MENTAL RETARDATION and the LAW

A Report on Status of Current Court Cases

February 1973

This issue of "Mental Retardation and the Law" features a detailed discussion of Wyatt v. Stickney (now known as Wyatt v. Aderholt on appeal), and Burnham v. Georgia--two important district court cases, one of which affirmed and the other of which denied that mentally retarded persons who are civilly committed have a constitutional right to treatment. These two cases were consolidated and heard together on appeal before the U. S. Court of Appeals for the Fifth Circuit in New Orleans on Wednesday, December 6, 1972, and the appeals argument is summarized in the pages which follow. As we go to press, the Court of Appeals has yet to issue an opinion in either of these cases.

Also featured is a discussion of the Donaldson and McDonald cases. Although Donaldson concerns a mentally ill plaintiff rather than a mentally retarded plaintiff, it is included because of its enormous precedential value. Donaldson is the first case in which a patient has successfully recovered money damages on the theory that he was involuntarily confined without treatment. McDonald is one of two Iowa Supreme Court cases in which a very controversial decision has been made to deprive parents of their children on the basis that the parents are mentally retarded and unable to provide a suitable home environment.

Altogether this issue contains updated information on or new reports of 26 court cases.

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GEORGIA: Burnham v. Department of Public Health of the State of Georgia, Civil Action No. 16385 (N.D. Georgia)

This class action, modeled on the lines of Wyatt, was filed on March 29, 1972 before Judge Sydney Smith in the United States District Court for the Northern District of Georgia. Plaintiffs in this suit were or had been patients at one of the six State-owned and operated institutions named in the complaint and operated for the diagnosis, care, and treatment of mentally retarded or mentally ill persons under the auspices of the Public Health Department for the State of Georgia. Defendants in this case are the Department of Public Health, the Board of Health for the State of Georgia, and Department and Board members and officials, the superintendents of the six named institutions; and the judges of Courts of Ordinary of the counties of Georgia, which are the courts specifically authorized by Georgia laws to commit a person for involuntary hospitalization. The complaint, which is described more fully in the June 9, 1972 issue of "Mental Retardation and the Law," alleged violations of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and sought a preliminary and permanent injunction and a declaratory judgment similar to those awarded in Wyatt. Defendants filed an answer to plaintiffs[1] complaint on April 21, 1972, and moved for summary judgment.

On August 3, 1972, Judge Sidney 0. Smith, Jr. granted the defendants' motion to dismiss. Although Judge Smith recognized that persons committed to Georgia's mental institutions might have a moral right to effective treatment, he disagreed with plaintiffs that Georgia was under a legal obligation to provide such treatment. In his opinion, Judge Smith gave two reasons why he lacked jurisdiction to decide the case. Primarily, he found no legal precedent for a ruling that there is a federal constitutional right to treatment. While Judge Smith was aware of the Wyatt decision, he stated, "This court respectfully disagrees with the conclusion reached by that court in finding an affirmative federal right to treatment absent a statute so requiring." Moreover, the court interpreted the Eleventh Amendment to prohibit a federal court from requiring state expenditures in an area controlled by state law. Judge Smith further suggested that treatment of involuntary patients in mental institutions is not a "justiciable issue"--i.e., not an issue capable of definition and resolution by a court. Finally, he indicated that the establishment and policing of individualized treatment cannot be undertaken by a court, and should be left to the discretion of the professionals rendering services.

ALABAMA: Wyatt v. Stickney, Civil Action No. 3195-N (M.D. Ala.)

A full description of the District Court proceedings in Wyatt v. Stickney is contained in the June 1972 issue of "Mental Retardation and the Law." The history of this very important first right to treatment case will not be repeated here. Briefly, developments in the Wyatt case since its reporting in the June 1972 issue have been as follows:

On June 26, 1972, the district court denied a motion filed by Appellant-Defendant Wallace for stay of execution and a motion for an order of modification of the district court's final order and opinion of April 13, 1972, noting that " . . . the appeal seems frivolous." Subsequently, on August 15, 1972, the Court of Appeals for the Fifth Circuit recognized the significance of the case and ordered the appeal expedited.

The Fifth Circuit granted the American Psychological Association, American Orthopsychiatric Association, American Civil Liberties Union, American Association on Mental Deficiency, National Association on Mental Health, National Association for Retarded Children, and the American Psychiatric Association leave to participate fully in the appeal as amici curiae on the side of the plaintiffs below. All of these groups were represented by common counsel. Also appearing as amici in favor of affirmance of the district court's order was the U. S. Department of Justice. The Fifth Circuit further granted the States of Texas and Indiana leave to participate as amici curiae on the side of defendants below (i.e., Governor Wallace and the State of Alabama).

Oral argument was heard on December 6, 1972, for over two hours. Both the Wyatt and Burnham cases were heard by a three-judge panel composed of Judges Wisdom, Coleman and Bell. As we go to press, this Fifth Circuit panel has not yet issued a decision in these cases.

ANALYSIS OF THE WYATT AND BURNHAM APPEAL ARGUMENTS

For the appeal of the Wyatt case, lawyers for Governor Wallace and the State of Alabama adopted the identical arguments which had persuaded the Georgia court to dismiss the Burnham case. Briefly, the arguments in both the Wyatt and Burnham appeals were as follows:

(1) Both States argued that the adequacy of mental treatment, care and diagnosis afforded involuntarily committed patients in state-supported institutions does not involve a right or immunity protected by the Constitution and laws of the United States. The States' position was relatively simple. Nowhere in the Federal Constitution is the right to treatment expressly provided for. Nor, according to the States, is there any significant legal precedent which interprets the Federal Constitution as implicitly guaranteeing such a right. The defendant States argued that an earlier seminae right to treatment case heavily relied upon by plaintiffs--Rouse v. Cameron (decided by Chief Judge Bazelon of the U. S. Court of Appeals for the District of Columbia)--was based upon explicit language in the District of Columbia statute. Although the Rouse case suggested that absent a statute expressly providing for treatment, a serious constitutional issue would be raised by involuntary confinement of mental patients without treatment, it did not actually reach and decide this issue.

Plaintiffs' response was that there is absolutely no precedent other than the Burnham case itself for the proposition that involuntarily confined patients do not have a right to treatment, and that with little case law there is on the subject strongly suggests that there is such a right. Plaintiffs stressed that there are three basic constitutional provisions which arguably establish a right to treatment:

(a) Due Process--The 14th Amendment states that no person can be deprived of liberty without due process of law. This provision has been interpreted to require that governmental action affecting individual liberties be consistent with "fundamental fairness." Applying the due process clause to the situation of a mentally handicapped person who had been involuntarily confined, the Supreme Court recently stated that the nature and duration of confinement must bear a reasonable relationship to the purpose of his commitment. Since a mentally handicapped person subject to civil commitment is denied the full range of procedural safeguards made available to criminal defendants, and since the mentally handicapped person can be confined for an indefinite term even though he has committed no criminal act, fundamental fairness requires that treatment--and not mere custody--be the necessary

quid pro quo for his loss of liberty. As the District Court in Wyatt stated:

> Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely for no convicted offense.'

(b) Equal Protection of the Laws--The 14th Amendment also prohibits denial to any citizen or group of citizens of equal protection of the laws. Under this Constitutional provision, courts must scrutinize classifications of citizens to assure that such classifications are reasonable. Classifying certain persons as "mentally handicapped" and subsequently depriving them of their liberty is reasonable only if treatment is provided. Even in those states where the mentally ill must also be "dangerous" before commitment is authorized, treatment remains a necessary trade-off for involuntary commitment. If treatment is not afforded, then the entire system of classification is unreasonable and the mentally handicapped are denied equal protection, because they alone are picked out for "preventive detention" while all other dangerous people who have not actually committed criminal acts are allowed to remain free.

(c) Cruel and Unusual Punishment--The 8th Amendment prohibits cruel and unusual punishment. The Supreme Court has held that punishing a sickness as if it were a criminal offense violates this prohibition. Since civil commitment of a mentally handicapped person without treatment amounts to punishing him for his sickness, such commitment violates the 8th Amendment.

A second, more narrowly framed, version of the 8th Amendment argument follows from analogous cases on prison conditions. The conditions in Alabama's mental institutions --the physical deprivation, the lack of basic sanitation, the overcrowding, the lack of physical exercise, the inadequate diet, the unchecked violence of inmates against each other and of employees against inmates, the lack of adequate medical care and psychiatric care, the abuse of solitary confinement and restraint--all bear a close resemblance to conditions which have been held to violate the 8th Amendment in cases involving convicted criminals and persons accused of crime. It follows, therefore, that

action. The defendant States argued that the establishment and policing of the individualized treatment required by the Rouse case cannot be undertaken by a court. According to the defendant States, a court should not and cannot choose among the vast array of psychotherapies in order to assure that constitutionally adequate treatment is provided. As the States observed, the proper therapy or habilitation plan for one patient or resident might be contraindicated for another.

The plaintiffs and amici countered with the argument that this objection rested upon a misunderstanding of the Wyatt approach. The emphasis in Wyatt had been upon assuring the existence of those conditions which are a prerequisite to any kind of therapy or habilitation—a humane physical and psychological environment, qualified staff in adequate numbers, and individualized treatment plans. Plaintiffs argued that under this approach, the court is not required to choose one specific form of treatment or habilitation over another, but merely assures that there will be a range of adequate treatment or habilitation alternatives available, which persons rendering direct services can choose from. Thus, according to plaintiffs, if the goal is to assure the existence of the preconditions necessary for minimum adequate treatment, rather than adequate treatment itself for a particular resident, a class action is perfectly appropriate.

(4) Another argument against right to treatment class actions put forth by both the State of Alabama and the State of Georgia was that the kind of order rendered by Judge Johnson in Alabama violates the sovereignty of the State guaranteed under the Eleventh Amendment of the Federal Constitution. Assuming that the right to treatment is provided for, if at all, by state statutes and is not to be found in the United States Constitution, the Eleventh Amendment (designed to insure state sovereignty) would protect the state from having to appear in federal court. Both States appeared to concede that if there were a federal constitutional right to treatment, then a defense by the State that it lacked the necessary financial resources to provide such treatment, would not be acceptable. And both States conceded further that, if the right to treatment were a federal constitutional right, the Eleventh Amendment would not protect the State from being sued in a federal

district court, assuming it had denied this right to its residents.

Plaintiffs and amici on the side of plaintiffs argued, of course, that the right to treatment was a Federal Constitutional right, and that for this reason the States' Eleventh Amendment argument was invalid.

(5) The States argued further that a kind of decree rendered by Judge Johnson in Alabama constituted a serious and illegal infringement upon the functions of the legislature. For example, the State of Alabama argued that the cost of implementing the minimum standards set forth in the Johnson decree would require capital expenditures of sixty-five to seventy million dollars, a sum equal to more than half of the State's present general fund. The State of Alabama argued further that in usurping a characteristically legislative function, the federal district court had failed to give sufficient consideration or recognition to other equally important demands on the State's revenue, such as the need to provide old age pensions, welfare payments for indigents, the building of modernized highways, etc. Such decisions, according to the State of Alabama, are a matter of policy suitable for legislative rather than judicial determination. Only a legislature can decide whether it is more important to provide a "subsistence pension for elderly having no other income than to provide expensive psychiatric treatment and other services to patients at mental institutions."

The position of plaintiffs on the "invasion of legislative domain" issue drew upon existing precedent from analagous cases in related law areas. Plaintiffs argued that where a basic constitutional right is involved, the case law is clear that lack of adequate funds is not an acceptable excuse. Plaintiffs relief upon cases in the prison area which stress that even convicts are human beings with basic human dignity and prohibit certain kinds of solitary confinement and other extreme deprivations as constituting cruel and unusual punishment. The gist of these cases is that it is entirely up to a state whether to maintain a prison system at all, but once it has decided to run a prison system (or by analogy here, a mental institutional system) it must run it in a way which is consistent with basic constitutional protections.

(6) A last issue, not directly related to the right to adequate treatment, but very important nonetheless for the development of such cases in the future, was whether the attorneys for the plaintiff class in the Wyatt case were entitled to an award of attorneys' fees to be assessed against the defendants. In its order to June 1972, the district court in Wyatt had awarded three lawyers representing the plaintiffs approximately $37,000 for attorneys' fees and expenses incurred in representing the plaintiffs during the previous one and one-half years. According to the State of Alabama, the general rule is that in the absence of a contrary provision of statute or a contrary requirement of applicable state law, the prevailing party in an action in federal court is not entitled to recover counsel fees. Plaintiffs stressed that legal issue is in an evolving stage. They stressed that fees had already been awarded in analogous cases both where a plaintiff acts as "private attorney general" to enforce a strong national policy and where a plaintiff has successfully maintained a suit that benefits a group of others in the same manner as himself. Plaintiffs further argued that there had been "bad faith" on the part of the defendants in denying them their constitutional rights and that this factor had been taken into account in other cases where courts had awarded attorneys' fees. The essence of plaintiffs' argument, supported by the amici groups on plaintiffs' side, was that since most of the involuntarily committed mentally retarded are cut off by the nature of their problem and their confinement from access to meaningful legal representation, the court should invoke its inherent equity powers to allow attorneys' fees so as to encourage private lawyers to serve as counsel for this otherwise sadly underrepresented group.

NEW CASES

A. RIGHT TO TREATMENT

FLORIDA: Donaldson v. O'Connor, Civil Action No. _____ (decided by the Federal District Court in Tallahassee, Florida, on November 28, 1972)

While this case concerns a mentally ill rather than a mentally retarded person, it is included because of its enormous precedential significance. Donaldson is the first case ever in which a former mental patient has been permitted to sue for (and has subsequently been awarded) money damages for being deprived of his liberty without treatment. Prior to this decision, only habeas corpus and injunctive relief have been awarded in such situations. The case survived two motions to dismiss and went to trial on November 28, 1972. After deliberating for two hours and fifteen minutes, a federal court jury in Tallahassee awarded the plaintiff $38,500 damages, to be assessed personally against the Superintendent of his hospital and his treating physician. In its charge to the jury, the court instructed that:

> "the burden was upon the plaintiff to establish by a preponderance of the evidence that the defendant doctors confined plaintiff against his will, knowing that he was not mentally ill or dangerous, or knowing that if mentally ill he was not receiving treatment for his alleged mental illness."

The court also instructed the jury:

> "that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such individual treatment as will give him a realistic opportunity to be cured or to improve his or her mental condition."

Finally, the judge instructed the jury that in order to recover, the plaintiff did not have to prove that defendants acted in bad faith or maliciously. He simply had to prove that he was not dangerous, and received only custodial care, all of which was known to defendants.

Defendants have filed an appeal in this case.

MINNESOTA: Welsh v. Likens, 4-72 Civ. 451 (D. Minn.)

This class action brought on behalf of residents at six state hospitals for the mentally retarded is very similar to Wyatt, with one important exception. In addition to the allegations that defendants have failed to provide plaintiffs with a constitutionally required minimal level of habilitation and with less restrictive alternatives to institutionalization as required by the due process clause of the Fourteenth Amendment to the United States Constitution, plaintiffs also assert that they have been required to work at non-habilitative tasks in the institutions for nominal wages in violation of the Fair Labor Standards Act, as amended, 29 U.S.C. §201 et seq. Plaintiffs have submitted interrogatories to the defendants and anticipate further pre-trial discovery in the immediate future. No trial date has yet been set.

B. RIGHT TO PUBLIC EDUCATION

CONNECTICUT: Seth Kivell, P.P.A. v. Dr. Bernard Nemoitan, et. al., No. 143913, (Superior Court, Fairfield County, Connecticut, July 18, 1972)

This "right to education" suit was brought by the mother of a 12 year old child who has been a "perceptually handicapped child with learning disabilities" since before February 1970. The suit sought both a mandamus directing the defendants--members of the Stamford, Connecticut Board of Education--to perform their duties towards the minor in accordance with state statutes mandating special education for an exceptional child and money damages against the defendants for reimbursement of tuition expended by the mother for an out-of-state educational facility. In a decision issued July 18, 1972, Judge Robert Testo found for the plaintiffs on both counts noting that in response to plaintiffs' earlier administrative actions the state commissioner of education had informed the superintendent of the Stamford Board of Education that the program offered to the plaintiff for the school year 1970-71 by the defendants would not have met the plaintiff's special educational needs.

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However, the court was careful to limit the scope of its holding. Judge Testo wrote:

> "This Court will frown upon any unilateral actions by parents in sending their children to other

facilities. If a program is timely filed by a local board of education and is accepted and approved by the state board of education, then parents to accept said program. A refusal by the parents in such a situation will not entitle said child to any benefits from this court."

NEW YORK: In the Matter of Peter Held, Civil Action No. H-2-71, H-10-71, (Family Court of the State of New York, County of Westchester, November 29, 1971)

This "right to education" case was first filed in January 1971 by the mother of an 11 year old handicapped child. On November 29, 1971, the court granted the cost of providing for the special education of the child in accordance with the provisions of Section 4403 of the New York State Education Law. An initial decision in this case in June 1971 ordering the State of New York and the City of Mt. Vernon to pay plaintiff's private school tuition had been vacated in August 1971. A new trial was ordered because the court had lacked jurisdiction over the City of Mt. Vernon, plaintiffs, having failed to make a valid service of process upon the city. In the second trial, the City of Mt. Vernon and its School District were properly named as defendants along with Westchester County.

In his decision, Judge Dachenhausen noted that before the plaintiff began to attend a private special education facility in New York City the 11 year old child's reading level was recorded at only 1.5 despite 5 years of public education. In the year since he entered the private school he raised his reading level by about 2 grade levels. Further, the court noted that the Superintendent of the Mt. Vernon Public Schools certified that the special facilities available at the private school were not available in Held's home school district.

NORTH CAROLINA: Crystal Rene Hamilton v. Dr. J. Iverson Riddle, Superintendent of Western Carolina Center, Civil Action No. 72-86 (Charlotte Division, W.D. of North Carolina)

This case was filed on May 5, 1972 in the Charlotte Division of the Western District Court of North Carolina on behalf of Crystal Rene Hamilton—a mentally retarded 8 year old--and

all other school age mentally retarded children in North Carolina. Defendants include the Superintendent of the Western Carolina Center, a State institution for the mentally-retarded; the Secretary of the North Carolina Department of Human Resources; the State Superintendent of Public Instruction; and the Chairman of the Gaston County Board of Education.

When she was admitted to the Western Carolina Center in November 1971, Crystal had received only nine hours of publicly-supported training. She was admitted to the Center "under the provision that she would be able to remain in said Center for a period of only six months, after which time it would be necessary for her to return to her home and be cared for by her parents." The complaint alleged that the parents were unable to provide "this care and treatment," that the State does not have other facilities to provide the care, and the Center administrator has notified Crystal's parents to take her home.

The legal basis of the complaint in this case is that the State, through its board and agencies, "has failed to provide equal educational facilities for the plaintiff and has denied to her access to education and training . . " The North Carolina statute "guarantees equal free educational opportunities for all children of the State between the ages of six and twenty-one years of age." Also at issue is the classification scheme used by the State which "selects some students as eligible for education and some as not . . ." Further, the complaint argues that the State's practice of making financial demands upon the parents of mentally retarded children for the care and treatment of their children is a denial of equal protection to these children.

The defendants in this case were given until December 1, 1972 to provide the judge with information concerning their activities on behalf of the educable retarded. This order was made in conference, orally, and was never dictated. Some of the information has been provided, and the rest will be coming in shortly, from the 150 public school units in North Carolina. The judge wants to narrow the factual context of the case for the three-judge panel which has been convened. This case has been consolidated with the case of North Carolina Association for Retarded Children, James Auten Moore v. State of North Carolina (See update below).

WISCONSIN: Mindy Linda Panitch, et. al. v. State of Wisconsin, Civil Action No. 72-L-461 (U. S. District Court, Wisconsin)

This suit is being brought against the State by Mindy Linda Panitch as representative of a class of children "who are multi-handicapped, educable children between the ages of four and twenty years, whom the State of Wisconsin through local school districts and the Department of Public Instruction is presently excluding from and denying to, a program of education and/or training in the public schools or in equivalent educational facilities."

At issue in this action is a Wisconsin statute and policy enabling handicapped children to attend "a special school, class or center" outside the State. When this occurs, and depending upon the population of the child's residence, either the county or school district is required to pay the tuition and transportation. State policy limits the enrollment of children under this act to "public institutions."

The original complaint alleges that the plaintiff and members of the class are denied equal protection of the laws since the "defendant does not, either through local school districts or the department of public instruction, provide any facility within the State to provide an education and/or training to plaintiff and other members of the class." This violation of the laws, it is alleged, occurs even though special education programs are available outside the State. Plaintiffs seek declaratory relief, injunctive relief, and costs.

In an amended complaint, the plaintiff, as a representative of her class, is suing three defendants: the State, the State Superintendent of Public Instruction, and a local public school district, individually and as a representative of the whole class. The attorneys could not agree whether the named plaintiff and named defendant public school district were proper representatives, or on the definition of the class of educable retarded plaintiffs or the class of local school districts. They therefore moved for a determination of the classes. Judge Gordon, in mid-November, found the plaintiff to be representative of her class of all educable, handicapped children between the ages of four and twenty that are being denied education at public expense. In addition, he found the public school district to be a fair representative of its class.

(As an interesting aside, the judge in this case spoke in open court about the problems that he as a parent had in placing his handicapped children a few years earlier. He asked if any parties desired him to disqualify himself, but none did).

MARYLAND: Maryland Association for Retarded Children, Leonard Bramble, et. al. v. State of Maryland et. al., Civil Action No. 72-733-K (U. S. District Court, Maryland)

A class action suit has been brought by the Maryland Association for Retarded Children and 14 mentally retarded children against the State of Maryland and its state board of education, state superintendents of education, secretary of health and mental hygiene, director of the mental retardation administration, superintendents of state institutions, commissioner of the mental health administration, and local boards of education for their failure to provide retarded or otherwise handicapped children with an equal and free public education.

As in other right to education cases, the complaint emphasizes the importance of providing all persons with an education that will enable them to become good citizens, achieve to the full extent of their abilities, prepare for later training, and adjust normally to their environment. It is further argued that "the opportunity of an education, where the state has undertaken to provide it, is a right that must be made available to all on equal terms."

The plaintiffs allege that the state's tuition assistance program provides insufficient funds to educate these children and thus parents are forced to use their own resources. Another allegation is that the state when making placement decisions does not provide for notice and procedural due process.

The plaintiffs are seeking declaratory and injunctive relief, including a 60-day order for free, publicly-supported education with appropriate structure and guidelines to guarantee that the individual child's needs are met. They further seek compensatory education for those children formerly excluded from school, and appointment of a master.

Now in a discussion stage, this case will have a more permanent schedule assigned in January. One defendant has filed an answer.

NEW YORK: Piontkowski v. John Gunning and The Syracuse School District (filed with the Commissioner of Education for the State of New York on August 4, 1972)

This class action, filed with the Commissioner of Education for the State of New York against the Syracuse Board of Education, charged the Board with failure to educate over 40 "trainable mentally retarded" children. Lawyers for plaintiffs had spent six months investigating the city's policy of excluding this group of children and had met with the majority of parents to consider possible legal action.

On August 22, 1972, attorneys for the Syracuse City Board of Education filed a respondant's brief with the Commissioner of Education in which they admitted to each of plaintiffs' allegations, with only one exception. The respondants agreed that the children cited as plaintiffs, along with approximately twenty other children (they denied that they were as many as forty), were entitled to public school education. The School Board instructed its staff to immediately open classrooms for this group of 22 children. Plaintiffs' lawyers are currently concerned with implementation of the School Board's instruction and specifically with outreach efforts to identify other mentally retarded children who have been excluded from public education in New York and who are entitled to such education under the School Board's decision.

C. RIGHT TO FAIR CLASSIFICATION

MASSACHUSETTS: Stewart et. al. v. Philips et. al., Civil Action No. 70-1199-F (D. Mass.)

This suit attacks the classification methods employed by the Boston school system for placing mentally retarded children in special education classes. The seven named plaintiffs, found to be not retarded by independent psychological evaluations, were all placed in retarded classes on the basis of a single IQ test. The suit alleges that irreparable harm has been caused by the stigma and "by the nature of the instruction given. The remedies sought are damages and the

establishment of a Commission on Individual Education Needs. Made up of public organizations, private organizations and parents, the commission would oversee a proposed testing procedure detailed in the complaint. All children presently in special education classes would be retested.

The original judge in this case has retired, and the time for discovery under his order has expired. Now pending before the new judge are motions to enlarge the time for discovery, for dismissal, and for summary judgment. Boston is claiming that new regulations have settled the case, but the plaintiffs are not satisfied with the implementation of these regulations.

D. CUSTODY

IOWA: In the interest of: Joyce McDonald, Melissa McDonald, Children, and the State of Iowa v. David McDonald and Diane McDonald, Civil Action No. 128/55162 (Iowa Supreme Court, October 18, 1972); and

In the Interest of: George Franklin Alsager et. al. and the State of Iowa v. Mr. and Mrs. Alsager, Civil Action No. 169/55148 (Supreme Court of Iowa, October 18, 1972)

These two cases open up the new subject matter category of child custody problems for "mental retardation and the law." In the McDonald case, David McDonald, 24, and his wife Diane, 21, were adjudged unfit to care for their four year old twins, Melissa and Joyce. The Iowa Supreme Court ruled that these twin girls should be taken from their parents because the mother's intelligence quotient was so low that she could not give them proper care. In so doing, the Iowa Supreme Court upheld a decision by the Scott County Juvenile Court of August 1970 which separated the parents from their daughters.

A Scott county juvenile probation officer had filed a petition seeking termination of the relationship in which it was alleged the relationship should be terminated as the parents were unfit by reasons of conduct found by the juvenile court likely to be detrimental to the physical or mental health or morals of children as defined in Section 232.41(2) and (d) of the Iowa Code and for the further

reason that following an adjudication of dependency, reasonable efforts under the direction of the court had failed to correct the conditions leading to the termination.

After hearing evidentiary testimony, the Juvenile Court found that Mrs. McDonald could not provide the twins "the stimulation in her home that they must have to grow and develop into normal, healthy children." Intelligence tests given the parents by Davenport school officials indicated that the husband had an I.Q. of 74 and the wife had an I.Q. of 47. The twins, who have lived in foster homes since they were about seven months old, were also tested and were found to be not retarded. Lower court testimony by nurses and social workers who had visited the McDonald home before the girls were placed with foster parents indicated that the twins were then "pale" and just "u iresponsive." These witnesses testified that while Mrs. McDonald could handle the bathing and feeding of her children, they doubted whether she could make decisions on whether they were ill. Witnesses further testified that Mrs. McDonald had a lack of concern about the twins, but that this was not true of the husband. The McDonald's attorney argued that no evidence was presented that the parents were guilty of immoral conduct, intoxication, habitual use of narcotic drugs or other habits that were likely to be detrimental to the children. But the Supreme [!*] Court found that the primary consideration in such a custody hearing is the welfare and best interests of the children, and that the presumption that the best interests of children are served by leaving them with their parents have been rebutted in this case. The eight justices of the Iowa Supreme Court who sat on this case en_ bane concurred unanimously in the decision, which held that the State "has the duty to see that every child within its borders receives proper care and treatment." The court's opinion made no further comment on what it would consider a proper parent-child relationship or upon the role which the State should assume in measuring the fitness of parents to provide "proper care and treatment."

The McDonald opinion appears to involve some misconceptions about the nature of mental retardation and also raises some vexing policy considerations. The Iowa Supreme Court, for instance, relied upon testimony of Mrs. Clanton, a deputy probation officer, before the juvenile court that evaluation tests administered to the children "disclosed the children were not retarded but needed love and affection and would

probably regress if placed back in the original home." According to the Iowa Supreme Court, "it was Mrs. Clanton's opinion that a person with a low I.Q. did not have the same capacity to love and show affection as a person of normal intelligence." The writer knows of no "evaluation" test which is constructed to disclose whether a mentally retarded person would "probably regress if placed back in the original home" and also questions the generalization that a person with a low I.Q. does not have the same capacity to show love and affection as a person of a normal intelligence. Also troubling is the court's failure to consider less drastic alternatives to separating the children from their parents and offering them for adoption. According to the Iowa Supreme Court, "as the witness David repeatedly expressed the desire to have the twins returned to him and his wife. He testified he had had experience in bathing and feeding his mother's small children and declared a willingness to help with the children in the evening after coming home from work. He told of an arrangement made with a 25 year old lady who lives across the hall from his apartment to help take care of the twins and a third child born to this marriage for the first few months in order to get the children on schedule and assist his wife and teach her how to care for the children in the event the children were returned to the McDonald home." Fundamental issues raised by this opinion are the nature and limits of a State's right and obligation to scrutinize and separate a family as "parens patriae" when such powers may conflict with the parents' right to privacy and with the presumption that parents and not the State will raise children and make basic decisions about the child's best interest.

On the same day as it decided the McDonald case, the Iowa Supreme Court also decided the Alsager case, in which it upheld an earlier ruling by the Cook County juvenile court which took protective custody of the Alsager's five children. The juvenile court held that "while the Alsagers do love their children," neither have "the capacity nor training nor willingness to learn to understand the needs of children." The Iowa Supreme Court held "the material facts can be said to be identical (with those of the McDonald case) except to add the finding that the tragic deficiencies of both families in this case appears to have resulted in more harm to the children . . We are precluded from attempting to achieve a justice as desired by the unfortunate parents by working a cruel injustice on the children."

UPDATED INFORMATION ON PREVIOUSLY REPORTED CASES

A. RIGHT TO TREATMENT

NEW YORK: New York Association for Retarded Children, et. al. v. Rockefeller, 72 Civil Action No. 356; and Patricia Paresi, et. al. v. Rockefeller, 72 Civil Action No. 357 (E.D. r.Y.)

On June 30th a motion for preliminary relief was filed, supported by a 102 page brief, 500 pages of pre-trial deposition testimony from defendants, massive affidavits from plaintiffs[1] expert witnesses, and numerous exhibits obtained through pre-trial discovery. The motion was argued during four days of extensive testimony in December. The hearings were adjourned until January 9, at which time the State concluded its case.

MASSACHUSETTS: Ricci, et. al. v. Greenblatt, et. al., Civil Action No. 72-469F (M.D. Massachusetts)

This class action has been assigned to visiting Judge Real of Los Angeles. In November 1972, he heard arguments on the plaintiffs' motion for certification as a class action and the defendants' motion for summary judgment in light of the Comprehensive Care and Treatment Plan for Belchertown State School, filed by the plaintiffs in June. No action has yet been taken on either of these motions or the earlier contempt petition filed by plaintiffs with regard to the defendants' failure to complete the medical examinations of the residents of Belchertown State School in the time required by the court's order of February 11, 1972. Extensive discovery has already been undertaken by plaintiffs. As of the middle of December, the concerted effort to reach a consent decree through negotiation appears to have failed.

GEORGIA: Burnham v. Department of Public Health of the State of Georgia, Civil Action No. 16385 (N.D. Georgia) (See feature, p. 3).

ALABAMA: Wyatt v. Stickney, Civil Action No. 3195-N (M.D. Ala.). (See feature, p. 3).

ILLINOIS: Wheeler et. al. v. Glass et.' al., Civil Action No. 17-1677, (U.S. Court of Appeals, 7th Circuit)

This case was argued on October 19, 1972, before a three-judge panel of the Seventh Circuit. The opinion has not yet been handed down.

ILLINOIS: Rivera et. al. v. Weaver et. al., Civil Action No. 72C135 (D. 111.)

Plaintiffs in this case dismissed their own district court complaint. The reason is that virtually the same relief sought was obtained in State court in the case of In the Interest of Mary Lee and Pamela Wesley. A comprehensive August 29, 1972 order gave institutionalized children who were wards of the State the right to leave if they wanted to and further affirmed the State's responsibility to find places for them. An elaborate system of reporting was set up and the plaintiffs' lawyers were appointed as child advocates for 200 children. They are now preparing a lengthly report to the court in preparation for a possible right to treatment case.

B. RIGHT TO COMPENSATION FOR INSTITUTION MAINTAINING LABOR

FLORIDA: Roebuck et. al. v. Florida Department of Health and Rehabilitative Services et. al., Civil Action No. TCA 1041 (N.D. Fla., Tallahassee Division)

Defendants in this case moved for dismissal. The court requested more briefs and held two oral arguments, then reserved judgment on defendants' motion. Interrogatories have been served by plaintiffs but not all of their questions have been answered. Plaintiffs will rephrase the interrogatories, limiting some broad ones, and are considering filing a motion for data on peonage priorities throughout the whole State. In addition, the plaintiffs are conducting informal interviews.

TENNESSEE: Townsend v. Treadway, Commissioner, Tennessee Department of Mental Health, Civil Action No. 6500 (D. Tenn.)

The trial, previously set for October 2, 1972 was continued and is now set for March 1973. In August 1972, the plaintiffs moved for certification as a class action, but no decision has yet been made on this motion by the court. At present negotiations on a proposed settlement are taking place.

C. RIGHT TO PUBLIC EDUCATION

MICHIGAN: Harrison et. al. v. State of Michigan et. al., Civil Action No. 38557 (E.D. Michigan)

This case was dismissed on motion due to mootness. There exists in Michigan a statute requiring mandatory education

for all handicapped children, which will become effective in September 1973. The court ruled that it couldn't devise a plan or implement a plan sooner than that date. In dismissing the complaint, the court held for the first time in Michigan that the handicapped have an equal protection right to education. The attorneys feel that this order will shape the controversy for the fall if the statute is not implemented.

WISCONSIN: Marlega v. Board of School Directors of City of Milwaukee, Civil Action No. 70-C-8 (E.D. Wise.)

This case is closed. In a new case, the Marlega procedures on disciplinary transfers are being modified by a consent decree.

NORTH CAROLINA: North Carolina Association for Retarded Children, Inc., James Auten Moore, et. al., v. The State of North Carolina Department of Public Education (E.D. N.C., Raleigh Division)

Defendants in this case have moved to dissolve the three-judge panel claiming a lack of federal jurisdiction. The court has not yet ruled on this motion.

NEW YORK: Reid v. Board of Education of City of New York, Civil Action No. 71-1380 (S.D. New York)

Pursuant to the Second Circuit Court of Appeals decision on abstention, plaintiffs filed with the State Commissioner of Education. Plaintiffs' claims are basically the same, with state constitutional claims added. A hearing is expected to take place in January, but the exact date has not yet been set. The Commissioner's only action thus far has been to deny temporary relief.

CALIFORNIA: Lori Case, et. al. v. State of California, Department of Education, et. al., Civil Action No. 191679 (Cal. Superior Court, Riverside County)

A factual hearing was held on September 5, 1972. On December 11, 1972, Judge E. Scott Dales issued a Notice of Intended Decision denying plaintiffs relief. The court said that plaintiffs' case was without merit and that a preponderance of the evidence supported a finding for the defendants.

Plaintiffs have requested the court to issue its Findings of Fact and Conclusions of Law and intend to move for a new trial.

D. RIGHT TO FAIR CLASSIFICATION

LOUISIANA: Lebanks et. al. v. Spears et. al., Civil Action No. 71-2897 (E.D., La., New Orleans Division)

In June, plaintiffs amended this complaint to include the Louisiana Department of Hospitals and the Louisiana Department of Education. In turn, these two new defendants filed a third-party complaint against the United States Department of HEW and the United States Commissioner of Education alleging that the Federal Government has the primary duty to accord to all United States children an education suited to their needs. This complaint is based both upon the due process and general welfare clauses of the U.S. Constitution, Title I of the Elementary and Secondary Education Act, and the new defendant's position that Title I violates the Due Process Clause and the Fifth Amendment on equal protection grounds. The trial was set for November but upon the request of defendants was continued until April 1973.

CALIFORNIA: Larry P., M.S., M.J., et. al. v. Riles et. al. Civil Action No. C-71-2270 (N.D. California)

In June 1972, the Court entered a preliminary injunction enjoining the State of California from using I.Q. tests for placing black children in classes for the educable mentally retarded. The plaintiffs are presently involved in discovery in preparation for the trial on the request for a permanent injunction.

CLOSED CASES REPORTED IN EARLIER ISSUES OF "MENTAL RETARDATION AND THE LAW"

A. RIGHT TO EDUCATION

PENNSYLVANIA: Pennsylvania Association for Retarded Children, Nancy Beth Bowman et. al. v. Commonwealth of Pennsylvania, David H. Kurtzman, et. al., Civil Action No. 71-42 (3 Judge Court E.D. Pa.)

DISTRICT OF COLUMBIA: Mills v. Board of Education of the District of Columbia, Civil Action No. 1969-71 (District of Columbia)

B. COMMITMENT LAWS

INDIANA: Jackson v. Indiana (U.S. Supreme Court, No. 70-5009), 39 Law Week 3413; 40 Law Week 3247, 3256, Slip Opinion, June 9, 1972.