advocates felt, overcame many of the difficulties inherent in the constitutional theory since it applied equally to voluntary and involuntary residents and gave a more positive definition to

26. *Id.* at 784 (citing *Rouse v. Cameron*, 373 F.2d 451 (D.D.C. 1966); *Covington v. Harris*, 419 F.2d 617 (D.D.C. 1969)).

27. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

28. *E.g.*, *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

29. *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974).

30. Friedman, *Rights of the Mentally Handicapped: Which Way in the 1980s?*, 17 TRIAL, No. 2, 42, 43-44 (1981) [hereinafter cited as Friedman].

31. A statutory right to treatment in the least restrictive setting had been recognized previously in *Dixon v. Weinburger*, 405 F. Supp. 974 (D.D.C. 1975) under the District of Columbia's Hospitalization of the Mentally Ill Act, 21 D.C. CODE § 501 et seq. (current version at 21 D.C. CODE ANN. §§ 501-592 (1973 & Supp. VII 1980)).

32. *E.g.*, The Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1420 (1975); Mental Retardation Facilities and Community Mental Health Centers Act of 1963, 42 U.S.C. § 2689-2689aa (1976 & Supp. II 1978).

the right to treatment.³³

Following the Third Circuit's opinion in *Pennhurst*, and the First Circuit's in *Naughton v. Bevilacqua*,³⁴ there was a flurry of federal court decisions finding an implied private cause of action under the Developmentally Disabled Act.³⁵ Thus, when the Supreme Court granted certiorari to *Pennhurst*, mental health advocates hoped that some of the confusion among the lower courts in the area of the rights of the mentally disabled would finally be resolved.³⁶

III. THE COURT'S ANALYSIS

Writing for the majority, Justice Rehnquist³⁷ first reviewed the general structure of the Developmentally Disabled Act: the purposes of the Act and the conditions for the receipt of federal funds, as well as the funding sections, and procedures and sanctions to ensure state compliance with its requirements.³⁸ The Court emphasized that the overall purpose of the Act is "to assist" the states.³⁹ Focusing on section 6010, the "bill of rights" provision, the Court noted that language suggesting that section 6010 is a "condition" for the receipt of federal funding under the Act was noticeably absent.⁴⁰

Since the court of appeals had found that section 6010 created substantive rights in favor of the disabled and imposed an obligation on the states to provide certain kinds of treatment, the Court treated the question before it as one of statutory construction: "Did Congress intend in § 6010 to create enforceable rights and obligations?"⁴¹ It concluded that intent to legislate pursuant to section 5 of the fourteenth amend-

33. Note, *Public Law 94-103: An Implied Private Right of Action to Enforce the Right of Treatment for Institutionalized Mentally Retarded Persons*, 54 IND. L.J. 505 (1979).

34. 605 F.2d 586 (1st Cir. 1979).

35. See, e.g., *Henkin v. South Dakota Dept. of Soc. Serv.*, 498 F. Supp. 659 (D.S.D. 1980); *Petition of Ackerman*, 409 N.E.2d 1211 (Ind. App. 1980). But see *Burnham v. Department of Pub. Health*, 349 F. Supp. (N.D. Ga. 1972) (failure to demonstrate deprivation of a federally protected right absent a statutory mandate).

36. See *Friedman*, *supra* note 29.

37. Justice Rehnquist was joined in his opinion by Chief Justice Burger and Justices Stewart, Powell and Stevens.

38. 101 S. Ct. at 1536-38.

39. *Id.* at 1537.

40. *Id.* at 1538.

41. *Id.*

ment⁴² is least likely to be inferred in situations, such as this, where the rights asserted would burden the states with “*affirmative*” funding obligations.⁴³ On the other hand, Congress’ power to legislate pursuant to the spending power⁴⁴ depends on whether the state “voluntarily and knowingly” accepts the conditions placed on its participation.⁴⁵ (Such legislation is in the nature of a contract.) Consequently, if Congress intends to impose a condition, it must do so explicitly.⁴⁶

Applying those principles to the case at hand, the Court found “nothing in the Act or its legislative history to suggest that Congress intended the states to assume the high cost of providing ‘appropriate treatment’ in the ‘least restrictive environment’ to their mentally retarded citizens.”⁴⁷ Rather, the majority was convinced that the Act was a “typical funding statute”⁴⁸ and that section 6010, when examined in light of the more specific provisions of the Act, did nothing more than describe a “congressional preference” for certain kinds of treatment.⁴⁹ The Court stated that Congress “fell well short of providing clear notice” to the states that they, by accepting funds under the Act, would be obligated to comply with section 6010.⁵⁰

Justice Blackmun, concurring in part and concurring in the judgment, agreed with much of the majority’s analysis but felt that Congress, in enacting section 6010, intended to do more than “set out politically self-serving but essentially meaningless language about what the developmentally disabled deserve at the hands of state and federal authorities.”⁵¹ Therefore, the Court should give effect to the interrelation of sections 6010 and 6063.⁵²

42. U.S. CONST. amend. XIV, § 5 provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

43. 101 S. Ct. at 1539.

44. The spending power is encompassed in U.S. CONST. art. I, § 8, cl. 1, which states that “Congress shall have Power To . . . provide for the . . . general Welfare of the United States”

45. 101 S. Ct. at 1539.

46. *Id.* at 1540.

47. *Id.*

48. *Id.* at 1542.

49. *Id.* at 1540.

50. *Id.* at 1543.

51. *Id.* at 1547.

52. *Id.*

Justice White,⁵³ dissenting⁵⁴ in part, agreed that section 6010 was enacted pursuant to Congress' spending power and not to its power under section 5 of the fourteenth amendment.⁵⁵ He emphasized, however, that it does not necessarily follow that section 6010 was to have no effect beyond the mere "encouragement" of state action.⁵⁶

The dissent interpreted the language and schemes of the Developmentally Disabled Act as a clear indication of Congress' intent that section 6010 serve as "requirements that participating states must observe in receiving federal funds under the Act."⁵⁷ In addition, the dissent believed that "the legislative history confirms the view that Congress intended section 6010 to have substantive significance."⁵⁸ Furthermore, Justice White would hold that the rights of section 6010 can be enforced in federal court by the developmentally disabled under section 1983.⁵⁹

IV. CRITIQUE

The majority's interpretation of section 6010 is unpersuasive. Moreover, as Justice White pointed out,⁶⁰ section 6063 of the same Act was amended in 1978 to expressly require a participating state to provide assurances to the Secretary of Health and Human Services⁶¹ that the rights of developmentally disabled persons would be protected consistent with section 6010.⁶² It is difficult to believe that the Secretary must

53. Justice White was joined in his opinion by Justices Brennan and Marshall.

54. 101 S. Ct. at 1549.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1552. For example, Justice White quoted Congressman Rogers' statement, prior to final passage, that the revised Title II included a "brief statement of the rights of the developmentally disabled to appropriate treatment and care," which constituted "modest requirements." 121 CONG. REC. 29,309 (1975).

59. 101 S. Ct. at 1558.

60. *Id.* at 1549 n.4, 1556.

61. The Department of Health and Human Services is the governmental agency responsible for the administration of the Act. *Id.* at 1537.

62. 42 U.S.C. § 6063 (5)(C) now provides:

The plan must contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to the rights of the

continue to fund a program that is failing to live up to its assurances.⁶³

A strict construction of the statute exemplifies the conservative attitude expressed in recent Supreme Court decisions in the mental health field⁶⁴ and a general trend away from the judicial activism of the past. Even the dissent would have adopted a more moderate approach than the court of appeals.⁶⁵

The *Pennhurst* decision will undoubtedly stem the tide of lower court cases holding that section 6010 of the Developmentally Disabled Act establishes the right to appropriate treatment enforceable by way of an implied cause of action under section 1983. It remains to be seen, however, whether the Court would uphold a decision that developmentally disabled persons may bring suit to compel compliance with other conditions contained in the Act.⁶⁶ Meanwhile, at least one writer has expressed the fear that "the nation's mentally retarded will once again be at the mercy of fifty state legislatures."⁶⁷

Pennhurst's greatest impact, however, may be from what it failed to do rather than from what it did. By limiting the decision to a construction of section 6010 of the Developmentally Disabled Act, the Supreme Court left the door open for courts to continue finding a right to treatment under various constitutional theories. *Pennhurst* may have much the same effect as *O'Connor v. Donaldson*,⁶⁸ in which the Court avoided the right-to-treatment issues by basing its ruling on a "right to liberty." In other words, *Pennhurst* will continue the confusion among the federal and state courts concerning the ap-

developmentally disabled).

63. Indeed, the Secretary himself recently announced that "[f]ailure to comply with the assurance may result in the loss of Federal funds." 45 Fed. Reg. 31,006 (1980).

64. See *Addington v. Texas*, 441 U.S. 418 (1979); *Parham v. J.R.*, 442 U.S. 584 (1979).

65. 101 S. Ct. at 1558-59. Specifically, Justice White disagreed with the appointment of a special master.

66. Of particular significance are 42 U.S.C. §§ 6011 and 6063(b)(5)(C). However, Justice Blackmun noted a "negative attitude" on the part of the majority toward such a holding. 101 S. Ct. at 1547.

67. 19 Duq. L. Rev. 149, 165 (1980).

68. 442 U.S. 563 (1975).

propriate judicial policy in this area.⁶⁹

V. CONCLUSION

In finding that section 6010 of the Developmentally Disabled Act does not create in favor of the mentally retarded any substantive rights to appropriate treatment in the least restrictive environment, the Supreme Court not only ignored a large body of lower court cases but avoided deciding the constitutional issues involved.

Backlash against deinstitutionalization may develop as economy cuts make it difficult to provide more and better services for the mentally disabled.⁷⁰ The *Pennhurst* decision will be viewed by many as an abdication of the judiciary's responsibility to protect the rights of this vulnerable and powerless group.

FAYE L. CALVEY

CONSTITUTIONAL LAW — Access to Trials — States Have the Authority to Experiment With Media Coverage of Their Criminal Trials Without the Defendant's Consent. *Chandler v. Florida*, 101 S. Ct. 802 (1981). The United States Supreme Court unanimously¹ decided in *Chandler v. Florida*² that Florida's program³ which allowed electronic media coverage⁴ of criminal

69. Schoenfeld, *A Survey of the Constitutional Rights of the Mentally Retarded*, 32 S.W.L.J. 605 (1978).

70. Friedman, *supra* note 29.

1. Justice Stevens did not participate in this decision.

2. 101 S. Ct. 802 (1981).

3. In *In re Post-Newsweek Stations, Florida, Inc.*, 347 So. 2d 402 (Fla. 1977), the Florida Supreme Court revised *In re Post-Newsweek Stations, Florida, Inc.*, 327 So. 2d 1 (Fla. 1976) which had required the participants' consent so as to allow a one year experiment in which the electronic media could televise and photograph judicial proceedings without the consent of participants. Florida's revised Canon 3A(7) was the ultimate result of this experiment. The Florida Supreme Court established guidelines for standards of conduct and technology to govern electronic media coverage of court proceedings in *In re Post-Newsweek Stations, Florida, Inc.*, 347 So. 2d 404 (Fla. 1977).

4. The ruling in *Chandler v. Florida*, 101 S. Ct. 802 (1981) included television,