REPORT OF THE COMMISSION ON THE MENTALLY DISABLED AND THE SECTION ON INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

Be It Resolved, That the American Bar Association urges the swift and effective implementation of federal laws and regulations codifying the rights of mentally handicapped persons, and further urges state governments to consider legislation insuring such rights within their respective jurisdictions.

REPORT

Federal legislation in this decade has significantly expanded and codified the civil rights of mentally and physically handicapped persons. Unfortunately, implementation of these rights often lags years behind the enacting legislation, and falls short of legislative expectations. This resolution recognizes the need for speedy, effective implementation of such rights, and is recommended to counteract genuine roadblocks frustrating these long awaited reforms.

Conservative estimates indicate that at least one person in the United States out of every ten (20,000,000) will at some time in his life have some form of mental or emotional illness. The most widely accepted conclusion regarding incidence of mental retardation in the United States is that 3 percent of the population (6,000,000) will at some time in their lives function in the mentally retarded range. Depending on the definition of physically handicapped, the number of permanently handicapped people in the United States ranges from 22,000,000 to 68,000,000. Thus, failure to implement legislation enhancing the civil rights of mentally and physically handicapped persons potentially affects a staggering number of people.

The American Bar Association has recognized in another context the impact of failure to implement legislation benefiting the handicapped, and has resolved to support vigorous enforcement of such legislation. At the 1976 Annual Meeting, the House of Delegates approved a recommendation that the Association support "responsible vigorous enforcement of Federal, State and local legislation . . . designed to ensure ready and effective access to public buildings and transportation services for all persons, including the physically handicapped. . . ."

Although it seems unquestionable that legislation concerning mentally and physically handicapped persons' civil rights would be effectively implemented, experience has frequently demonstrated the necessity of strong enforcement. The regulations necessary for implementation of Section 504 of the Rehabilitation Act of 1973 are an unfortunate example of this need.

Section 504 provides:

No otherwise qualified individual in the United States shall, solely on the basis of handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The legislative history makes clear:

The section . . . constitutes a broad grant of new authority to individuals receiving Federal financial assistance.

It does not specify the manner in which the Federal Government will require its recipients to conform to its regulations, but it clearly implies the existence of a Federal enforcement mechanism.

The conferees fully expect that section 504 regulation will be the primary enforcement mechanism of the legislation.

The American Bar Association has repeatedly urged Federal and State governments to consider legislation insuring such rights within their respective jurisdictions. Nonetheless, the federal and State laws are merely a policy expiring in half years elapsed before enactment and the implementing regulations.

Considerable criticism has been aimed at the Federal Government for its failure to develop regulations necessary for implementation of Section 504. This failure has frequently been the result of lack of funds, but it has also been caused by failure to consult with representatives of handicapped persons.

The Association recognizes the need for vigorous enforcement of Federal and State laws affecting the handicapped, and has resolved to support such enforcement. It is imperative that all Federal, State and local legislation enhancing civil rights of mentally handicapped persons be effectively implemented.
The mentally disabled

The delay in implementation occurred in spite of Executive, Congressional, and judicial expectation to the contrary. On April 29, 1976, President Ford issued Executive Order 11914, authorizing HEW and other federal agencies dispensing federal financial assistance to adopt rules and regulations to ensure compliance with Section 504, and giving HEW the responsibility to coordinate federal agency implementation of the section. On May 5, 1976, the Senate held oversight hearings to determine why Section 504 regulations had not been developed, and why enforcement activities had not been undertaken. On July 26, 1976, the District Court for the District of Columbia ordered HEW to promptly issue final Section 504 regulations. Although by January 12, 1977 regulations viewed as complete by both the former Secretary of HEW and his Department had been developed, the former Secretary refused to sign the regulations, and instead transmitted them to Congress to “acknowledge” as “being consistent with the law.” This prompted the District Court to hold on January 18, 1977 that continued failure to issue final regulations violated the Court’s July 26, 1976 Order, and to order the immediate promulgation of final Section 504 regulations. Final Section 504 regulations were published in the Federal Register May 4, 1977.

Failure to implement legislation such as Section 504 at the agency level has a profound effect at the personal level. Lawsuits filed by handicapped persons provide a glimpse of the most grievous examples: mobility-disabled persons are prevented from using public transportation; handicapped children are excluded from public schools; qualified handicapped persons are

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Section 504 provides:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The legislative history makes Congressional intent clear:

The section . . . constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap.

It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended. . . . The conferees fully expect that HEW’s section 504 regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act (P.L. 93-112) was enacted over one year ago—September 26, 1973. (4 U.S. Code Cong. & Admin. News 6390-6391 (1974)) (emphasis added).

Nonetheless, the federal government argued that the Section is not directive and is merely a policy expression. Three and a half years elapsed between the section’s enactment and the issuance of final implementing regulations. This inaction drew considerable criticism from a broad range of groups, including the National Association of Retarded Citizens, the Epilepsy Foundation of America, the United Cerebral Palsy Association, and the Council for Exceptional Children.


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not hired because of their handicap; patients who are mentally retarded and mentally ill are shuttled between mental retardation and mental health facilities, with both disclaiming responsibility for treatment; and, mentally ill prisoners are denied access to vocational rehabilitation programs.

The delay in implementing Section 504 is not atypical of federal legislation designed to enhance the civil rights of mentally and physically handicapped persons. In addition to the delay in implementing Section 504 of the Rehabilitation Act of 1973, Section 503 of the Act was not implemented through final regulations until April 16, 1976. Proposed regulations implementing the Education of All Handicapped Children Act, enacted in November, 1975, were issued November 29 and December 30, 1976. The Community Mental Health Centers Amendments of 1975, which completely rewrote the Community Mental Health Centers Act, are presently implemented by proposed regulations issued November 2, 1976

Swift and effective implementation of these and other laws concerning mentally and physically handicapped persons' civil rights is essential. The mentally and physically handicapped have traditionally been powerless to improve their position in society, and their civil rights have been virtually ignored by the legislative process.

The promise of legislation recognizing the civil rights of the handicapped becomes a cruel anomaly when the legislation is not implemented and the rights exist only on paper.

Having finally resorted to the Courts to seek fulfillment of these elusive promises, it is little wonder that "... unless the laws are effectively implemented and enforced, the small number of lawsuits by handicapped persons presently in the courts may rapidly increase." The specter of handicapped persons being forced to seek judicial acknowledgment of legislatively conferred civil rights in order to enjoy those rights is shameful. The resulting potential for increased litigation frustrates important Association policies aimed at reducing court congestion. It is clear that well-prepared, timely-issued regulations would reduce excessive resort to litigation by defining right, procedure, and legislative meaning.

Bureaucratic inaction should not be allowed to nullify legislative enactments designed to enhance the civil rights of the mentally and physically handicapped. Rather, these laws should be swiftly and effectively implemented to ensure that their purpose is fulfilled. Determined federal efforts would also encourage state governments to guarantee their handicapped citizens comparable rights where previous federal indifference is little wonder that "... unless the laws are effectively implemented and enforced, the small number of lawsuits by handicapped persons presently in the courts may rapidly increase." The specter of handicapped persons being forced to seek judicial acknowledgment of legislatively conferred civil rights in order to enjoy those rights is shameful. The resulting potential for increased litigation frustrates important Association policies aimed at reducing court congestion. It is clear that well-prepared, timely-issued regulations would reduce excessive resort to litigation by defining right, procedure, and legislative meaning.

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