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**LONG-OVERDUE REFORM OF D.C.'S ANTEDILUVIAN
DEVELOPMENTAL DISABILITIES LAW: FROM FOREST HAVEN TO
THE 21ST CENTURY**

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*250 The purpose of this subchapter is to assure that individuals with developmental disabilities and their families ... have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs authorized under the subchapter
Developmental Disabilities Assistance and Bill of Rights Act of 2000, § 101.
[FN1]

The District of Columbia should implement a model system of effective quality services and supports for residents with intellectual and developmental disabilities and for their families
D.C. Resolution 17-457, § 2(f) (December 11, 2007).

[The] law should help everybody with a physical or mental disability - it should be broad. . . .
Report on Focus Groups on Services for Residents with Developmental Disabilities and their Families (January 2008). [FN2]

There can be no question that the time has come for sustainable reform of our system of care and habilitation for some of our most vulnerable residents.
Fenty Administration's DDS Reform Plan (2007). [FN3]

We have to believe that this is the beginning of something much better than what we had.
Mary Lou Meccariello, executive director of The Arc of the District of Columbia and chair of the Legislative Committee which drafted the Developmental Disabilities Reform Act bill. [FN4]

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I. Introduction

People with disabilities in the District of Columbia have been living with (and sometimes dying because of) an inadequate, restricted, archaic, developmental disabilities law that was enacted in 1978. [FN5] It rations services to a narrower range and limits them to a narrower class of eligible recipients than has been authorized under the federal funding legislation since 1970. [FN6] Coupled with what at times over the years has been inept and constrained implementation, the 1978 statute has led to a system of services that has been too narrow at best and shameful in a number of instances. Since the current legislation took effect on March 3, 1979, [FN7] a veritable revolution has taken place in disability policy and services, and a number of significant changes have taken place in the courts, including in the District, but the antiquated law has remained, virtually unchanged, on the D.C. statute books.

Currently pending in the Council of the District of Columbia is a bill that offers the possibility of enacting a belated, but forward-looking, developmental disabilities statute - one that would expand eligibility for developmental disabilities supports and services to reflect the scope of eligibility under federal law, and that would endorse and make operational the more enlightened and humane approaches, structure, and philosophy of programs for addressing the needs of persons with disabilities that have emerged since 1978.

The purposes of this article are to examine the origins and nature of developmental disabilities laws and programs and their significance for people with such disabilities, to discuss the Forest Haven facility and the *Evans* litigation it spawned, to examine the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, to trace legal and programmatic developments in disability policy since 1978, and to compare the 1978 statute with the proposed Developmental Disabilities Reform Act. Part II of the article traces the history of federal developmental disabilities legislation, discusses the emergence of the terminology of “developmental disabilities” and its evolution, and describes the types and significance of developmental disabilities programs and services. Part III focuses on the Forest Haven facility and the treatment accorded those confined there, and looks at the ongoing proceedings in the court suit currently titled *Evans v. Fenty* and the judicial opinions it has produced in regard to those who resided in the *252 institution. Part IV describes the 1978 statute, its origins, and some of its shortcomings; and then describes important developments, in philosophical and administrative approaches to developmental disabilities programs and services, and in the law, that have occurred since 1978. And Part V explores the presently pending DDRA bill, highlights some of the ways in which it expands and improves upon existing law on developmental disabilities supports and services in the District of Columbia, and offers a general critique of the bill.

A few comments are in order in regard to the title of the article. The term “antediluvian” has origins that mean before the biblical great flood; in the title it is used in another of its meanings: “extremely primitive or outmoded”; [FN8] “so extremely old as seeming to belong to an earlier period, . . . antiquated, archaic.” [FN9] The reference to “Developmental Disabilities Law” also requires a bit of explanation in that the current statute in D.C., as its title indicates, addresses the condition of, as it was termed at the time of the statute's enactment in 1978, “mental retardation.” [FN10]

The term “mental retardation” is rapidly being replaced by the phrase “intellectual disability,” the now-preferred terminology for the condition. [FN11] The author of this article has written elsewhere about the evolutionary pattern of terminology for referring to disabilities, particularly including “mental retardation,” in which new, unsullied terms gradually get loaded up with stereotypes and derogatory connotations and are eventually replaced with fresh, unblemished terms, and the cycle begins anew. [FN12] The American Association on Intellectual and Developmental*253 Disabilities (AAIDD), an influential, 130 year-old professional organization and a leading authority on mental retardation/intellectual disability, was called the American Association on Mental Retardation until 2007. [FN13] The association was renowned for promulgating the official definition of mental retardation, but its members voted to change the name of the organization to the ‘American Association on Intellectual and Developmental

Disabilities’ as of the beginning of 2007 and to adopt “intellectual disability” terminology in lieu of “mental retardation.” [FN14] AAIDD has announced the issuance of the 11th edition of its authoritative definition manual, previously titled *Mental Retardation: Definition, Classification and Systems of Supports*, but now to be named *Intellectual Disability: Definition, Classification, and Systems of Supports*. [FN15] In the 11th edition, the term “mental retardation” is universally replaced by “intellectual disability,” and AAIDD presents its first official definition of the term “intellectual disability,” as follows: “Intellectual disability is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18.” [FN16] In this article, “intellectual disability” will generally be utilized instead of “mental retardation” except in quotations, statutory language, and discussion of legal rulings or statutes where it might prove confusing.

*254 Whether referred to as mental retardation or intellectual disability, the condition is a type of developmental disability, so one could assert that, strictly speaking, the 1978 Act is an “intellectual disability law,” that, if the DDRA bill is passed, will be replaced by a “developmental disabilities law.” Less rigidly, however, an intellectual disability is a developmental disability (one of many), [FN17] so a statute that addresses only intellectual disability may properly be characterized as a “developmental disability law” (albeit a limited and partial one), particularly when the law expressly taps into and secures resources under federal developmental disability laws. This latter usage is intended in the reference in the article's title to the 1978 D.C. Act as a developmental disabilities law.

Another necessary clarification concerns the references in this article to the “Mentally Retarded Citizens Constitutional Rights and Dignity Act” as the “1978 Act.” The Act's full short title is the “Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978.” It was considered and adopted by the Council of the District of Columbia on first and second readings on September 19, 1978 and October 3, 1978, respectively. [FN18] After it was signed by the Mayor of the District on November 8, 1978, it was assigned Act No. 2-297. [FN19] Because, however, of the “Home Rule” restrictions Congress has placed on D.C. [FN20] - restrictions that many D.C. residents consider to be a form of “disenfranchisement” [FN21] or “colonial status” [FN22] - the “Act” had to be transmitted to both Houses of Congress for their review, and accordingly did not become law until the congressional layover period was completed on March 3, 1979. Because of its short title and because the D.C. Council completed its “enactment” process in 1978, the law is popularly referred to as a 1978 Act, and that convention is followed in this article.

II. Developmental Disabilities Laws and Programs: Their Scope, History, and Significance

What we now call “developmental disabilities” laws had their origins in federal “mental retardation” legislation passed in the early 1960s. In 1961, President John F. Kennedy, whose sister Rosemary reportedly had an intellectual disability, convened a panel of experts to develop ‘A National Plan to Combat Mental Retardation.*255 ‘

[FN23] Based in part upon the recommendations of the Panel, President Kennedy sent to Congress, on February 5, 1963, a special message on mental illness and intellectual disability. In regard to intellectual disability, the President presented a proposed legislative package offering a “bold new approach” focusing on three major objectives: (1) to seek out and eradicate the causes of intellectual disability; (2) to add to the underlying knowledge and skilled manpower regarding intellectual disability; and (3) to strengthen and improve the programs and facilities serving persons with intellectual disability. [FN24] The President explained that to pursue these objectives he proposed “to use Federal resources to stimulate State, local, and private action.” [FN25] In response to the President's Message, Congress enacted the gist of his recommendations in the Maternal and Child Health and Mental Retardation Planning Act, [FN26] which authorized \$265 million in federal aid over five years to support programs for those with intellectual disabilities; and the Mental Retardation Facilities and Community Mental Health Construction Act of 1963, [FN27] which made \$330 million available over five years for grants for the erection of new buildings to serve citizens with disabilities. President Kennedy signed these bills into law at a White House ceremony on October 23, 1963, less than a month before he was assassinated. [FN28]

A. Eligibility under Federal Developmental Disabilities Laws

Apart from provisions relating to mental health conditions, the 1963 Acts focused on providing funding for research and service facilities and some service programs regarding intellectual disability (“mental retardation”), and, when Congress expanded the range of services somewhat and increased the program funding in 1967, it retained the limitation on eligibility to the class of persons with intellectual disabilities. [FN29] Eligibility for services and programs under the federal law has not been limited to “intellectual disability” (“mental retardation”), however, since 1970, when the term “developmental disability” was introduced, and “cerebral palsy” and “epilepsy” were included in addition to intellectual disability.*256 [FN30] “Autism” and “dyslexia resulting from” one of the other listed conditions were added in 1975. [FN31] In 1978, Congress expanded the definition once more, dropped the list of particular conditions, and adopted a more generic approach focused on “severe, chronic disability” that “is attributable to a physical or mental impairment,” “is likely to continue indefinitely,” “results in substantial functional limitations,” and causes the person to need “care, treatment, or other services which are of lifelong or extended duration.” [FN32]

The decision to eliminate the list of covered conditions in the 1978 amendment was a carefully deliberated choice in the Congress. The House version of the Bill had preserved the listing approach of the prior Acts, but the Senate's version of the Bill was ultimately adopted in conference. The Joint Conference Report indicated,*257 however, that the previously enumerated groups were not to be deprived of their eligibility:

The conferees stress, however, that the definition agreed to is intended to cover everyone currently covered under the definition and is also intended to add other individuals with similar characteristics. In this definition, individuals with the conditions currently listed in the law - autism, cerebral palsy, dyslexia, epilepsy, or mental retardation - would be included if they meet the following criteria: manifestation prior to

age 22, expectation of continuing indefinitely, substantial functional limitation, and need for multiple services for an extended period. It is not the intent to exclude anyone who legitimately should have been included under the definition in current law. [FN33]

Since the adoption of the “developmental disabilities” term in 1970, each of the versions of the federal developmental disabilities laws has incorporated a criterion that the disabling condition must have had its inception before the person reached a certain age - 18 in the 1970 [FN34] and 1975 [FN35] statutes, and 22 since 1978. [FN36] The congressional rationale for the before-a-certain-age limitation in the developmental disabilities definition was enunciated in the statutory finding in the 1978 version that ‘individuals with disabilities occurring during their developmental period are more vulnerable and less able to reach an independent level of existence than other handicapped individuals who generally have had a normal developmental period on which to draw during the rehabilitation process.’ [FN37] The current version of the congressional finding simply says that “individuals whose disabilities occur during their developmental period frequently have severe disabilities that are likely to continue indefinitely.” [FN38] These findings are not wholly convincing and raise questions such as whether the asserted rationale made more sense with an age-18 cutoff rather than the age-22 limit imposed under the 1978 and subsequent enactments. The drawing of any sharp eligibility line based on a person's age necessarily has an element of arbitrariness. Is there any significant difference between a person who becomes disabled at age 21 and one who becomes disabled shortly after the 22nd birthday? Such reservations notwithstanding, under the existing federal standards, the “developmental” in “developmental *258 disability” means that the disability had its onset prior to the person turning 22 years old.

The 1978 definition, with only minor cosmetic changes, was reenacted in 2000 in the Developmental Disabilities Assistance and Bill of Rights Act of 2000. [FN39] The current definition, virtually the same, provides as follows:

The term ‘developmental disability’ means a severe, chronic disability of an individual that:

- (i) is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (ii) is manifested before the individual attains age 22;
- (iii) is likely to continue indefinitely;
- (iv) results in substantial functional limitations in three or more of the following area of major life activity:
 - (I) self care
 - (II) receptive and expressive language
 - (III) learning
 - (IV) mobility
 - (V) self-direction
 - (VI) capacity for independent living
 - (VII) economic self-sufficiency; and
- (v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of

assistance that are of lifelong or extended duration and are individually planned and coordinated. [FN40]

B. Nature and Importance of Developmental Disabilities Programs and Services

The definition of “developmental disabilities” is quite important because it determines eligibility for a wide range of services available under federal developmental disabilities legislation. Major elements of the developmental disabilities program were established in the Developmental Disabilities Assistance and Bill of Rights Act of 1975 (DDABRA). [FN41] Although the 1975 DDABRA was repealed and incorporated into the 2000 Act, resulting in a relocation of the codification of *259 its provisions, [FN42] the name of the Act and most of its provisions were retained, [FN43] and the core of the developmental disability statutory scheme is derived from it. Subsequent references to DDABRA in this article refer to the 2000 Act, which constitutes the source of most of the current law, other than the definition of developmental disability as discussed in the prior section.

1. Federal-State Developmental Disabilities Grant Program

The Supreme Court provided a concise summary of federal developmental disability statutory law when it declared: “The DD Act is a federal-state grant program whereby the federal government provides financial assistance to participating states to assist in creating programs to care for and treat the developmentally disabled.” [FN44] DDABRA establishes a federal grant program to states conditioned on state compliance with certain procedures and requirements set out in the Act, including submission of a state plan. [FN45] The term “state,” as used in the statute, includes the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands in addition to the 50 states of union. [FN46] “The keystone of the funding scheme,” as one commentator put it, “in keeping with the goal of encouraging comprehensive planning, is that the plan created by each state must be submitted to and approved by the Secretary of Health and Human Services.” [FN47] The overall purpose of DDABRA and, accordingly, of the state funding program is “to assure that individuals with developmental disabilities and their families . . . have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life” [FN48]

The Act provides that, to obtain funding, each state must designate and maintain a Council on Developmental Disabilities. [FN49] These councils are expected to “engage in advocacy, capacity building, and systemic change activities that . . . *260 contribute to a . . . comprehensive system that includes needed community services, individualized supports, and other forms of assistance that promote self-determination for individuals with developmental disabilities and their families.” [FN50] They are also directed to develop the state plan and to implement it “by conducting and supporting advocacy, capacity building, and systemic change activities,” [FN51] and are authorized to engage in activities “to promote the development of a . . . comprehensive system of community services, individualized supports, and other forms of assistance that contribute to the achievement of the purpose of this subtitle.” [FN52] The State Council is also responsible

for determining each year the extent to which each state plan goal was or was not achieved during that year, [FN53] and annually preparing and submitting a report providing a description of the extent to which goals were achieved or not achieved, and, if the latter, factors that impeded the achievement. [FN54] The state plan explicitly must include “a comprehensive review and analysis of the extent to which services, supports, and other assistance are available to individuals with developmental disabilities and their families, and the extent of unmet needs for services, supports, and other assistance for those individuals and their families, in the State.” [FN55]

DDABRA also makes it clear that services rendered under the Act are to be individualized. It repeatedly specifies the need for “individualized supports,” [FN56] and Congress made the following policy declaration:

It is the policy of the United States that all programs, projects, and activities receiving assistance under this title shall be carried out in a manner consistent with the principles that . . . individuals with developmental disabilities and their families have competencies, capabilities, and personal goals that should be recognized, supported, and encouraged, and any assistance to such individuals should be provided in an individualized manner . . . [FN57]

The state plan requirements include a provision, among the mandated assurances, headed “Individualized Services,” which states that “[t]he plan shall provide assurances that any direct services provided to individuals with developmental disabilities and funded under the plan will be provided in an individualized manner, consistent with the unique strengths, resources, priorities, concerns, abilities, and capabilities of such individual.” [FN58]

*261 Together, such provisions engender a pipeline through which federal funding is channeled to states for providing, on an individualized basis, services, supports, and other forms of assistance to persons with developmental disabilities. For any state that wants to provide services and assistance to its residents with developmental disabilities, DDABRA offers an opportunity to obtain federal dollars to do exactly that.

2. Developmental Disabilities Bill of Rights

A conspicuous aspect of DDABRA was its inclusion of a developmental disabilities “Bill of Rights, [FN59] in which Congress found that individuals with such disabilities have certain listed rights, “in addition to any constitutional or other rights otherwise afforded to all individuals.” [FN60] The “Bill of Rights” begins with a congressional declaration that people with developmental disabilities have a right to appropriate treatment, services, and habilitation that maximize the potential of the person . . . [and are] provided in the setting that is least restrictive of the individual's personal liberty. [FN61] It provides that both the federal government and the states have an obligation to see to it that public funds are provided only to programs that provide appropriate treatment, services, and habilitation, and that meet certain “minimum standards.” [FN62] The minimum standards include (1) being free of “abuse, neglect, sexual and financial exploitation, and violations of legal and human rights” and of subjecting persons with developmental disabilities to greater risk of harm than the general population (2) providing appropriate and sufficient medical and dental services; (3) prohibiting use of physical restraint and seclusion unless absolutely necessary for physical safety and not as punishment or as a substitute for a habilitation program; (4) prohibiting the excessive or

inappropriate use of chemical restraints; and (5) permitting visits by close relatives or guardians without prior notice. [FN63] In addition, “[a]ll programs for individuals with developmental disabilities should meet standards ... that are designed to assure the most favorable possible outcome for those served” [FN64] For residential programs serving people who need “comprehensive health-related, habilitative, assistive technology or rehabilitative services,” they must meet standards at least equivalent to regulations applicable to “intermediate care facilities for the mentally*262 retarded,” issued in 1988. [FN65] Other residential programs must meet standards assuring that they render appropriate and humane care, serve individuals whose needs they can meet, are sanitary, and protect residents' rights. [FN66] Nonresidential programs must assure that they provide care that is appropriate for the individuals they serve. [FN67]

The Bill of Rights provisions originated in the Senate version of DDABRA and were incorporated into the final Act in conference. [FN68] The conference report explained:

These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts. [FN69]

Despite this indication of congressional intent and the rights terminology used in the Bill of Rights section of the Act, the U.S. Supreme Court ruled, in *Pennhurst State School and Hospital v. Halderman*, that Congress did not intend for the bill of rights provisions to create enforceable obligations for states to provide habilitation in the least restrictive setting. [FN70] The declaration of rights in that section is therefore not directly binding on states and serves only as an expression of Congress's preference regarding the types of services to be provided and the manner in which they should be provided. Some of the Court's language in the *Pennhurst* decision recognized, however, that other provisions of the federal developmental disabilities law establishing statutorily expressed conditions on receipt of federal funding may create enforceable rights.

3. Enforceability of Express Conditions of Funding

After ruling that the Bill of Rights provision did not establish enforceable rights, the Court had turned to the plaintiffs' suggestion that “they may bring suit *263 to compel compliance with those conditions which are contained in the Act.” [FN71] In this connection, the Court recognized that certain sections of the DD Act in effect at the time of the litigation [FN72] were “[o]f particular relevance” to such a contention of enforceability. [FN73] The Court accepted the proposition that such provisions could be enforceable; it observed that the “Court of Appeals was apparently aware of these conditions since it referred expressly to § 6063(b)(5)(C) in concluding that § 6010 [the Bill of Rights provision] creates a right to treatment[,]” but declared that “[i]ts error was in bypassing these specific conditions and resting its decision on the more general language of § 6010.” [FN74] The Court ruled that the validity of the plaintiffs' claim regarding the violation of rights under the developmental disabilities law would depend upon the resolution of several issues, including whether the programs at issue in the lawsuit were “programs assisted” under the developmental disabilities Act and thus whether the defendants had violated requirements of the Act [FN75]; whether the remedy

in the event of a violation would be action by the Federal Government to terminate funds to the State instead of a private cause of action for noncompliance [FN76]; and, if the plaintiffs' relief was limited to enjoining the federal government from providing funds to the state, whether the state defendants would choose to assume the additional cost of complying with the federal standard or to stop using federal developmental disability funds. [FN77] Ultimately, the Supreme Court remanded the case to the Court of Appeals for resolution of these “difficult questions.” [FN78] On remand, the Third Circuit upheld, on state law grounds, the district court's ruling in favor of the plaintiffs. [FN79] After subsequent proceedings including another appeal to the Supreme Court in which the Supreme Court invalidated the Court of Appeals decision on the pendent state law claim, [FN80] the parties eventually settled *264 the lawsuit without any ultimate ruling on the issue of whether other provisions of federal developmental disabilities law create enforceable rights. [FN81]

Based in part on language of the Supreme Court in the *Pennhurst* decision, most courts have recognized that provisions of the federal developmental disabilities law, other than the bill of rights provision, may create enforceable rights. In *Giesecking v. Schafer*, [FN82] for example, the court ruled that the Supreme Court's decision in *Pennhurst* did not preclude possibility of statutory liability arising from violations of other sections of the Act, and that other provisions of the Act which expressly condition the receipt of federal funds on compliance could give rise to section 1983 or implied rights of action. [FN83] The court considered whether the plaintiffs had a private cause of action against the Secretary of Health and Human Services to compel him to either terminate or reduce federal funding because of the state agency's alleged failure to comply with DDABRA requirements, [FN84] and concluded, relying on analysis in the case of *Garrity v. Gallen*, [FN85] that the plaintiffs had a limited private right of action under the DD Act against the Secretary of Health and Human Services to compel him to perform his mandatory duties under the Act, which include limiting or terminating federal funds for a state's failure to comply with expressed conditions in the DD Act.” [FN86]

The state and state official defendants in *Giesecking* argued that an action against the federal Secretary of Health and Human Services was, in fact, the plaintiffs' exclusive remedy if the state had failed to comply substantially with the provisions of the Act. [FN87] The court declared, however, that it was “unpersuaded that this remedy is the exclusive remedy for the alleged violation by a state of the expressed ‘conditions’ to the receipt of federal funds set forth in the DD Act.” [FN88] And the court concluded that in regard to such “expressed conditions to the receipt of federal funds” Congress “intended to create enforceable ‘rights’ in developmentally disabled individuals, and that these rights can be enforced by way of a cause of action under section 1983.” [FN89] After what it described as “a careful and painstaking analysis of the DD Act, the cases interpreting it since *Pennhurst* [] and similar funding statutes,” [FN90] the *Giesecking* court found that in DDABRA Congress clearly intended to create enforceable rights that could be enforced by a cause of action against the state and state officials. [FN91]

*265 Prior to and subsequent to the decision in *Giesecking v. Schafer*, most other courts have reached similar conclusions. [FN92]

4. Protection and Advocacy Systems

Another major feature of DDABRA is the State Protection and Advocacy (P & A) program. The impetus for this program reportedly had its roots in revelations about, [FN93] and legal actions to challenge, [FN94] disturbing conditions at Willowbrook State School, a New York residential institution for people with *266 intellectual disabilities. [FN95] Concern and indignation about degrading and dehumanizing practices at the facility prompted New York Senator Jacob Javits to push Congress to establish and fund, as part of the Developmental Disabilities Assistance and Bill of Rights Act of 1975, a protection and advocacy system. [FN96] In 2000, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act of 2000, [FN97] which repealed and replaced the old DD Act in its entirety. In its current version, the Act requires that, to receive federal funding for its programs serving persons with developmental disabilities, a state must “have in effect a system to protect and advocate the rights of individuals with developmental disabilities.” [FN98] The P & A system must be independent of developmental disabilities service providers, [FN99] and must have the authority, inter alia, to “pursue legal, administrative, and other appropriate remedies” in the interest of protecting and advocating for the rights of people “who are or who may be eligible” for services, treatment, or habilitation. [FN100] They are specifically empowered to investigate incidents of abuse and neglect of persons with developmental disabilities, [FN101] and to provide information and referrals relating to programs and services addressing the needs of people with developmental disabilities. [FN102] The P&A agencies are also expressly accorded a wide scope of access to records regarding clients, investigations, complaints of possible abuse and neglect, deaths, and situations in which there is probable cause of serious and immediate jeopardy to health or safety. [FN103] This requirement for developmental disability protection and *267 advocacy systems has resulted in every state establishing such an agency; as the National Disability Rights Network (NDRN), the national membership organization for the federally mandated P&As, notes with pride, “Protection and Advocacy agencies (P&As) exist in all states and territories and receive funds under a variety of federal programs. There is also a Native American P&A in the four corners region of the Southwest.” [FN104]

The scope of P&A activities has grown considerably. Since it established the Developmental Disabilities Protection and Advocacy program in 1975, Congress has periodically authorized the P&As to receive or seek funding for other P&A or P&A-related activities. There are now eight different P&A programs; [FN105] in addition to the original Developmental Disabilities P&A, the others are as follows:

The Client Assistance Program (CAP), established by 1984 amendments to the Rehabilitation Act, [FN106] provides federal funding to P&As (and some other eligible entities) to advise persons receiving or seeking services from state rehabilitation agencies under the Act of all available benefits under the Act, and to assist such persons in pursuing administrative, legal and other appropriate remedies. [FN107]

Protection and Advocacy for Individuals with Mental Illness (PAIMI), created by Congress in 1986, [FN108] expanded the P&As' responsibilities to include protecting and advocating for the rights of people with mental illness and of investigating reports of abuse and neglect in facilities that care for or treat individuals with mental illness. The Act was amended in 2000 to allow P&As to serve not just those individuals with mental

illness who live in residential “facilities” [FN109] but also those who reside in the community, including in “their own home.” [FN110]

Protection and Advocacy for Individual Rights (PAIR), established by Congress under the Rehabilitation Act Amendments of 1992, [FN111] authorizes *268 P&As to serve persons with disabilities who are not eligible for services under the PADD, PAIMI, and CAP programs. With the addition of PAIR authorization and funding, the P&As are able to serve people with all types of disabilities. [FN112]

Protection & Advocacy for Assistive Technology (PAAT) was created in 1994 when Congress expanded the Technology-Related Assistance for Individuals with Disabilities Act [FN113] to include funding for P&As to provide protection and advocacy services to assist individuals with disabilities in the acquisition, utilization, or maintenance of assistive technology devices or assistive technology services. [FN114]

Protection & Advocacy for Beneficiaries of Social Security (PABSS) was established in 1999 when Congress enacted the Ticket to Work and Work Incentive Improvement Act, [FN115] which included provisions granting the P&A programs the authority to provide advocacy and other services to assist beneficiaries of Social Security secure or regain gainful employment. [FN116]

Protection & Advocacy for Individuals with Traumatic Brain Injury (PATBI) was added to the P&As' domain in 2002 to make protection and advocacy services available to individuals with traumatic brain injury. [FN117] Although P&As often served such individuals under programs, the PATBI funding provides more resources specifically to address the unique needs of this population. [FN118]

Protection & Advocacy for Voting Accessibility (PAVA), established in 2003 as part of the Help America Vote Act of 2002, requires P&As to help ensure that individuals with disabilities participate in the electoral process, including registering to vote, having access to polling places, and casting their ballots. [FN119] P&As have pursued these objectives through voter education*269 efforts, training of election officials, voter registration drives, polling place accessibility surveys, and similar activities. [FN120] Unlike under other sources of P&A authority, PAVA activities are restricted by a statutory provision stating that P&A agencies may not use PAVA program funds for voting access litigation. [FN121]

With this array of federal funding sources and advocacy responsibilities, the P&As have become a significant force on behalf of the advancement of opportunities and protections for people with disabilities. The agencies' national organization, NDRN, describes the P&As as collectively “the largest provider of legally based advocacy services to people with disabilities in the United States.” [FN122] The P&As engage in a wide range of activities on behalf of individuals with developmental disabilities. The Administration on Developmental Disabilities, the federal agency directly responsible for administering the developmental disabilities protection and advocacy program, describes the following categories of P&As' endeavors:

- the protection and advocacy of legal and human rights
- information and referral
- investigation of complaints of violation of rights of individuals with developmental disabilities

- working to resolve complaints through mediation, alternative dispute resolution and litigation. [FN123]

The United States General Accounting Office offered a more detailed overview of P&As' work when it observed:

P&A activities on behalf of individuals with developmental disabilities include legal representation; information and referral services; training and technical assistance in self-advocacy; short-term assistance, mediation and negotiation assistance to obtain benefits and services such as medical care and housing, transportation, and education; representation in administrative*270 appeals; and investigation of reports of abuse and neglect, sexual harassment, inappropriate seclusion and restraint, and other problems. [FN124]

One state P&A agency offered the following perspective on the nationwide confederation to which it belongs:

The national network of state P&A systems has successfully secured enforcement and expansion of the rights of people with disabilities and enhanced their safety through a variety of means including class action and other systems change litigation, advocating for passage of state legislation, and monitoring of conditions in select facilities. [FN125]

A 2008 law review comment included the observation that “P&As engage in a variety of advocacy activities, though their priorities differ as they respond to local and state-specific problems” and then identified some diverse examples of particular efforts engaged in by P&A agencies around the country, such as the Hawaii P&A's launching of a community television series on disability rights which included programs on emergency preparedness and other issues of importance to individuals with disabilities; a Pennsylvania P&A's campaign to combat bullying and harassment of children with disabilities in public schools, which included a variety of “Know Your Rights” publications and resources for affected parents; and the Oregon P&As use of an online questionnaire to investigate instances of maltreatment of individuals with mental disabilities in emergency rooms. [FN126] The author added that “[t]hese examples represent a very small slice of the advocacy in which P&As engage each day. P&As also regularly meet with local, state, and national government officials, comment on proposed regulations, and visit local facilities for individuals with disabilities,” and “[o]ccasionally, a P&A determines that litigation is the best way to advocate on behalf of state residents with disabilities.” [FN127]

At their inception, a key, central focus of P&As was protecting and advocating for individuals residing in institutions. NDRN has written:

The initial focus of . . . P&A statutes was to safeguard the well-being of individuals living in institutions and this remains a major focus of P&A activity today. All P&As continue to monitor, investigate and attempt to remedy adverse conditions in large and small, public and private, facilities that care for people with disabilities. P&As also assist persons with disabilities*271 find living arrangements that are the least restrictive possible; indeed, the P&As have been at the forefront of the de-institutionalization movement. [FN128]

P&As may pursue a range of strategies in promoting the rights of institution residents, including filing lawsuits, either individually or as class actions, to enforce constitutional and statutory rights of residents; issuing public reports describing their findings and recommending corrective action; working with facilities to develop cooperative protocols for monitoring conditions and performance, and making improvements; and providing training and technical assistance to facility personnel and self-advocacy training for residents. [FN129] In 2003, the U.S. General Accounting Office (GAO) issued a report to the Chairman of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives on the P&As' involvement in deinstitutionalization lawsuits; GAO provided an overview of the 24 such suits that P&As had filed, joined, or intervened in; sampled three of them; and reported favorably on the extent of the P&As' focus on deinstitutionalization cases relative to their other work, their communications with parents and guardians involved in the litigation, and the P&As' monitoring of the health and well-being of individuals transferred from institutions to community settings. [FN130]

As time has passed and their statutory mission has expanded, P&As' focus has broadened to encompass the rights of persons with disabilities irrespective of where they reside. “[T]he P&As now devote considerable resources to ensuring full access to inclusive educational programs, financial entitlements, healthcare, accessible housing, transportation, and productive employment opportunities, as well as continuing to seek prevention of abuse and neglect.” [FN131] In pursuing such objectives, P&As engage in a full range of efforts to promote the rights of individuals with disabilities, including, in addition to litigation, information and referral; training and technical assistance to service providers, and state legislators and other policy makers; self-advocacy training; and public awareness activities. [FN132]

The P&A agency of the state of Illinois has trumpeted the virtues of the U.S. developmental disabilities protection and advocacy program as follows:

Today, the national P&A System is:

- A legally-based advocacy group providing advocacy and legal services and investigating abuse and neglect
- *272 • Broad in scope, addressing a wide range of societal barriers that prevent people with disabilities from fully participating in their communities and leading productive and independent lives
- Cross-disability, advocating for people with any type of mental and physical disability, including developmental disabilities and mental illnesses
- Advocating for people of all ages, including children and seniors
- Advocating for people regardless of where they live, including those living with their parents, independently in the community, in group homes, nursing homes, psychiatric hospitals, and state-run institutions. [FN133]

More detailed information regarding the activities and accomplishments of the P&A systems can be found in Annual Reports and Program Reports published by NDRN and available on its website. [FN134]

5. Other Developmental Disabilities Programs

In addition to the Protection and Advocacy Systems and the basic developmental disabilities services programs administered through the State Councils on Developmental Disabilities discussed above, DDABRA also establishes several other funding programs for the benefit of individuals with such disabilities: University Centers for Excellence in Developmental Disabilities Education, Research, and Service; Projects of National Significance; Family Support Programs; and the Program for Direct Support Workers Who Assist Individuals with Developmental Disabilities.

The University Centers for Excellence in Developmental Disabilities Education, Research, and Service (UCEDDs) had their origin in a federal funding program for construction of “University-Affiliated Facilities for the Mentally Retarded” (UAFs) established in the initial “mental retardation” legislation passed in the Kennedy Administration. [FN135] The 1963 law provided that grants would be awarded for building of public and nonprofit clinical facilities associated with a college or university that would provide services to people with intellectual disabilities. [FN136] In the DDABRA of 2000, [FN137] Congress replaced the UAF provisions with new sections renaming and revising the prior program. [FN138] The objective of the UCEDD program is to establish a “[n]ational network of university centers for excellence in developmental disabilities education, research, and *273 service.” [FN139] They are expected to offer leadership and advice to policymakers at the Federal, State, and community level; and to “promote opportunities for individuals with developmental disabilities to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life” [FN140] The Secretary is directed to award grants to designated Centers in each State, which must be interdisciplinary education, research, and public service units of universities, or public or not-for-profit entities associated with universities; [FN141] and must implement “core activities” of interdisciplinary training, community service (such as training, technical assistance, and exemplary services), research, and information dissemination. [FN142] The Act authorizes funding for 67 UCEDDs - at least one in every state and territory. [FN143]

DDABRA also authorizes the Secretary of Health and Human Services to fund “Projects of National Significance.” [FN144] The phrase “of national significance” is not defined in the Act, although one provision refers to projects being “of sufficient size and scope.” [FN145] The law does set out broad purposes that funded grants, contracts, or cooperative agreements are to pursue: funded projects are to create opportunities for full and direct participation of individuals with disabilities in all areas of community life, and they are to support national and state policies that promote “self-determination, independence, productivity, and integration and inclusion.” [FN146] Projects can address these purposes through family support activities, data collection and analysis, technical assistance to state Developmental Disabilities Councils (and service providers funded under the state plan) and UCEDDs), and “other projects of sufficient size and scope that hold promise to expand or improve opportunities” for individuals with developmental disabilities. [FN147] In regard to such “other projects” the Act provides a list of a dozen examples of the kinds of projects they can be, including assisting the development of information and referral systems, providing technical assistance to self-advocacy organizations, educating policymakers, enhancing participation of *274 racial and ethnic minorities in developmental disabilities initiatives, aiding the transition from school to

As the foregoing subsections indicate, the District of Columbia, its residents who meet the federal definition of individuals with developmental disabilities, and their families, have much to gain by having a maximally inclusive, fully functional, comprehensive, developmental disabilities service system in the District. The federal law affords the opportunity for citizens with developmental disabilities and their families to have access to a variety of “needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life” [FN159] Services rendered by state developmental disabilities programs are critical and indispensable determinants of progress and quality of life of individuals with developmental disabilities and their families. By definition, a person who has a developmental disability has the “need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.” [FN160] The primary stated purpose of DDABRA is “to assure that individuals with developmental disabilities and their families . . . have access to needed community services, individualized supports, and other forms of assistance” [FN161] Clearly, indeed virtually syllogistically, *276 developmental disabilities services are a necessity for people with such disabilities and their families.

The National Association of State Directors of Developmental Disabilities Services has written:

Services and supports that assist with major life activities are critical to people with developmental disabilities and their families. Well designed community-based supports and services - personal assistance, habilitation and training, employment supports, respite care, out-of-home day services, homemaker services - made available based on a person's needs . . . have proven to be effective in both achieving good personal outcomes and reducing the need for most costly models of services. [FN162]

Other authorities in the developmental disabilities field similarly recognize the critical importance of services rendered under the federal/state developmental disabilities program. [FN163] The Director of the DC Department on Disability Services, Judy Heumann, has spoken of her department's responsibility for “services vital to District residents with disabilities to help them to lead healthy, independent and productive lives in our community.” [FN164]

In addition to crucial services and supports provided by state developmental disabilities service agencies, the developmental disabilities system affords entrée to legal rights, to protection and advocacy services, and to various other categories of services and benefits provided under federally funded developmental disabilities*277 programs including University Centers for Excellence in Developmental Disabilities Education, Research, and Service; Projects of National Significance; Family Support Programs; and the Program for Direct Support Workers Who Assist Individuals with Developmental Disabilities - all of which are summarized in the preceding sub-subsections. For people with developmental disabilities and their families, this impressive array of programs, rights, and potential resources represents a veritable treasure trove of opportunity that can

make the difference between hope and success, on the one hand, and frustration, helplessness, and decline, on the other.

And apart from significant and admirable benevolent concerns about the welfare of citizens with developmental disabilities and their families, federal developmental disabilities laws and programs afford the governments of states and the District of Columbia a pathway to sizeable federal funding contributions. The details of the funding mechanisms under DDABRA are beyond the scope of this article, but the potential federal contributions are substantial. The Act provides, for example, that the federal share of costs of all projects in a state funded as part of the state developmental disabilities service system “may not be more than 75 percent of the aggregate necessary cost of such projects,” except that for activities targeting individuals with developmental disabilities who live in urban or rural poverty areas the federal share may be up to 90 percent, and for certain projects in which the state Council or its staff is implementing state-plan activities the federal share may not exceed 100 percent of the aggregate necessary cost. [FN165]

In addition to funding directly provided through federal developmental disabilities programs, services for people with developmental disabilities can be supported by federal funding through what are called “Medicaid waivers.” Again, the details of such waivers are beyond the scope of this article, but the basic idea is that a waiver is a funding mechanism which allows the state to offer community-based services as an alternative to institutional services. The term waiver specifically refers to two elements of a mechanism enabling delivery of home and community-based services: (1) the granting by the Center for Medicare and Medicaid Services, upon application by the state, of a special waiver or a special allowance from the services typically included in the State Medicaid Plan to permit the state to use Medicaid funds to provide alternative community supports for a specified population otherwise at risk for institutionalization; and (2) the waiver, by individuals to be served, of the institutional services for which they would otherwise be eligible, so that they may receive community-based supports *278 instead. [FN166] Regulations regarding Medicaid waivers for “home and community-based services” in the District of Columbia are published in Chapter 19 of Title 29 of the District of Columbia Municipal Regulations. [FN167] Funds available to states for services to persons with developmental disabilities through the Medicaid waiver process are substantial; as an international disability association reported: “The Medicaid program is an enormously important source of money to pay for services and supports for people with developmental disabilities. About \$3 of every \$4 that states spend for developmental disabilities services comes by way of Medicaid.” [FN168]

Indeed, both the Medicaid program and the federal developmental disabilities funding programs are “enormously important source[s] of money to pay for services and supports for people with developmental disabilities.” Financial leverage, affording assistance to vulnerable citizens, recouping federal tax dollars commensurate with other jurisdictions, filling gaps in the social service network, and a variety of other fiscal and humanitarian considerations all afford big incentives for the District of Columbia, like other eligible jurisdictions, to take full advantage of federal programs that underwrite the costs of services and programs for people with developmental disabilities.

III. Forest Haven and the *Evans* Case

Legislation to address the needs of individuals with developmental disabilities in the District of Columbia has been thoroughly and dramatically influenced by a federal court lawsuit challenging practices and conditions at a facility with the pleasant name of Forest Haven.

A. Forest Haven: The District of Columbia's Problematic Institution

Forest Haven, the District of Columbia residential facility for people with intellectual disabilities, opened in Laurel, Maryland, in 1925 under the name of *279 “the District Training School for the Mentally Retarded.” [FN169] Although Forest Haven has sometimes been characterized as having been a state-of-the-art facility in its early days, [FN170] problems with the institution were not long in coming; published reports indicate that “[a]dministrators have complained of overcrowding and too little staff since it opened.” [FN171] Indeed, one newspaper reporter has suggested that the District's motives, from the beginning, were less than admirable; he quoted a developmental disabilities authority as indicating that Congress only built Forest Haven in order to “exile people [with intellectual disabilities] from the nation's capital and hide them in a rural area.” [FN172] The journalist suggested that the District had felt political pressure from wealthy neighbors to close a facility for African Americans with intellectual disabilities in the Logan Circle neighborhood of D.C. [FN173] In 1976, the D.C. Human Resources director in charge of Forest Haven testified that he had inherited “40 years of neglect” at the facility. [FN174] Over the years, D.C. officials with administrative responsibility for Forest Haven have admitted “the facility's deficiencies,” [FN175] recognized the existence of “snakepit” conditions within it, [FN176] and acknowledged that conditions for some categories of residents “have always been very bad.” [FN177] Other critics and commentators have been equally, and often even more, derisive. D.C. Council Chair Vincent Gray has described his reaction to conditions at Forest Haven when he visited it as a psychology graduate student in the late 1960s; he called what he saw “horrifying” and “the most dehuman[iz]ing thing I had ever seen.” [FN178] Reporters periodically *280 penned newspaper articles about the institution, with titles such as “Forest Haven: 200 Wait Mindlessly for Death,” [FN179] “Disgraceful Fate of the Retarded,” [FN180] “Forest Haven Called ‘Depressing,’” [FN181] “Overcrowding, Insufficient Staff,” [FN182] and “Forest Haven: ‘40 Years of Neglect.’” [FN183] The various articles were filled with “horror stories” of the inhumane and cruel ways in which residents of Forest Haven were treated, or confined and ignored. In 1976, columnist Richard Cohen wrote:

Forest Haven is an old story around here. Every once in a while a reporter goes out there and returns horrified . . . A story is written, promises made that things will improve. It has been that way now for some time. In 1973, Sen. Hubert Humphrey complained about conditions at Forest Haven. In 1976, he complained again. [FN184]

A few months before Cohen's column was published, the Department of Health, Education, and Welfare (HEW), citing the city's failure to meet medical, nutritional, and other needs of Forest Haven residents, had threatened to cut off Medicaid payments unless the facility made substantial progress in upgrading care. [FN185] Later that year,

HEW announced that it was sending in a team of federal health specialists to assist the District in improving conditions at Forest Haven. [FN186] In the same year, congressional committees held hearings on conditions at the institution. [FN187] The House Committee on the District of Columbia hired two consultants to report on Forest Haven and to suggest solutions to problems identified; their conclusion was that Forest Haven was among the worst such facilities in the country, ranking “extremely low . . . in terms of deterioration and human degradation,” and should be phased out. [FN188]

*281 Of all the attention and activity focused on Forest Haven in 1976, the most important in the long run was the filing of the *Evans* lawsuit, which would precipitate the closing of Forest Haven in 1991.

B. The *Evans* Case

U.S. District Court Judge Ellen Segal Huvelle summarized the *Evans* case in 2007 as an action that “was filed more than thirty years ago in an effort to remedy the constitutionally deficient level of care, treatment, education, and training being provided to residents of Forest Haven, the District of Columbia's institution for persons with developmental disabilities” [FN189] The lawsuit was initiated on February 23, 1976, by a woman named Joy Evans and her family, and by several other named plaintiffs, on behalf of a class of residents of Forest Haven. [FN190] The plaintiffs challenged a range of conditions at Forest Haven, including “the lack of comprehensive habilitation programs to meet individual needs of residents; the unsafe, unsanitary, and unpleasant condition of the Forest Haven facilities; inadequate staffing, lack of training, and abuse of residents by staff; inadequate medical, dental, and mental health care and nutrition; inadequate recordkeeping; lack of after-care and rehabilitation programs and vocational training for former residents; and inadequate funding.” [FN191] The Court of Appeals for the District of Columbia Circuit characterized the *Evans* case as “a class action alleging a panoply of constitutional violations resulting from poor conditions at the facility” [FN192]

In addition to four other District officials, all sued in their official capacities, [FN193] the first named defendant in the case was the Mayor of the District of Columbia, *282 who at the time of filing in 1976 was Walter Washington. [FN194] During the more than a third of a century the lawsuit has continued, the name of the case has changed each time a new Mayor has taken office; thus the action has been variously styled *Evans v. Washington*, [FN195] *Evans v. Barry*, [FN196] *Evans v. Kelly*, [FN197] *Evans v. Barry*, [FN198] *Evans v. Williams*, [FN199] and, presently, *Evans v. Fenty*. [FN200] The captioned named plaintiff, Joy Evans, died prior to the court's initial issuance of a judgment and order in June of 1978, but the court allowed her name to be retained in the caption to subsequent proceedings in the case. [FN201] From its inception until his death in August 1995, Judge John H. Pratt presided over the proceedings in *Evans*; [FN202] at that time, the case was reassigned to Judge Stanley S. Harris, [FN203] and it is currently assigned to Judge Huvelle. [FN204]

The attorney who filed the lawsuit on behalf of the Forest Haven residents in 1976 was Robert S. Katz of the Urban Law Institute of the Antioch School of Law in Washington, D.C. - the predecessor of the David A. Clarke School of Law (DCSL) of the

University of the District of Columbia. Professor Joseph B. Tulman of DCSL later served as counsel for the plaintiffs for some 14 years of the litigation's history; a number of other attorneys and organizations, including the *283 Center for Public Representation, [FN205] have represented the plaintiff class or individual plaintiffs as counsel or co-counsel during the pendency of the action. University Legal Services (ULS), which in 1996 was designated as the Protection and Advocacy (P&A) agency for the District of Columbia, [FN206] currently serves as co-counsel for the plaintiff class. [FN207] Ms. Sandy Bernstein, Legal Director of ULS, and legal counsel in *Evans*, was a member of the symposium panel on Developmental Disability Law & Rights for which this article was prepared. The United States, represented by the Department of Justice, participated in the case as amicus curiae between July 1976 and January 1977, and was permitted to intervene as a plaintiff in January 1977. [FN208] The defendants in *Evans* have been represented by various attorneys with the District of Columbia's Office of the Attorney General and the Corporation Counsel. [FN209]

In their complaint, the plaintiffs sought declaratory and injunctive relief alleging that they were not receiving “a constitutionally minimal level of habilitation, a term which incorporates care, treatment, education and training” and that Forest Haven was providing “only the most meager custodial care” [FN210] The plaintiffs asserted their rights to receive treatment, services, and habilitation “designed to maximize the developmental potential of the individual . . . provided in a setting which is least restrictive of the individual's personal liberty.” [FN211] Factual allegations in the complaint estimated the number of residents at 1,050, and noted that all the named plaintiffs and almost all of the other residents had been committed to Forest Haven by court order. [FN212] The complaint also observed that they were “overwhelmingly black and from low-income backgrounds” and that *284 their ages paralleled those of the community at large. [FN213] A key premise of the lawsuit was framed in allegations that the plaintiffs had been committed to Forest Haven for the purpose of treatment, but “residents receive virtually no treatment”; and that, due to the “lack of any habilitation programs,” frequently residents lost social and personal care skills that they had when they came to the institution. [FN214]

The complaint recited a lengthy litany of deficiencies in conditions at Forest Haven, including fire and safety hazards; prison-like restrictions of residents' movements; old, poorly designed, and filthy buildings, with dim lights, broken steps, and falling paint; absence of “lamps, sofas, rugs, comfortable chairs, pictures, magazines, books, toys, games and the other accoutrements of normal living”; overcrowded, barren dormitories, with no privacy or places to keep personal possessions; toilets often lacking seats and without partitions or curtains between them; isolation rooms without protective wall coverings and containing nothing other than a vinyl mattress; drastically unsanitary dining room facilities; shortages of soap and other supplies; inadequate staffing resulting in the provision of “only marginally adequate custodial care”; beatings, physical abuse, and sexual abuse of residents by staff and other residents; forced inactivity and prolonged deprivation of most residents, including the lack of schooling, training, recreational, or vocational experiences and resulting in “such behavior as head-nodding and/or body posturing”; overmedication; markedly inadequate authorized staff positions and very high absentee rates; inadequate in-service staff training; insufficient medical and clinical

personnel; use of drugs to control residents, often administered by unlicensed attendants without adequate training; excessive use of physical restraints such as straight-jackets and wrist straps; failures to provide prompt treatment for injuries and illnesses; absence of continuing health care programs, medical, dental, and developmental examinations, and prevention programs; failure to provide residents an adequate, nutritious, well-balanced diet; inadequate and incomplete record-keeping lacking important information regarding residents; failure to provide residents and their parents notice of their rights and responsibilities and to consult them when major decisions being made; and the non-existence of after-care and rehabilitation programs and vocational training for former residents. [FN215]

The complaint presented six causes of action [FN216] - denials of rights guaranteed under the Fifth, Eighth, First, and Fourth Amendments to the United States Constitution; of rights guaranteed under Developmental Disability Assistance and Bill of Rights Act (DDABRA), [FN217] and under the statute authorizing and governing*285 the operation of Forest Haven at the time of the lawsuit. [FN218] In their Prayer for Relief, the plaintiffs sought declaratory relief adjudging that Forest Haven did not meet “constitutionally minimum standards of adequate habilitation, including care, treatment, education and training,” and that the defendants' acts and omissions violated the constitutional and statutory provisions raised in the six causes of action. [FN219] They also asked for permanent injunctive relief prohibiting the defendants from continuing to operate Forest Haven in a manner that violated the plaintiffs' rights and requiring the defendants to provide Forest Haven residents such additional appropriate habilitation to prevent further regression and deterioration. [FN220]

On June 14, 1978, Judge Pratt considered a Motion for Summary Judgment filed by the plaintiffs and the responses and submissions filed by the parties in connection with it, and entered what was labeled a “Final Judgment and Order” in the case. [FN221] Because of the important interplay between this Order and the 1978 statute, this article discusses the Order in some detail. Although the court's opinion did not expressly term the Final Judgment and Order a “consent order,” Judge Pratt did characterize it as such later, [FN222] and subsequent judges in the case have followed suit. [FN223] The Supreme Court has stated that “[c]onsent decrees and orders have attributes both of contracts and of judicial decrees While they are arrived at by negotiation between the parties . . . , they are motivated by threatened or pending litigation and must be approved by the court” [FN224] Although, like ordinary contracts, they are voluntarily entered into and their terms are negotiated by the parties and not decided unilaterally by a court - desirable results in light of judicial and legislative interest in achieving voluntary compliance with the law - consent orders “bear some of the earmarks of judgments entered after litigation” and have “the legal force and character of a judgment decreed after a trial” in that they are entered as and look like judgments, the court has authority to modify a consent decree over the objection of a signatory in certain circumstances, and the terms of such an order are enforceable by *286 the court and noncompliance can result in a citation for contempt of court. [FN225] The “dual character” of a consent order [FN226] was apparent in the 1978 decree in *Evans*. The court acknowledged that during the pendency of the litigation the defendants had initiated policies and practices that conformed to provisions in the decree and that they had

consented to the entry of the Judgment and Order “so as to assure protection of the rights of the plaintiffs.” [FN227] At the same time, the court found that “there remain significant deficiencies necessitating the Court's entry of injunctive relief.” [FN228] The court's Order rendered substantial declaratory and permanent injunctive relief for the plaintiffs, and the court expressly retained ongoing jurisdiction over its implementation. [FN229] In addition, a provision of the order reserved to the plaintiffs the right to move the court at a later time for the appointment of a Special Master. [FN230]

The “declaratory” portion of the relief provided in the 1978 judgment consisted of four proclamations regarding broad rights of the plaintiffs. Although the complaint included a couple of statutory claims, the order addressed only constitutional claims. It recognized that, based upon the Due Process Clause of the Fifth Amendment, the plaintiff class had “a federal constitutional right to habilitative care and treatment”; under the Fifth and Eighth Amendments, plaintiffs had a “right to be free from harm”; and class members had an additional Due Process right to “receive habilitative care in the alternative least restrictive of individual liberty” and, somewhat repetitively, “to be kept free from harm.” [FN231] To flesh out the right to “habilitative care and treatment,” the court's order included the following definition:

Habilitation is the process by which a resident is assisted in acquiring and maintaining those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social capabilities. Habilitation includes but is not limited to, programs of formal, structured education and training. [FN232]

The order also elaborated on the “least restrictive alternative” concept by declaring that “[h]abilitative care in the alternative least restrictive of individual liberty means living as normally as possible and receiving appropriate individualized services in the community in the least separate, most integrated and least restrictive settings.” [FN233] And the court provided additional definitional guidance *287 by clarifying that “[a]s used in this Order, ‘integrated’ refers to the integration of [persons with intellectual disabilities] with [persons not having such disabilities] in the community.” [FN234] Most significantly, paragraph 4 of the Final Judgment and Order, provided that “[t]he Court finds that violations of the federal constitutional rights of class members, as set forth in paragraphs 1 thru 3, supra, have occurred.” [FN235]

Having found that constitutional rights were violated, the court proceeded to order injunctive relief in two broad categories. The first of these addressed community living arrangements and services necessary for “individualized habilitation of class members.” [FN236] In this connection, the court permanently enjoined the defendants to provide each class member with: “a written individualized habilitation plan,” developed in accordance with Standards for Services for Developmentally Disability Individuals promulgated by the Joint Commission on Accreditation of Hospitals; an individualized habilitation program designed in accordance with the individual's plan; and annual periodic reviews of the plan and program. [FN237] The court also ordered the defendants to provide all class members “community living arrangements suitable to each,” along with “community-based day programs and services . . . necessary to provide them with minimally adequate habilitation,” all of which were to be provided “in the least separate, most integrated and least restrictive community settings.” [FN238] The 1978 Order

specified a number of implementation mechanisms for accomplishing the provision of the community living arrangements, programs, and supportive services; chief among these was a requirement that the defendants develop a Plan of Implementation for providing all class members with community living arrangements, which in no event were to house more than eight people with intellectual disabilities. [FN239] The plan was to contain various components, including specifications regarding the quantity and type of community living arrangements to be provided, how they would be funded, the time frame for their provision, and delineation of responsibility for their creation and operation; specifications of resources, procedures, and a schedule for individual evaluations and development of habilitation plans, and periodic reviews; steps to be taken for recruitment, hiring, and training of qualified community staff; plans for creating a Community Advisory Board charged with investigating, monitoring, and evaluating complaints;*288 and steps to be taken to safeguard class members' personal possessions. [FN240]

The Order mandated the defendants to provide “all necessary and proper monitoring mechanisms” to assure that the required community living arrangements and community services “of the necessary quantity and quality” would be provided; and required periodic reporting to the court, a demographic study of the District area's capacity for accommodating Forest Haven residents in the community, and the hiring of a full-time developmental disabilities expert to assist the defendants in coordinating and carrying out their efforts to implement the provisions of the Order. [FN241] The court's Judgment and Order set specific numerical goals for “deinstitutionalization” of residents in each of the next three years - 30 by the end of fiscal year 1978, 60 more by the end of 1979, and an additional 110 by the end of 1980- pending the development of the Implementation Plan. [FN242] Judge Pratt's Order also declared bluntly that “[t]here shall be no admissions to Forest Haven until further order of this Court.” [FN243] The U.S. Court of Appeals for the District of Columbia Circuit succinctly summarized the outcome of the Order in the following terms: “In 1978, the parties agreed to a consent judgment that called for the closing of Forest Haven and placing its residents in ‘community living arrangements.’” [FN244]

The second category of injunctive relief in the 1978 Order, not mentioned in the Court of Appeals' summary of the ruling, was the “Interim Operation of Forest Haven.” [FN245] The court directed the defendants to prepare and submit a “Plan for the Interim Operation of Forest Haven,” which would contain specific requirements for safeguarding the health, safety, and well-being of residents of the facility, and for ensuring that it would be operated in a manner that would be consistent with the prompt provision of living arrangements, programs, and services in the community. [FN246] The court also enjoined the defendants to “exert maximum efforts to comply with” nineteen specific mandates. [FN247] These consisted of nine things that were prohibited and ten that were required. Prohibited were: (1) physical or psychological abuse, neglect, or mistreatment of residents, including assaults, fractures, cuts, bruises, abrasions, burns, bites, lacerations, drug overdoses, and verbal abuse; (2) utilizing seclusion (locking up a person in a room alone) for any purpose; (3) employing physical restraints, seclusion, or “time-outs” as punishment, for staff convenience, as a substitute for a habilitation program,*289 or pursuant to a pro re nata (PRN) - as needed - restraint order basis; (4) administering

excessive or unnecessary medications; (5) using medication as punishment, for staff convenience, as a substitute for programming, or in quantities that interfere with a resident's developmental program; (6) administering drugs on a PRN (as needed) basis; (7) feeding a resident in a position less than the maximum upright position consistent with the individual's capabilities and disabilities; (8) aversive behavior modification techniques; and (9) denying habilitative programming as punishment. [FN248] The following were required: (1) administration of drugs to residents only by appropriately trained and qualified staff; (2) training programs for staff permitted to administer drugs; (3) monitoring of residents' medications and review by a physician at least monthly; (4) a program of medical, dental, and health-related services, providing continuity of care for injuries and physical illnesses, with immediate reporting to the resident's parent or guardian of any injuries or illnesses requiring the attention of a physician; (5) immediate evaluation of residents' need for individualized adaptive equipment, such as wheelchairs, walkers, braces, and feeding apparatus, and auxiliary sensory aids, such as hearing aids, and provision of such equipment and aids to those who needed them; (6) a nourishing, well-balanced diet and assistance to residents in developing proper eating habits, with no denials of nutritionally adequate diet as punishment; (7) reasonable opportunities for visitation, for telephone communication, and for sending and receiving mail; (8) compensation in accordance with applicable D.C. and federal laws for all residents' labor having economic benefit to the institution; (9) maintenance of Forest Haven buildings used by residents in a clean, odorless, insect-free condition, and in compliance with applicable laws and regulations; and (10) development and implementation of appropriate training programs for staff. [FN249] The fact that the parties and the court felt it necessary to spell out these particular “shalts” and “shalt nots” speaks volumes about the shortcomings of Forest Haven.

Apart from its direct legal implications, the consent order in *Evans v. Washington* had a significant impact in precipitating the Council of the District of Columbia to enact legislation responding to, and seeking to engender compliance with, the requirements in the Order in the form of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978. [FN250] The 1978 legislation is described and analyzed in part IV below.

Expectations expressed in titling the 1978 ruling a “Final Judgment and Ruling” were certainly not fulfilled [FN251] and much has happened since; the case has *290 had a long and tortuous history that continues in 2010. Judge Huvelle aptly summarized developments in the intervening years in her decision in 2007 in the following terms:

[T]his litigation has resulted in a series of consent orders and remedial plans in which defendants have admitted that class members' constitutional rights have been violated and have agreed to take actions necessary to remedy these constitutional violations. Because these measures have been unsuccessful in achieving desired outcomes for class members in many critical areas, the litigation has also resulted in a series of efforts by plaintiffs and plaintiff-intervenor to force compliance with the Court's orders through motions for contempt and other relief. [FN252]

In the period between the issuance of the 1978 Order and the closing of Forest Haven in 1991, the plaintiffs and the United States as plaintiff-intervenor filed:

- Motions for contempt and for enforcement of the 1978 Order in January 1981;

- Contempt motions in June 1982;
- Contempt motions in July 1989; and
- Motions for civil contempt sanctions and damages, and for immediate enforcement of the 1978 Order in July 1990. [FN253]

And, in November 1990, the United States attempted to compel the federal court to act on pending motions by filing a petition for a writ of mandamus in the D.C. Circuit. [FN254]

During the same period, the court entered:

- An additional Consent Order, on June 25, 1981, that incorporated a list of measures “necessary to the implementation” of the 1978 Order, reaffirmed the obligations of defendants under that Order, and imposed a variety of additional more specific requirements. [FN255]
- Another Consent Order, on February 8, 1983, that required defendants to take specified additional steps to implement the 1978 and 81 Orders, including*291 placing all Forest Haven residents in community settings by the end of Fiscal Year 1988. [FN256]
- An Order on January 30, 1990, holding the defendants in civil contempt, based on a finding that “the District of Columbia has been in consistent and continuing violation of the three [1978, 1981, and 1983] Consent Orders.” [FN257]
- An Order on April 9, 1990, imposing a schedule for outplacement of the remaining 233 residents still at Forest Haven by September 30, 1991. [FN258]

Ultimately, the last residents left Forest Haven in October of 1991. [FN259] Subsequent to the closing of the facility, the plaintiffs and the U.S. next attempted to compel the defendants into compliance with other requirements in the Consent Orders in March 1995, by filing motions for contempt, contempt sanctions, appointment of a special master, and emergency injunctive relief. [FN260] This resulted in the court issuing an Order to Show Cause in April 1995, in which it found that the District was in violation of the 1978, 1981, and 1983 Orders. [FN261] And, at a hearing in May 1995, Judge Pratt found the defendants to be in contempt. [FN262] After the case was reassigned in October 1995 upon the death of Judge Pratt, Judge Stanley S. Harris issued formal Findings of Fact, Conclusions of Law, and an “Order of Reference”; he declared the defendants to be in contempt of the Consent Orders in several respects, including for failing to provide all class members “community living arrangements suitable to each, in the least separate, most integrated and least restrictive community settings,” with “community-based day programs and services . . . necessary to provide them with minimally adequate habilitation.” [FN263] The court determined it necessary to designate a Special Master, appointed Margaret G. Farrell to serve that role, and directed her to work with the parties to develop a remedial plan to enable the defendants to purge their contempt. [FN264] Special Master Farrell submitted a remedial plan in January 1996, and, in an order*292 issued on August 2, 1996, the court adopted her proposed findings of fact and issued a Remedial Plan which adopted her recommendations “in great part.” [FN265] The court explained that these actions were necessary in light of the defendants’ “unrelenting contempt” of the court’s orders and “their seeming inability to bring

themselves into compliance therewith,” and stated its striking conclusion that the “[d]efendants have, for over two years, chronically and unapologetically violated the terms of nearly every aspect of this Court's multiple Consent Orders.” [FN266]

The court would later summarize the court-ordered 1996 Plan as having “imposed a series of further requirements with respect to the timely payment of care providers, negotiation of long-term provider contracts, maintenance of the required case management ratio, and implementation of class members' individual habilitation plans.” [FN267] In addition to these measures, the Special Master had recommended that the defendants be required to apply to the Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services for a home-and-community Medicaid waiver. [FN268] On April 30, 1996, the defendants did submit an application to HCFA for a home-and-community Medicaid waiver, leading the court to conclude in its August 1996 ruling that that particular recommendation had been satisfied and need not be addressed in the court's Remedial Plan. [FN269]

In addition to the specific and general requirements imposed in the Remedial Plan, the court's Findings of Fact included the following stern warning: “the point has been reached beyond which this Court will not tolerate further and continuing incidences of contempt by defendants. Any further noncompliance with this Court's longstanding Consent Orders, and noncompliance with the Remedial Plan issued this date, must be expected by defendants to result in serious consequences.” [FN270] One form of the “serious consequences” that would result from continuing non-compliance by the defendants was spelled out in provisions of the Plan calling for substantial fines to be levied for their ongoing failure to purge their contempt by complying with Plan requirements. [FN271] Such consequences were *293 called into play on April 2, 1997, when plaintiffs filed a motion for sanctions for defendants' alleged violations of the provisions of the Remedial Plan requiring timely payment of care providers. [FN272] On February 10, 1999, the court imposed \$5,096,340 in civil sanctions for defendants' delinquencies in payment of both Medicaid and non-Medicaid vouchers. [FN273] The Court of Appeals for the District of Columbia Circuit reversed this imposition of contempt fines in February 2000 because it found the fines were a criminal sanction that could not be imposed without a criminal trial, including a right to a jury trial, proof beyond a reasonable doubt, and a requirement that the noncompliance be proven to be willful. [FN274]

In addition to imposing the contempt fines, the court's 1999 Opinion ordered Special Master Farrell to work with the parties to develop a plan for concluding the litigation and terminating the court's jurisdiction over the case; the court expressed its view that such a resolution “would serve the interests of all parties involved.” [FN275] The dispute proved to be, in the words of the court, “intractable” until the latter part of 2000 when “[p]ursuant to the Court's February 1999 Order, under the direction of the Special Master, Margaret G. Farrell, with the assistance of her then-consultant, Clarence J. Sundram, the parties engaged in lengthy negotiations that resulted in a series of agreements” that were presented to the court for acceptance and approval. [FN276] On February 20, 2001, the court appointed Mr. Sundram to join Ms. Farrell as co-Special Master. [FN277] The documents submitted to the court included the Parties' Joint Stipulated Findings of Fact, filed on December 22, 2000; a Consent Order and

accompanying Settlement Agreement, filed on February 2, 2001; and a 2001 Plan for Compliance and Conclusion of *Evans v. Williams* (hereinafter the 2001 Plan). [FN278] In an Opinion and Order entered on March 30, 2001, the court described the trio of documents as follows:

Taken together, these documents, fashioned collaboratively by the parties who are represented by able and experienced counsel, set forth a careful and detailed blueprint for achieving compliance with the Court's Orders, *294 for the development of permanent and independent mechanisms to safeguard the rights of class members, and for the phased withdrawal of judicial oversight of the District of Columbia's mental retardation system as compliance with the Court's Orders is achieved. [FN279]

The court “commend[ed] the co-Special Masters and all counsel not only for resolving their differences, but for the exceptionally thorough manner in which they have agreed upon procedures for dealing with the problems that have persisted for so long.” [FN280] Observing that “[t]his case is unusual, in that a “final judgment” in plaintiffs' favor was entered more than 20 years ago,” the court concluded that “the proposed compromise of the controversy, which will be of substantially greater benefit to the class than would continued litigation over how to deal with past conduct by defendants, is fair, reasonable, and adequate.” [FN281] Accordingly, the court adopted the Parties' Joint Stipulated Findings of Fact, approved the 2001 Plan (“as, in effect, a statement of the conditions for the expected vacating of the Court's relevant prior Orders”), formally entered the Consent Order, and approved the Settlement Agreement and attached it to the Order. [FN282]

The Stipulated Findings of Facts were extensive and detailed, but their gist was that the District's system for support of individuals with developmental disabilities had suffered a “serious breakdown[],” was “broken” and “highly dysfunctional,” “was fundamentally unable to deliver even the most basic services,” and “urgently need[ed] to be fixed,” “redefined and rebuilt.” [FN283] The Consent Order provided the traditional, legally enforceable document intended to settle the case. The Settlement Agreement was designed as a formal agreement, enforceable as a contract upon dismissal of the lawsuit, whose signatories would include a non-party entity (the Quality Trust for Individuals with Disabilities, Inc.), and was intended to exist beyond the life of the federal court lawsuit. [FN284] The 2001 Plan was a how-to guide for achieving compliance with the various Court Orders in the case; it identified major goals of the Orders, identified tasks necessary for compliance, set time frames for implementation of tasks, and established specific outcome criteria and a method for assessing compliance. [FN285] The Plan was not to be independently enforceable, but the parties agreed that there would be accountability for its implementation, through such mechanisms as periodic progress*295 reports and calls for status conferences with the court at least bimonthly. [FN286] It also called for a new procedure for the reporting and investigation of unusual incidents, creation of a Fatality Review Board, and adoption of new mechanisms to prevent misuse or overuse of such control procedures as restraints, time-outs, and psychotropic medications. [FN287] The basic idea was that the defendants' satisfaction of the outcome criteria set forth in the Plan would constitute compliance with the related Court Orders and would permit the defendants to seek dismissal of the relevant Order. [FN288] Even upon the dismissal of all the Court Orders upon defendants' showing that they have

achieved compliance, however, the declaratory judgment in the case would still remain. [FN289]

Particularly notable among the various elements for achieving compliance pursuant to the 2001 Plan, the Consent Order, and the Settlement Agreement were the Quality Trust and the *Evans* Legislative Principles. The court declared that “a cornerstone of the Plan is the creation of a new, independent, and durable nonprofit agency called the Quality Trust for Individuals with Disabilities (the Quality Trust),” supported by a funding mechanism that would eventually allow it financial independence from the District’s annual budget process. [FN290] Startlingly, the defendants agreed in the Consent Order to provide \$31.5 million in funding for the Quality Trust over the succeeding eleven years, including an initial endowment of \$11 million “to better ensure its financial independence in carrying out its duties.” [FN291] The 2001 Plan outlined “three essential functions” for the Quality Trust: (1) to provide independent monitoring of the quality of services and supports available to individuals with developmental disabilities, and serve as an independent voice for consumers in dealing with the District of Columbia government; (2) to provide lay advocacy, including representation in grievance and administrative proceedings, to represent consumers regarding day-to-day issues affecting their quality of life and access to services and supports; and (3) to provide legal representation for individuals without lawyers, and also to serve as a resource to other legal advocates, helping to raise the standard of legal representation of individuals with developmental disabilities. [FN292]

Another striking element of the 2001 Plan was its call for “a complete revision of the existing statutes to establish in law the rights that have been declared in the *296 Court’s Orders, while also updating the laws, consistent with a set of legislative principles agreed upon by the parties, to reflect contemporary standards and practices.” [FN293] The “set of legislative principles” referred to consisted of thirty-two statements of legislative principles, headed “*Evans* Legislative Principles,” negotiated by the parties and attached as an appendix to the 2001 plan. [FN294] They were derived from the *Evans* Orders but were stated more generically to apply beyond the plaintiff-class; they were divided into nine broad categories, as follows: Fundamental Rights, Freedom from Harm, Individual Choice, Substituted Judgment, Training, Services and Supports, Advocacy and Monitoring, Grievance System, and Assessments of Needs. [FN295] The parties did not make revising D.C. laws to comply with the Legislative Principles an independently enforceable element of settling the case; the Settlement Agreement declared the parties’ agreement that “if the appropriate legislative body does not enact legislation to implement the Legislative Principles (attached to the *Evans* 2001 Plan), before the end of the 2001 legislative session, the parties will accomplish the objectives of the Principles through alternative means.” [FN296] Counsel for the plaintiffs sought to advance the process of enacting new legislation consistent with the Legislative Principles by pulling together a group of disability law experts, coordinated by the author of this article, who, working with plaintiffs’ counsel Professor Joseph Tulman of the University of the District of Columbia, David A. Clarke School of Law, and Kelly Bagby of University Legal Services, and in consultation with the co-Special Masters, drafted a proposed bill based on the Principles, titled “The Mental Retardation and Developmental Disabilities Rights Amendment Act of 2001: A Proposed Draft Bill.” [FN297] The introductory section of

the paper presenting the draft bill explained that “[t]he proposed draft bill presented here seeks to convert the Legislative Principles into concrete legislative language,” [FN298] and the second section described the “Major Objectives” of the proposal in the following categories: Turning the Legislative Principles into Statutory Language; Eliminating Institutionalization as a Statutory Option; Updating Terminology and Broadening the Scope of the Statutory Provisions to Encompass Developmental Disabilities; Making the Statute Consistent with Other Applicable Laws; Embracing Concepts of Integration, Inclusion, Independence, Person-Centered Programming, Etc.; and Crystallizing Commitments in Statutory Form to Prevent *297 Back-Sliding. [FN299] When defendants' counsel did not embrace the proposal, the 2001 draft bill was not pursued and the 1978 law remained in place.

After various efforts and initiatives in the interim years after 2001, including the establishment of the Quality Trust and defendants' endowment and funding of it; defendants' establishment of an Incident Management and Investigation Unit, a quality assurance unit, a Fatality Review Unit, and an intake process for reporting of serious incidents; court-ordered appointment of a senior D.C. official to coordinate District agencies' activities; and negotiation of a “ninety-day plan” in 2005, [FN300] the parties found themselves back in court in 2007 as a result of plaintiffs' motion, filed in May 2006, seeking an order finding defendants in noncompliance with the outstanding Court Orders and placing the Mental Retardation and Developmental Disabilities Administration (MRDDA) into receivership. [FN301]

Judge Huvelle, who was assigned to the *Evans* case in 2001 upon the retirement of Judge Harris, [FN302] encapsulated the events leading up to the 2007 ruling as follows:

[T]his litigation has resulted in a series of consent orders and remedial plans in which defendants have admitted that class members' constitutional rights have been violated and have agreed to take actions necessary to remedy these constitutional violations. Because these measures have been unsuccessful in achieving desired outcomes for class members in many critical areas, the litigation has also resulted in a series of efforts by plaintiffs and plaintiff-intervenor to force compliance with the Court's orders through motions for contempt and other relief. Before the Court is the latest such effort. [FN303]

After reviewing the background and procedural posture of the case, [FN304] and making extensive factual findings, [FN305] the court ultimately concluded, “[b]ased on a voluminous but basically uncontested record,” that the plaintiffs had “demonstrated, by clear and convincing evidence, that defendants have failed to comply with existing Court Orders in the core areas of health, safety, and welfare,” and that these failures to comply were “systemic,” “serious,” and “continuous.” [FN306] The court recognized that after adoption of the 2001 Plan the defendants “made significant progress in some areas, including the development of policies and procedures to guide the various components of their service delivery system,” but added that the defendants had been “unable to effectively implement these policies*298 and procedures in many important respects and . . . failed to achieve desired outcomes for many class members in the critical areas of health, safety, and welfare.” [FN307] Due to such failings, the court ruled that members of the plaintiff class continued to be placed in overly restrictive, inappropriate programs instead of in “least restrictive, most integrated settings.” [FN308] While the court acknowledged that some encouraging recent improvements had been made since the

Fenty Administration took office in January 2007, it ruled these developments were insufficient to alter the defendants' noncompliance with the court's Orders, and that the plaintiffs had sustained their burden of establishing defendants' liability. [FN309] Accordingly, it granted the plaintiffs' motion for a finding of noncompliance, observing that "it is clear based on the tortured history of this case that there have been repeated failures to comply with the Court's Orders." [FN310] The court refused, however, to appoint a receiver to oversee the MRDDA, holding that receivership is a "remedy of last resort" that "should be undertaken only when absolutely necessary." [FN311] Instead the court ordered the parties to consult with the Special Masters and to develop and submit a new order and propose a plan for how they would proceed in the remedial phase of the lawsuit. [FN312] Ending on a hopeful (perhaps in the circumstances slightly naïve) note the court stated that it "expects the parties to continue their prior efforts to resolve this matter so that the plight of the class members can be improved as expeditiously as possible, and they will not have to continue to await the outcome of this painfully lengthy and cumbersome litigation." [FN313]

Unfortunately, the *Evans* litigation has not had particularly smooth sailing since the 2007 Opinion. On May 8, 2008, for example, Elizabeth Jones, Court Monitor in the *Evans* case, filed a Quarterly Report to the Court in which she reported on the provision of health care services to the members of the plaintiff class. [FN314] While she noted that some improvements had occurred, she reported that "the health care provided to the majority of the class members reviewed fails to meet minimally acceptable standards of care. These class members remain at very serious risk." [FN315] She described the overall findings of her reviews as "very troubling" and concluded that "[t]here continue to be serious deficits in this system."*299 [FN316] A week after the report was filed, a Status Hearing was held before Judge Huvelle. At the hearing, after the Court Monitor summarized and commented on her report, [FN317] an attorney representing the U.S. Department of Justice stated that the Department embraced and was troubled by her findings regarding health care services; [FN318] he then spoke in favor of "the health care agreement" negotiated between the Department of Justice and the defendants, that the plaintiffs refused to sign on to, and sought to get the court to sign it and make it a court order, and to stay the proceedings until it could be implemented. [FN319] Judge Huvelle expressed considerable dissatisfaction with the agreement, in part because the court and the Court Monitor were not consulted, [FN320] and in part because the plaintiffs were not part of it, [FN321] but primarily because the court viewed the document as just one more in a long series of delay mechanisms not leading to real compliance, as expressed in the following strong reaction from the court:

I issued an opinion in March '07. We had a six-month plan. Then we had a Fenty plan. We had a 90-day order. Now, you say ... I should sign on to something I've never seen before two days ago. And that should bring everything to a close. I'm not going to do it, Mr. Farano. So figure out what you are going to do from here, you, the Department of Justice. I will not sign this order. I will not have it, an order that has no monitoring whatsoever, that distracts us. I have court orders. I have a court order for everything. . . . I cannot in good faith sign any more consent orders. [FN322]

In subsequent comments to the court at the Status Hearing, D.C. Attorney General Peter Nickles sought to contest the notion that D.C. had not met its commitments under

the Fenty Plan and the 90-day court order, argued that it was “incorrect to conclude that there has not been substantial progress,” and contended that “continued litigation will not bring benefits to the class.” [FN323] The latter comment prompted the following interchange:

*300 THE COURT: How, sir, could you possibly take that position after all the years you took on the other side, to say that litigation doesn't help at all? I'm not going to debate whether it does or not. . . .They have won something, so you are not in a position -

MR. NICKLES: I am not seeking, your honor, to take away what they won.

THE COURT: You are

Later Attorney General Nickles declared that “[t]he plaintiffs are going to completely undermine our ability to serve the citizens of the District of Columbia because they're unreasonable.” [FN324] Judge Huvelle responded,

Mr. Nickles, their position is that the District has undermined their ability to provide safe and health[y] environment[s] for the class members. We have diametrically opposed views. I[t] can only serve to have it litigated. At this point it has gone to the point of liability. It now goes to the remedy. [FN325]

Later, the court told the Attorney General that “[y]ou can't tell a winning plaintiff that they have to settle.” [FN326] Ultimately, the court refused to sign the health care agreement, rejected a scheduling order proposed by the defendants, imposed the court's own scheduling order, and refused to grant a stay of the proceedings.

On May 22, 1999, the Special Masters found that the plaintiffs had proved by clear and convincing evidence that the defendants continue to be in serious noncompliance with critical provisions of outstanding court orders. [FN327] On August 14, 2009, the Masters filed an extensive, comprehensive, and well-written report that discussed the history of the *Evans* case and detailed the current status of defendants' compliance. [FN328] The report identified areas where the plaintiffs failed to sustain their burden of proving noncompliance, but, more importantly, it also found that the plaintiffs had “sustained their burden of proving current, continuing, serious and systemic noncompliance with the requirements of court orders addressing class members' rights to timely and adequate health and mental health care, safety and protection from harm, and individualized services in the least restrictive environment.” [FN329] The report provided a thorough survey of the various efforts*301 and mechanisms employed over the years in the effort to achieve compliance with the plaintiffs' rights and the court's orders, particularly those tried in the last ten years, and their deficiencies, [FN330] leading the Special Masters to conclude that “[t]his case is a veritable trail of broken promises and unperformed obligations which have resulted in regular, serious, systemic and demonstrable harm to class members.” [FN331] The Masters also found that the defendants “clearly have not used their best efforts or taken all reasonable steps within their power to achieve compliance with the court orders” leading to a need for additional remedial measures. [FN332] Accordingly, the Special Masters recommended to the court that it appoint an Independent Compliance Administrator to serve as the focal point for the compliance efforts of the defendants toward the goal of “phased judicial disengagement from active supervision of the defendants' developmental disabilities

service system within three years.” [FN333] They indicated that they envisioned the authority of the Independent Compliance Administrator as being limited to taking actions necessary to achieve compliance with the court orders within a three-year period, and that this appointee was not intended to have the powers of a receiver or to subsume the power and authority of D.C. agency heads or subordinate officials. [FN334]

The positions of both the plaintiffs and the defendants were on dramatic display at a hearing before the *Evans* court on December 17 and 18, 2009. Attorneys for the plaintiffs asked the court to appoint an independent administrator to help the Department of Disability Services run the District's developmental disabilities program, while Attorney General Nickles contended that the lawsuit should be brought to an end. [FN335] Judge Huvelle did not give either side what it asked for, but was critical of Attorney General Nickles's hard-line legal strategy; she was quoted as saying: “I say this to the attorney general: You have responsibilities to the public, to the vulnerable people involved here and to the taxpayers. If you think court intervention is evil come up with a way to resolve this case through a remedy.” [FN336] She added that “[i]t's not just creating a structural umbrella to make things better. We've got to see it on the ground.” [FN337]

*302 And so the *Evans* case continues. [FN338] One wonders whether, analogous to the Jarndyce and Jarndyce lawsuit in Dickens's *Bleak House* that ended only when the entire estate at issue had been consumed, the *Evans* case will go on until the last of the unfortunate class members finally passes away. Surely the plaintiff class and the people of the District of Columbia deserve better than that.

IV. The 1978 Law and Subsequent Legal and Policy Developments

A. Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978

Apart from their direct legal implications, the filing of the *Evans* suit and the entry of the original consent order on June 14, 1978, had a significant impact in precipitating the Council of the District of Columbia to enact legislation responding to, and seeking to engender compliance with, the requirements in the Order in the form of the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978. [FN339] The Court of Appeals of the District of Columbia summed up the relationship between that law and the *Evans* case judgment by quoting the Council's committee report accompanying the 1978 legislation; that report declares the Council's intent to enact a law that “revises our existing commitment statute and provides an orderly legal mechanism for carrying out Judge Pratt's order.” [FN340] The legislation originated with Bill No. 2-108, introduced by Councilmember Arrington Dixon, which was a revision of an earlier version of such a bill that he had introduced in 1973. [FN341] The version passed in 1978, however, was strongly influenced by the *Evans* Order issued that year; the Committee Report discussed and quoted at length from the order, including the following language in which Judge Pratt had ordered the District to:

[p]rovide all class members with community living arrangements suitable to each, together with such community-based day programs and services as are necessary to provide them with minimally adequate habilitation until such individuals are no

longer in need of such living arrangements, programs and/or community services. Such community living arrangements, programs*303 and other services shall be provided in the least separate, most integrated and least restrictive community settings. [FN342]

Accordingly, the report specified that the bill was to assure that future commitments of individuals with intellectual disabilities would be consistent with the requirement that the placement be the least restrictive means of providing needed habilitation; it also noted that the bill contained a bill of rights for those having intellectual disabilities. [FN343] The Committee Report declared that the Committee had analyzed Judge Pratt's Order and could "find no inconsistencies between it and this bill," other than the court's requiring general needs assessments to be performed sooner than the bill did, and the fact that the bill did not prohibit all new commitments to Forest Haven as the order had. [FN344] Joining the Chair of the Committee on Human Resources and Aging, Polly Shackleton, in voting for approval of the bill and the report, was Councilmember David Clarke, namesake of the future David A. Clarke School of Law. [FN345] While the bill was pending, Chairperson Shackleton declared that its passage was vital to carry out Judge Pratt's 1978 Order. [FN346] The D.C. Council adopted Bill No. 2-108 on its first reading on September 19, 1978, and its second reading on October 3, 1978; the bill was signed by the Mayor on November 8, 1978, was assigned Act No. 2-297 and transmitted to both Houses of Congress for review, and became law at the end of the congressional layover period on March 3, 1979. [FN347]

Apart from a Statement of Purpose and Definitions comprising Title I and a Title VI presenting Miscellaneous Provisions and the Effective Date, the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978 consisted of four substantive parts. Title II required the Mayor to develop (1) a report on the current and projected needs in the District for facilities and services for individuals with intellectual disabilities, based on a determination of the projected incidence of such disabilities in D.C. and comprehensive evaluations of all residents of Forest Haven, and (2) a timetable for establishing needed facilities and services. [FN348] The provisions of Title III provide standards and procedures for commitments to facilities, for voluntary admissions to residential facilities and outpatient-nonresidential habilitation, for parent- or guardian-initiated commitments or admissions, for discharges and transfers, and for respite care (temporary overnight care). [FN349] Title IV addresses hearing and review procedures for commitments*304 and proceedings for review of voluntariness of, and competency of individuals to consent to, admissions. [FN350] Title V presents a list of rights of persons with intellectual disabilities, [FN351] very consistent with the injunctive relief provided in the 1978 Order for the "Interim Operation of Forest Haven." [FN352]

Upon its passage, a Washington Post editorial heralded the new law as one "that should improve substantially city-sponsored services to [citizens with intellectual disabilities] not only at Forest Haven, but also in other public and private programs." [FN353] Among major advances contained in the Act, the Post editors mentioned the survey of needs and facilities to provide a foundation for future city programs; establishment of a preference for small, community-based facilities and programs over large institutional ones; safeguards for the constitutional rights of individuals with intellectual disabilities; delineation of specific procedures for commitments, voluntary

commitments, transfers, or releases from residential or non-residential programs, and a requirement that such decisions must be approved by Superior Court officials; and the creation of an independent volunteer group of “advocates” to assist persons with intellectual disabilities. [FN354]

Such positive aspects of the 1978 Act have led to other laudatory comments about it, some many years after its enactment. Over three decades after he participated with the Arc of the District of Columbia in advocating for the law, now-D.C.-Council-Chair Vincent Gray spoke in proud terms of the 1978 enactment as “legislation that called for establishing the constitutional and civil rights of people with mental retardation . . . [and] that opened the door to living in the community such as group homes, apartments, and with families” [FN355] In 2007, a D.C. Council press release said that the 1978 statute was “[c]onsidered landmark when it took effect” [FN356] And, in 2008, the body that drafted the currently pending legislation to revise and replace the 1978 law - the D.C. Department on Disability Services, Management Advisory Committee (DDS MAC) Legislative Committee [FN357] - wrote that “[i]n 1978, D.C. Law 2-137 was on the forefront of a growing civil rights movement for people with disabilities.” [FN358]

*305 Certainly much of the hoopla about the 1978 law was and is fully justified; it represented a dramatic improvement over the prior statutory law in the District of Columbia at the time of its enactment. In the first place, the statutory codification of the 1978 *Evans* Consent Order was in itself a very important and forward-looking step. The legislation pursued and accomplished the objective set out in the Committee Report of “revis[ing the] existing commitment statute and provid[ing] an orderly legal mechanism for carrying out Judge Pratt's order.” [FN359] The Committee, pointing to requirements established in the 1978 Consent Order for comprehensive evaluations and habilitation plans for Forest Haven residents, a general population needs assessment, and reductions of the population at Forest Haven, observed that “much of the work required to implement this bill is also required under Judge Pratt's order.” [FN360] Codification of the judicially imposed standards and procedures was a tremendously important step toward ensuring clarity, continuity, breadth, and certainty in the future of the District's programs and services for individuals with intellectual disabilities. The Washington Post editors can perhaps be forgiven for their optimism in hoping that in responding to the court's mandates the legislation had also provided a “judicious response to the larger task of devising an effective overall program [that] . . . [w]ith any luck [] should . . . make further judicial decrees against city programs unnecessary.” [FN361] Would that it had proven to be so.

The 1978 statute made some more specific but significant revisions to the prior statutory standards. In revising commitment procedures and requirements, the 1978 legislation eliminated by omission a prior condition for admission to Forest Haven - that parents give up guardianship of the person, which would then devolve to the District. The Committee Report clarified that under the bill “commitment does not mean guardianship of the person is transferred to the facility when he enters, unlike the present situation in which the only way a . . . person can be admitted to Forest Haven is to have his family relinquish his guardianship to the District. Under the proposed bill the family would retain all of its rights and obligations” [FN362] Another provision, which the Committee Report described as “one of the most important provisions of the bill”

[FN363] was included in the “effective date” provision at the end of the legislation; it called for court *306 review of the commitments and admissions situation of persons in residential programs on the effective date of the law, with appropriate review officials to be appointed “as soon as possible, but not later than one hundred eighty days after the effective date” and all court hearings to review the admission or commitment of residents to be completed with three years. [FN364]

Section 312 of the 1978 law mandated that no person would be committed to a facility without a prior court hearing, [FN365] and Section 313 provided that a judicial determination of incompetency of an individual to refuse commitment would not serve as a determination of, nor have relevance to, the competency of the individual to make decisions in other matters. [FN366] Such provisions focused on providing protective legal safeguards to prevent arbitrary deprivations of the rights and liberty of individuals with intellectual disabilities. An important, ground-breaking part of the 1978 statute with a similar orientation was Title V, whose fourteen sections addressed categories of rights of persons with intellectual disabilities; [FN367] the Committee Report referred to Title V as a “bill of rights.” [FN368] The notion of a Bill of Rights for people with intellectual disabilities emerged and gained popularity in the period from the later sixties through the mid-seventies. [FN369] The provisions in the 1978 D.C. law, however, were more extensive and detailed than most of the earlier “bills of rights.” Indeed, the list of rights in Title V was in some ways more thorough and specific than the provisions in the provisions on the “Interim Operation of Forest Haven” in the *Evans v. Washington* consent order. [FN370]

One impressive feature of the 1978 law was the very first right listed which provided very broadly that all persons with intellectual disabilities “have a right to habilitation and care suited to their needs, regardless of age, degree of [intellectual disability] or [disabling] condition. [FN371] While most of the other rights were provided to “residents,” defined to mean a person committed or admitted to a facility for habilitation, [FN372] this one applies to every individual with an intellectual *307 disability. Similarly noteworthy for its breadth was another provision that declared that “any interested party shall have the right to initiate an action in the court to compel rights afforded . . . under this act.” [FN373] The enforcement provisions went on to provide that sovereign immunity would not bar an action to compel rights provided in Title V, and that reasonable attorneys' fees and court costs would be available. [FN374] Another provision gave to “any resident” of a facility the right to a “civil remedy” of “not less than twenty-five dollars per day” to be paid by the director of the facility or by the District for every day the resident was not provided an adequate program of “habilitation and normalization pursuant to the resident's individual habilitation plan.” [FN375] These were all quite potent, rights-friendly provisions.

The 1978 law quite obviously represented a huge advance over what came before. It recognized an array of significant rights and provided enforcement mechanisms, including the rights to go to court, to monetary damages, and to attorneys' fees and court costs. It sought to codify the *Evans v. Washington* Order, to assist with its implementation, and to make some of its principles applicable beyond its class and scope. It sought to endorse and act on what the Committee report described as a “fundamental change in the nation's perception of our obligations to [citizens with intellectual

disabilities],” away from a traditional orientation toward removing people with intellectual disabilities from normal life and emphasizing “what was assumed to best for the community” instead of for the individual with the disability. [FN376] The Committee pointed out that the existing D.C. law governing commitments to Forest Haven expressly provided that “the controlling factor throughout the proceedings” was “the welfare of the persons of the community.” [FN377] In pursuit of this transformation, the 1978 legislation stressed that habilitation, commitments, and admissions were to be targeted at meeting the specific needs of the individual. [FN378]

Law 2-137 endorsed concepts of community-based services and least restrictive alternatives, and established broad rights to habilitation and care. It referred to *308 “principles of normalization”; [FN379] “promot[ing] the economic security, standard of living and meaningful employment” of individuals with intellectual disabilities; [FN380] and “maximiz[ing their] assimilation into the ordinary life of the community.” [FN381] It also imposed important procedural safeguards into the processes by which individuals came to reside at Forest Haven and other facilities, or were discharged, or transferred; and it tightened up loose and ill-defined practices, and prohibited many that were harmful or dangerous. It required “individual habilitation plans” [FN382] and individualized “comprehensive evaluations” of persons being admitted or committed. [FN383] In short, the 1978 law helped to improve, substantially, a very bad situation.

Even for the time in which it was enacted, however, D.C. Law 2-137 was far from a model law. Some of its deficiencies derived, understandably, from its most pressing purposes announced in the Committee Report - revising the existing commitment statute and providing “an orderly legal mechanism for carrying out Judge Pratt's order.” [FN384] The result was that in spite of its broad and progressive statements of statutory intent, the 1978 statute overwhelmingly addressed and was colored by *Evans* case issues, Forest Haven, and commitment practices. The grant of rights in Title V, for example, began with announcement of a broad right to habilitation and care for all persons with intellectual disabilities, but almost all of the rest of the provisions establishing rights extended only to “residents,” i.e., people admitted or committed to a facility. Much of the law established a better, more defined, and procedurally proper commitment process, but the statute did little to discourage the widespread use of commitment to confine people with intellectual disabilities in D.C. residential facilities, nor, despite its articulation of a grand statutory purpose that “the use of institutionalization shall be abated to the greatest extent possible,” [FN385] it did not call for the phasing out of Forest Haven nor mandate any major incentives for its termination or reduction.

Another problem with the 1978 Act is that it contemplated payments for services by residents and their families. In the “Purpose” section of the law, it stated an intent to secure for each person with an intellectual disability habilitation, “skillfully and humanely provided,” in a setting least restrictive of personal liberty, “regardless of ability to pay.” [FN386] And another provision declared that no *309 resident of D.C. with an intellectual disability shall be denied habilitation in facilities or from community-based services affiliated with the District “because of inability to pay for such habilitation.” [FN387] But one of the “Miscellaneous Provisions” toward the end of the Act declared that if “increased financial responsibility” for support of a person with an intellectual disability will result from a change in a court's commitment order, the “responsible party”

must be provided reasonable notice and an opportunity for a hearing. [FN388] The Committee Report explained:

The Committee was concerned that the family, or the person himself, would suddenly find their financial obligation would increase because the court ordered a new, more expensive placement. Therefore this language was put in to require notice to the family, and an opportunity for a hearing, before any increased charges could be levied. [FN389]

This clearly implies that a “financial obligation” on the family or the individual will result from the provision of services under the Act. Reading these provisions together indicates that, as the Report observed, D.C. policy is that “no one needing care will be turned away from a D.C. facility or by a program operated under contract with the District because the person is unable to pay for the services,” [FN390] but that those who can afford to pay will be made to. Such an approach of charging for services rendered seems out of place in a government services program the costs of which are largely underwritten by the federal government. Moreover, the guarantee of “a right to habilitation and care suited to their needs” [FN391] is largely contradicted by forcing people to buy such care and habilitation at prices established by the vendor and based upon its assessment of their ability to pay.

One of the biggest shortcomings of the 1978 Act was the limited scope of individuals afforded anything under it. Subsection II.A. above describes the evolution of the federal definition of developmental disability which determines eligibility for services and programs under the federal law, and explains that this definition has not been limited to “intellectual disability” (“mental retardation”) since 1970, when the term “developmental disability” was introduced, and “cerebral palsy” and “epilepsy” were included in addition to intellectual disability. “Autism” and “dyslexia resulting from” one of the other listed conditions were added in 1975, and in 1978 Congress expanded the definition once more, to adopt a generic approach focused on “severe, chronic disability” that “is attributable to a physical or mental impairment,” “is likely to continue indefinitely,” “results in substantial functional limitations,” and causes the person to need “care, treatment,*310 or other services which are of lifelong or extended duration.” In the 1978 D.C. law, however, the Council turned its back on persons with cerebral palsy, epilepsy, autism, and other severe, chronic disabilities, by framing a law that authorized services only to people with intellectual disabilities. The class that had originated the *Evans* suit - “the mentally retarded residents of Forest Haven” [FN392] - garnered the lion's share of attention in the Act and, although the statute went beyond the residents of Forest Haven in some of its provisions, it did not extend services or opportunities to persons with disabilities other than intellectual disabilities. Picking and choosing among people with developmental disabilities based purely upon the disability category label to receive or not receive services and rights, that they need and are eligible for under the federal funding criteria, was an unfair and unfortunate approach, that was seriously outdated when the D.C. statute was enacted.

B. Developments Since 1978

Whatever strengths and weaknesses the 1978 Act may have had when it was enacted, a lot has changed since that time. One set of changes has consisted of amendments to the

Act. Unfortunately, most of them have served to weaken rather than improve the law. Several such amendments related to financial concerns. Key provisions that established a right to habilitation and care for all persons with intellectual disabilities without regard to their age or degree of intellectual disability; [FN393] and guaranteed facility residents a habilitation program that would maximize their human abilities, enhance ability to cope with the environment, and afford an opportunity to progress toward independent living, [FN394] were substantially restricted by the addition of a conditional clause: “To the extent that appropriated funds are available to carry out the purposes of this chapter, no District resident . . . shall be denied . . .” [FN395] Unless the D.C. developmental disabilities program is fully and optimally funded, the added language gives the District an escape hatch from the responsibility the provisions had previously established. For persons who are committed to a facility, however, two additional provisions were added to declare that they would retain the rights granted in the 1978 provisions “notwithstanding” the added conditional language applicable to all others. [FN396]

An analogous financial shield from fulfilling what would otherwise be a legal obligation was attached to the provision that granted facility residents the right to a penalty of “not less than twenty-five dollars per day” for every day the resident *311 was not provided adequate habilitation and normalization under the resident's individual habilitation plan.” [FN397] It added a proviso that such a payment would be due, “unless the District is unable to pay the cost of recommended services because available funds appropriated for the purposes of this chapter are insufficient to pay the costs.” [FN398] Again, in the absence of optimal, full funding D.C. can avoid a responsibility the law would otherwise apply.

The provisions relating to the obligation of individuals and their families to pay for services provided by the District were clarified by a 1995 amendment. In place of the provision that had said that no one would be denied habilitation in facilities or from community-based services because of inability to pay for it, [FN399] three provisions were substituted that go in a diametrically different direction. The current language declares (1) that a person with an intellectual disability, or the father, mother, spouse, or adult child of the person “shall pay to the District the costs of habilitation, care, or both,” if one of those parties, or the person's estate “is able to pay”; (2) that any person liable for such costs who does not pay them shall be issued a court citation and may be ordered to pay; and (3) that the Mayor may examine any of the parties under oath to determine their ability to pay. [FN400] Another revision made in 1995 dealt with a provision that had authorized the appropriation of “such District funds as may be necessary to implement the provisions of this act”; the amendment changed the phrasing to “necessary and available . . .” [FN401] The change thus affords the District an additional financial non-performance excuse.

The 1995 amendments included an additional change that created the impression of positive change without actually delivering it. The change was to replace the term “resident” with “customer,” [FN402] which suggests a broadening of the application of various rights and safeguards previously applicable to residents, making them available to recipients or potential recipients of non-residential services. The substitution turned out to be purely cosmetic or smoke-and-mirrors, because the 1995 law simultaneously provided a definition of “customer” as “a person admitted to or committed to a facility,” [FN403]

to wit, a resident. This sleight of hand *312 provided no change in the breadth of beneficiaries of rights and opportunities afforded under the legislation.

Apart from amendments to the 1978 Act, the value and utility of the law were affected dramatically by the closing of Forest Haven. Since Forest Haven was a focal point of much of what was addressed in the statute, its closing and the dispersal of its former residents placed a new emphasis on procedures, practices, and standards at smaller facilities and community-based programs. The rights set out in Title V of the 1978 statute, for example, were quite clearly formulated to address problems at the unfortunate facility in Laurel, Maryland. Although it mentioned and sought to provide some limited guidance in regard to non-institutional programs, the 1978 law was simply not designed for adequately addressing such matters. The *Evans* litigation has continued to wrestle with a variety of complex and thorny problems of non-compliance in the nineteen years since the last resident left Forest Haven. The 1978 legislation certainly did not incorporate or reflect the numerous orders, implementation plans, and enforcement mechanisms devised by the parties and the court since 1991. The 2001 Plan for Compliance and Conclusion, for example, contained a new vision of the system of services and supports, as well as quality assurance, for people with developmental disabilities. And the parties, recognizing a need to revise and update the underlying statute to reflect an evolving set of standards for the system that would move away from the requirement of ‘committing’ people with intellectual disabilities to the legal custody of the District and would incorporate improved models of service models for people with disabilities, negotiated, through an extended process, a set of ‘Legislative Principles.’ The 1978 law was fashioned without the benefit of any of this.

The past three decades have also witnessed a veritable revolution in the approaches, structure, and philosophy of programs for addressing the needs of persons with disabilities. Individualized programming has been replacing one-size-fits-all programs and services. Consumer input and decision-making have been embraced in what has been termed ‘person-centered’ services and supports. [FN404] Autonomous programs and facilities have given way to accountability and case management approaches. Notions of full participation, integration, inclusion, least restrictive environments, and independent living have come to dominate service and support programs for individuals with disabilities. These and other prominent concepts in current disability policy were examined in some depth by a D.C. scholar, Robert Silverstein of the Center for the Study and Advancement of *313 Disability Policy, in an article titled Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy. [FN405]

These modern approaches have been embraced and imposed as requirements in federal and state laws. In enacting the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DDABRA), Congress found that:

disability is a natural part of the human experience that does not diminish the right of individuals with developmental disabilities to live independently, to exert control and choice over their own lives, and to fully participate in and contribute to their communities through full integration and inclusion in the economic, political, social, cultural, and educational mainstream of United States society. [FN406]

It went on to make a strong declaration of U.S. policy that all programs, projects, and activities receiving assistance under DDABRA were to be carried out in a manner consistent with, inter alia, the following principles:

(1) individuals with developmental disabilities, including those with the most severe developmental disabilities, are capable of self-determination, independence, productivity, and integration and inclusion in all facets of community life, but often require the provision of community services, individualized supports, and other forms of assistance;

(2) individuals with developmental disabilities and their families have competencies, capabilities, and personal goals that should be recognized, supported, and encouraged, and any assistance to such individuals should be provided in an individualized manner, consistent with the unique strengths, resources, priorities, concerns, abilities, and capabilities of such individuals [FN407]

Subsequent sections of the Act provided extensive definitions of many of these concepts and approaches. [FN408]

Other federal laws enacted since 1978, including the Air Carrier Access Act of 1986, [FN409] the Voting Accessibility for the Elderly and Handicapped Act of 1984, [FN410] *314 the Fair Housing Amendments Act of 1988, [FN411] Section 255 of the Telecommunications Act of 1996 [FN412] and Section 508 of the Rehabilitation Act of 1973, [FN413] and, especially, the Americans with Disabilities Act (ADA), [FN414] have engendered a whole new atmosphere and mindset for people with disabilities by establishing and expanding their legal rights.

In the years since 1978, the courts have become increasingly involved in articulating and arbitrating the scope and implications of the legal entitlements and rights of individuals with disabilities. Under the ADA, for example, the U.S. Supreme Court has ruled that the Act protects the rights of people with disabilities to have equal access to the courts, [FN415] held the ADA applicable to protect prisoners in state penal systems, [FN416] held that the ADA prohibits discrimination by a dentist against a person with HIV infection, [FN417] and ruled that the ADA required the PGA to allow a golfer with a mobility impairment to use a golf cart in tournament play as a “reasonable modification.” [FN418] The reported cases in the lower courts construing and applying the civil rights of people with disabilities number in the thousands.

When the 1978 legislation was being considered, the lower courts had already begun to address lawsuits challenging the confinement of people with intellectual disabilities and mental health conditions in dreadful residential institutions. The Committee Report accompanying the 1978 law discussed some of the emerging litigation dealing with the rights of institution residents, specifically mentioning the case of *Wyatt v. Stickney* [FN419] and referring to court actions against Willowbrook in New York and Pennhurst State School and Hospital in Pennsylvania, in addition to the *Evans* suit itself. [FN420] In subsequent years, deinstitutionalization and institution-conditions cases would reach the highest judicial levels. In its 1982 decision in *Youngberg v. Romeo*, a case involving the Pennhurst facility, a state institution for people with intellectual disabilities, the Supreme Court decided that individuals confined in residential institutions have “constitutionally protected interests in conditions of reasonable care and safety, reasonably non-restrictive*315 confinement conditions, and such training as may be required by these interests.” [FN421]

One of the biggest advances in rights of persons with intellectual disabilities in regard to provision of habilitation services has taken place in the interpretation of the integration requirement imposed under the ADA. [FN422] In *Olmstead v. L.C.*, a case involving two plaintiffs with intellectual disabilities who were institutionalized at the Georgia Regional Hospital in Atlanta, the U.S. Supreme Court upheld the ADA's integration requirement and applied it to prohibit unnecessary segregation of people receiving habilitation services from the states. [FN423] Although the Justices disagreed on other aspects of the ruling, a clear majority held that pursuant to the ADA undue institutionalization constitutes discrimination by reason of disability. [FN424] The integration mandate under the ADA is set out in a regulatory provision issued by the Attorney General declaring that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” [FN425]

On June 18, 2001, President Bush issued Executive Order No. 13217, titled ‘Community-Based Alternatives for Individuals with Disabilities,’ which asserted his Administration's commitment to implementing the integration requirement of the ADA as articulated by the Supreme Court in *Olmstead*. [FN426] In the Executive Order, the President declared a U.S. policy commitment to community-based alternatives for individuals with disabilities; stated categorically that “[u]njustified isolation or segregation of qualified individuals with disabilities through institutionalization is a form of disability-based discrimination” prohibited by the ADA; and directed the relevant federal departments to take steps, including investigating and resolving complaints by individuals who allege that they are victims of unjustified institutionalization, to “fully enforce” and ensure the timely implementation of the *Olmstead* decision. [FN427] In the courts, actions to apply the integration mandate recognized in *Olmstead* continue to have dramatic impact on service programs for people with disabilities. [FN428]

*316 The court decisions, enforcement initiatives, and other developments mentioned in this subsection all occurred after the 1978 statute became law, sometimes decades or a quarter-century or more after, and have sharply remade the whole landscape of programs and services for people with disabilities. And yet the 1978 law still sits there, essentially unchanged - a defective, harmful relic of another time when people with developmental disabilities were undervalued and over-separated from the rest of the community - like a derelict ship that sits indefinitely, archaic, listing more than a little, and blocking the channel of progress.

V. The Developmental Disabilities Reform Act Proposal: Progress at Last?

A. Background, Development, and Introduction of the DDRA Bill

The Council of the District of Columbia has shown more interest in recognizing and advancing the rights of individuals with disabilities in the last five years. In 2006, for example, the Council passed the Disability Rights Protection Act of 2006, [FN429] which required the Mayor to establish an ADA Compliance Program responsible for compliance and monitoring procedures for the implementation of the ADA at all agencies, and to establish and implement an annual *Olmstead* Compliance Plan for serving individuals with disabilities in the most integrated setting in accordance with the *Olmstead v. L.C.*

decision; [FN430] the Act also established an Office of Disability Rights to oversee the ADA Compliance Program, to develop the annual Olmstead Compliance Plan and submit it to the Mayor, to evaluate the District's compliance with disability rights laws, and to investigate alleged violations of such laws. [FN431]

Only days later, the Council passed the Department on Disability Services Establishment Act of 2006, [FN432] based on a bill introduced by then Councilmembers Adrian M. Fenty and Vincent Gray. [FN433] This law established the Department on Disability Services (DDS) to lead the reform of the District's "mental retardation *317 and developmental disabilities system"; ensure that District laws, regulations, programs, policies, and budgets "promote inclusion and integration, independence, self-determination, choice, and participation in all aspects of community life for individuals with developmental disabilities and their families"; and promote the well-being of individuals with developmental disabilities throughout their lives, through delivery of "individualized, high-quality, safe services and supports." [FN434] DDS was put in charge both of developmental disabilities services and, on or before June 30, 2007, of the rehabilitation services program. [FN435] The Act transferred to DDS all developmental disabilities-related authority and all positions, assets, records, obligations, and all unexpended balances of appropriations, allocations, and other funds previously possessed by MRDDA. [FN436] In 2006, the Council also passed the People First Respectful Language Modernization Act of 2006, in which it sought to improve to some degree the language used in D.C. legislation to refer to individuals with disabilities. [FN437]

In the spring of 2007, DDS, acting through its Management Advisory Committee (DDS MAC), began work on a comprehensive revision of the 1978 statute. [FN438] In April, Mayor Fenty named Judith E. Heumann, a leader of the disability rights movement and an internationally recognized expert on disability and diversity issues, to be first director of DDS; D.C. Attorney General Peter Nickles, then the Mayor's General Counsel, referred to her as a "superstar." [FN439] On May 5, 2007, the DDS MAC legislative Committee held a Community Town Hall meeting attended by some eighty-five participants to get their input on the values and principles that should guide the new legislation. [FN440] Based in part on such input, on December 11, 2007, the D.C. Council passed a "Sense of the Council Regarding Rights and Services for Residents with Intellectual Disabilities and Their Families Resolution," declaring that the 1978 law "no longer reflects existing federal laws and programs, best practices in service delivery, or contemporary knowledge of *318 the rights, abilities, and preferences of individuals with developmental disabilities," and calling for "new legislation to reorganize and modernize District of Columbia law governing services and supports" for such individuals. [FN441] The Resolution stated that "[t]he District of Columbia should implement a model system of effective quality services and supports for residents with intellectual and developmental disabilities . . . ," and went on to list characteristics that services and supports provided by such a system should have, including full recognition of rights, abilities, and preferences; grounding in best practices, innovation, and standards of excellence; seeking maximum development of individuals' potential; a full range of service options, including comprehensive family support; an individualized, person-centered approach; and being supportive of opportunities for developing and maintaining relationships with families, friends, coworkers, and others. [FN442] It also declared it a

matter of “policy of the District of Columbia” that individuals with developmental disabilities “live with independence and dignity in the most inclusive and most integrated community setting possible and have the freedom and opportunity to fully participate in the cultural, economic, educational, political, and social fabric of their communities.” [FN443] The resolution thereby not only endorsed the need and rationale for a rewriting of the old law, it also provided a description of many of the values and principles that the new law should incorporate.

In the fall of 2007, the DDS MAC Legislative Committee undertook a variety of activities to gather additional ideas regarding the nascent legislative proposal, including focus groups with adults and young people with developmental disabilities and their families, service providers, advocates, and direct service professionals; [FN444] meetings with stakeholder organizations; [FN445] research on the laws of other jurisdictions; [FN446] and a Developmental Disability Services Work Group meeting on January 15, 2008, [FN447] a one-year follow-up of an earlier such meeting. [FN448] On *319 December 18, 2008, the DDS MAC Legislative Committee released its first draft of a “Developmental Disabilities Reform Act of 2008” proposal. [FN449] The Legislative Committee then commenced an impressively ambitious effort to get reaction to and input from District citizens and interested organizations on its draft bill. It sponsored a range of activities to spread the word about the draft legislation and to get feedback on it. These included a “DDRA Community Forum,” which the Committee described as “a kick-off Saturday townhall meeting,” on January 10, 2009; [FN450] meetings with attorneys; meetings for families; presentations and meetings with “community stakeholders,” such as self-advocacy groups, family support groups, provider agencies, and other professionals; and eleven Review and Revision Meetings for community members to come together and review the draft DDRA section by section. [FN451] Illustrating the volume of the Legislative Committee's efforts to publicize the content of the draft bill and to generate comments and suggestions for improvements, from January to July 2009 it held 34 meetings for discussions or presentations about the draft. [FN452] DDS MAC declared accurately that “[l]iterally hundreds of people have participated in town halls, forums, focus groups, and legislative drafting meetings.” [FN453]

Along with its other efforts, in October 2007, the DDS MAC Legislative Committee established what it described as “an Expert Review Panel of national experts on laws, rights and services for persons with . . . developmental disabilities.” [FN454] The panel had its initial meeting on December 11, 2007. [FN455] The *320 author of this article is one of the five members of the panel. [FN456] The author commissioned three students (dubbed “the disability group”) [FN457] in the Legislation Clinic he directs to assist him in developing input on the draft legislation. He asked the group to (1) review federal developmental disabilities laws; (2) sample a selection of state laws; and (3) analyze legal principles enunciated by the court in the *Evans* case. The findings resulting from these three pieces of research served as a touchstone for comparison with the DDRA bill to see if any significant areas of rights and requirements were overlooked or omitted. The students produced a report titled *Evolution to Empowerment: A Survey of the Rights of People with Developmental Disabilities for the Drafting of the Developmental Disabilities Reform Act*. [FN458] The report's findings were generally positive toward the draft DDRA. Of fifteen categories of rights and requirements examined, the students

concluded that the proposed bill adequately or fully addressed 12 of them. As to the others, the report offered suggestions for strengthening the legislation. The most critical of the report's comments focused on Waiting Lists, which the report argued should not be permitted. [FN459] The author presented the report, along with his own comments on the legislation, to the committee at its third meeting with the Expert Review Panel, on April 16, 2009.

After considering the various pieces of input and suggestions it had received on the first draft of the bill, the Legislative Committee of DDS MAC issued a second draft of the bill on August 27, 2009. [FN460] Accompanying the bill itself, the Committee also released a summary of changes from the first draft in a section-by-section format. [FN461] The summary indicated that the second draft incorporated “additional community feedback” as well as changes growing out of the DDRA Review and Revision Meetings. [FN462] Less than two months later, at a D.C. Council meeting on October 20, 2009, Council Chair Vincent Gray, along with *321 Councilmember Tommy Wells, Chair of the Committee on Human Services, introduced the Developmental Disabilities Reform Act [FN463] - Bill 18-501. [FN464]

Councilmembers Bowser, Mendelson, Thomas, Cheh, Catania, Evans, Graham, Michael Brown, and Kwame Brown joined Gray and Wells as additional cosponsors of the bill. [FN465] In his introductory statement, Councilmember Gray said that the legislation “creates a new paradigm in the District of Columbia, modernizing DC Law 2-137,” provides “a flexible legal framework that values all people with developmental disabilities and affirms and protects their rights as citizens,” and places new emphasis on community living services across the lifespan” [FN466] He added that the bill represented “the culmination of over two years of collaborative work by residents with developmental disabilities, families, advocates, lawyers, service providers and other stakeholders.” [FN467] In a press release issued after the introduction of the bill, Councilmember Wells said that the city's developmental disabilities service system was outdated and obsolete, and that the DDRA represented a “wholesale reform” of the system that would “replace the old system with a person-centric approach” and would eventually enable DDS to meet the needs of the developmental disabilities population directly, rather than requiring court action. [FN468]

The bill's introduction received only a smattering of press coverage, primarily a Washington Post article by Post staff writer Henri Cauvin that characterized the D.C. Council as having taken “its first step toward rewriting a statute brought about by the abuses of another era.” [FN469] The article stressed that the legislation would encourage individuals living in group homes to move into smaller residential settings and would create a new grievance system. [FN470] It also reported that Chairman Gray considered the bill one of his proudest legislative efforts - “an *322 exceedingly important bill.” [FN471] The introduction of the bill led the DDS MAC Legislative Committee to issue updated “Fact Sheets” [FN472] on the bill and an “Overview and Section-By-Section Analysis of Bill 18-501.” [FN473]

At the October 20, 2009, meeting of the Council, Councilmembers Gray and Wells also introduced a companion bill titled the “People First Respectful Language Modernization Amendment Act of 2009” [FN474] - Bill 18-502. [FN475] The DDS MAC Legislative Committee has posted information, including relevant links and

answers to frequently asked questions about this bill, on its blogsite. [FN476] This bill has the same name as the D.C. Law 16-169, the ‘People First Respectful Language Modernization Act of 2006,’ mentioned above. [FN477] The primary purpose of the 2009 bill is to “amend[] the D.C. Official Code to remove remaining offensive, dated language referring to persons with disabilities and replace[] it with respectful language,” [FN478] and, in particular, to change references from “mental retardation” to “intellectual disability” and require the District government to use ‘intellectual disability’ instead of ‘mental retardation’ in all District laws, regulations and official government publications, [FN479] for reasons described at the beginning of this article. [FN480] After introduction, the two companion bills were both referred to the Committee on Human Services. [FN481] The blogsite maintained by the DDS MAC Legislative Committee has summaries, links, and a wide range of other information about the proposed legislation. [FN482]

*323 B. Critique of the Pending Legislation

From the foregoing, and from the public statements of the Council of the District of Columbia, its Chair, the Mayor, the Department of Disability Services, and numerous others, a strong consensus has emerged about the need to, in the words of the Council's Resolution, “reorganize and modernize” D.C. laws regarding services and support for those with developmental disabilities and their families. The reasons why such reform of the current law is necessary are generally obvious and noncontroversial. The thirty-two-year-old statute is manifestly outdated. The law's overwhelming focus on Forest Haven and commitment is inappropriate, unhelpful, and essentially irrelevant. Eligibility for developmental disability services is severely restricted, to the substantial detriment to the health, safety, and welfare of D.C. residents with such disabilities and their families, and with massively damaging financial consequences for the District and its taxpayers. The operating principles and procedures of D.C.'s developmental disabilities program are egregiously behind the times compared to the prevalent standards in other jurisdictions. The long-standing pattern of dysfunction, inadequacies, and failure in District developmental disabilities agencies' performance can be explained to a greater or lesser extent by shortcomings in the statutes; it is even more certain that improvements in the law are needed to procure and ensure better performance in the future. And the terminology regarding individuals with disabilities and disabling conditions in the laws on the books is outdated and problematic.

The major ways in which the law should be revised are also mostly a matter of general consensus. The 1967 Council Resolution, the DDS draft DDRA bills, Bill 18-51, and Council Chair Gray's introductory remarks all call for the District to “implement a model system of effective, quality supports and services for residents with developmental disabilities and their families.” It is widely believed that the system of developmental disabilities services and programs should be based on best practices. Also broadly accepted is that the revised law should be targeted toward small, community-based programs in lieu of large, isolated, institutional ones. The law should incorporate Olmstead-compliance planning for implementation of the integration requirement imposed under the ADA as recognized in the *Olmstead v. L. C.* case and Executive Order

No. 13217. It should require individualized, person-centered services and support, provided in the least restrictive environment, allowing individuals to live independently with respect for individual's ability to make choices and control their living arrangements and daily lives. Revisions to the law should expand eligibility in accordance with the federal definition of developmental disability (not just including intellectual disability as under the current law), and should permit the maximization of receipt of federal Medicaid dollars. A person with a developmental disability should not have to be committed in order to receive developmental disability *324 services. The revised law should continue to afford protection to members of the *Evans* class. Modern acceptable terminology regarding disabilities and people who have them should be substituted for outmoded, insensitive terminology. A new and better version of the law should reflect full recognition and protection of the legal and constitutional rights of individuals with developmental disabilities. These principles and approaches are accorded widespread acceptance, and have not been seriously challenged in the extensive process of gathering facts and feedback on the legislation that led up to its introduction.

The preceding description of suitable approaches for revising the District's developmental disability statute should be compared with the DDS MAC Legislative Committee's synopsis that Bill 18-501:

- Recognizes the rights and abilities of people with developmental disabilities;
- Is rooted in local, national and international best practices;
- Establishes strong quality standards and safeguards;
- Aligns District law with federal law, helping the city to maximize federal funding;
- Helps families to support their members with developmental disabilities;
- Adopts a lifespan approach;
- Promotes interagency coordination; and
- Puts people with disabilities and community stakeholders in charge of helping to shape the future of the District's service system. [FN483]

The key question is how well Bill 18-501 measures up to the general expectations and legal requirements regarding its objectives and content.

In a conversation about the role of the Expert Review Panel, Ms. T.J. Sutcliffe, Director of Advocacy and Policy at the Arc of the District of Columbia and a member of the DDS MAC Legislative Committee, made an insightful comment to the author of this article Ms. T.J. Sutcliffe about the usefulness of “getting more eyes on the draft” to help identify gaps or problematic provisions. [FN484] Consistent with that idea, part of the research he assigned to the law students from his clinical program was to compare the scope of matters addressed in their survey of federal developmental disabilities laws, a selection of state laws, and legal principles enunciated by the court in the *Evans* case with the DDRA bill to see if they could identify any significant areas of rights and requirements that might perhaps *325 have been overlooked or omitted - i.e., to see whether the bill had “touched all the bases.” The students' research and survey indicated that the proposed DDRA bill got good marks in terms of hitting all the major issues and topics; it covers the waterfront and does not neglect major subject areas that one would have hoped it addressed.

Another approach to sizing up the extent to which Bill 18-501 accomplishes its objectives is to contrast it with the existing statute. Enlightening in that regard is the Side-by-Side comparison of the bill and the 1978 law issued by DDS MAC Legislative Committee. [FN485] It identifies that the pending DDRA bill would expand the ages served to all ages instead of generally only adults under the current law. A key change that the DDRA would entail would be the expansion of eligibility for developmental disability services in D.C. from intellectual disability only to the full range of developmental disabilities under the federal law; eligibility for services under the 1978 law is inconsistent with, and narrower than, federal law, and thus fails to maximize federal Medicaid funds, but if the DDRA was enacted, eligibility would be consistent with federal law which would maximize receipt of federal Medicaid funds. The intake process under the current law is by admission or commitment through the Superior Court with no time limit on the process, while under the bill eligibility would be determined by DDA within 40 days. Presently, DDA can provide services prior to commitment only to a person found to be incompetent in a criminal case; under the DDRA bill, DDA could provide services prior to an eligibility determination to a person who is homeless, at risk of abuse or neglect, or has been found incompetent in a criminal case. Instead of current service planning through an individual habilitation plan created by an interdisciplinary team, the pending bill would be through an individual support plan developed by the individual working with the DDA support coordinator and any other person the individual chooses. Bill 18-501 would require flexible, person-centered home and community-based services in place of present residential, facility-based habilitation. The current law authorizes family support only in the form of respite care, but the bill contemplates a comprehensive array of services under the guidance of a Family Support Council. As to rights, the existing law gives an extensive list of rights for people who reside in facilities, while the DDRA bill would expand individuals' rights beyond residential facilities to include choices and control of their lives more broadly, and DDS would be authorized to enforce rights. The 1978 law does not provide an internal grievance system, while the bill would establish an internal DDA grievance system. The current statute allows people who are committed (but not those who are admitted) a Superior Court hearing on grievances, while under the DDRA all people *326 eligible for DDA services could have access to the court. The bill would give all people eligible for DDA services access to an advocate through the DC advocate program, in lieu of the situation under current law in which only people who are committed can get a court-appointed volunteer advocate. No quality standards are imposed under the 1978 statute, but the DDRA bill would require interagency standards, mandatory criminal background checks and an abuse and neglect registry. The present law imposes no reporting requirements while Bill 18-501 requires annual reports on implementation of the law. [FN486]

In regard to every one of these differences between the current law and the bill, the pending DDRA bill represents a considerable improvement over the current law. Indeed, one of the very constructive things in Bill 18-501 is its section 134, which would repeal the Mentally Retarded Citizens Constitutional Rights and Dignity Act. Eliminating the provisions of the 1978 Act would obviously expunge its problematic and obsolete provisions, many of which are discussed in part IV above. Highlighting the many positive

aspects of the DDRA bill should not, however, obscure the fact that it has some limitations and drawbacks of its own.

One central problem with the pending bill grows out of the sudden expansion of the District's developmental disability services responsibilities that will occur upon the enactment of the DDRA. With the expansion of the eligible class from solely persons with intellectual disabilities to the much broader class of persons having any developmental disability, as has long been the case under federal law, DDS will not realistically be able to serve all such persons immediately. The bill addresses this perceived problem in two ways. Section 106 creates what has been called a "2-year roll-out period," that, for those affected, will actually be a two-year delay of eligibility. It provides that for the first year after the bill becomes effective a person is eligible for services and supports only if her or his disability meets the definition of intellectual disability. [FN487] During the second year, eligibility is expanded to include in addition a person whose condition meets "other eligibility criteria" established by regulations of the DDS Director. [FN488] Only after the first two years have passed would the full range of people having developmental disabilities be eligible for services and supports. [FN489] For the first twenty-four months, those having disabilities other than intellectual disabilities, and whatever other conditions the DDS Director sees fit to include after a year, would not be eligible to be eligible.

A highly unfortunate aspect of the 2-year delay of full eligibility is that it is based on type of disability and calls for different treatment of people based on *327 their category of condition. Such divisions of the disability community by diagnosis and label are something the modern disability rights movement has resisted mightily; the disability community has vigorously fought attempts to separate people into groups to be treated differently because of what disability group they happen to be in, whether the condition is HIV, mental health conditions, sexually transmitted diseases, autism, lupus, cancer, or whatever. As far back as 1979, Eleanor Holmes Norton, now D.C. Delegate to the House of Representatives, was telling the President's Committee on Employment of the Handicapped about the need for "essential unity" among protected civil rights classes: "If that equality is not attained internally among us, the essential lesson of equality we are trying to impart to the rest of society will be lost." [FN490] Indeed, denying services and opportunities provided to others and that they are otherwise eligible for based solely upon the fact that they have a certain kind of disability is akin to discriminating against them based on disability, a practice that laws such as the ADA and Section 504 of the Rehabilitation Act make illegal. [FN491] Picking and choosing people with developmental disabilities to receive services and rights based upon the disability category label is unacceptable.

An argument can be made that people with disabilities other than intellectual disabilities, who have been excluded and kept waiting for services since 1978, are more deserving of prompt services than those with intellectual disabilities. Under the current language of the DDRA bill, people with intellectual disability would immediately be classified as being in an eligible category, but this was true before the DDRA. People with other types of developmental disabilities will have no guarantee of eligibility for supports and services for two years after the effective date of the Act. What does that say to people with cerebral palsy, epilepsy, autism, and other people who have disabilities

other than intellectual disability? You have to wait two years to get anything from this law because you have the wrong condition? Surely that is not the message the District should be sending.

As established in the current bill, the so-called “Roll-Out Period” is arbitrary, unfair, and offensive. If there cannot be immediate services for all people with developmental disabilities, a better approach would be to provide that persons with all types of developmental disabilities shall be entitled to equal priority for *328 supports and services, with any precedence among individuals for receipt of supports and services to be based on urgency of the individual's needs for such supports and services, and the scope and degree of the individual's functional limitations, and not on the category of disability the individual has.

The second way of dealing with the immediate influx of people eligible for services in Bill 18-501 is by the authorization of waiting lists. Section 114 provides that if supports and services cannot be provided immediately to persons found eligible, “DDS shall establish one or more waiting lists.” A report of the National Conference of State Legislatures observed that “[r]esearchers and advocates consider waiting lists to be a reflection of system failure.” [FN492] Many states are making efforts to reduce or eliminate their developmental disabilities waiting lists. As of 2007, eight states reported having no one on their waiting lists for residential services, and twenty states reported having no one waiting for Home and Community-Based Services. [FN493] Several states, including New Hampshire, Virginia, New Jersey, New York, and Connecticut, have endorsed the goal of eliminating such waiting lists. In 2007, New Hampshire enacted Senate Bill 138 that aimed at eliminating waiting lists for people with developmental disabilities in three years [FN494] (although recent budget cuts have reportedly imperiled achievement of that goal). Similarly, New Jersey law aimed to get rid of waiting lists for community residential and day programs by 2008. [FN495] On March 27, 2009, Virginia passed a law to eliminate its waiting lists for developmental disabilities services, intended to be fully completed before the 2018 biennial budget. [FN496]

In the face of such trends, it is disappointing that the District is considering a statutory requirement of waiting lists, but given the rapid expansion of eligible recipients contemplated under the DDRA, it might be a necessary, temporary evil. Actually, during the period while the drafts of the DDRA bill were being prepared and revised, a statutory requirement of a developmental disabilities waiting list was slipped into D.C. law, hidden within a mammoth budget bill. The Fiscal Year 2010 Budget Support Act of 2009 included a provision making “establishment of a waiting list for supports and services” an additional duty of DDS. [FN497] When there are or must be waiting lists, the best path would seem to be to not put people on them unless absolutely necessary, have incentives built into the law to use them sparingly and get individuals off of them as soon as possible, and *329 eliminate the lists entirely as soon as it can be done. Bill 18-501 has some fairly good language, some of it suggested by the author, regarding notice requirements and appeal rights, and some significant reporting requirements. It provides that people on waiting lists must begin receiving services at a reasonable pace based on urgency of needs, must receive services as resources become available, and must be kept up to date on when they can expect to receive services. [FN498] It also requires DDS to

justify the waiting list, identify how a person is placed on the waiting list and the criteria that determine placement and rank on it, notify a person placed on a waiting list within 5 days, explain why the person has been put on the waiting list, tell the person how long he or she can expect to wait before receiving services, and tell the person how to file an appeal. [FN499] In addition, DDS must provide an update to each person on the waiting list at least four times per year, and must publish quarterly and annual reports on the waiting list. [FN500] The author had suggested a provision stating that “DDS shall only place a person on a waiting list when the DDA is unable to provide supports and services immediately”; it was included as § 114(c) in DDS MAC Legislative Committee's DDRA Draft 2, [FN501] but was removed prior to introduction.

Nothing is said anywhere in the bill about the need for or prospect of ever eliminating waiting lists completely. The proposed Act would not establish any mandate nor even provide any incentives, other than paperwork, for DDS to reduce waiting lists and to shorten the length of time persons eligible for services stay on the lists. The absence of any appropriate urgency for getting people off of the waiting lists, or of any expectation that it will be accomplished in a timely fashion, is shown in the provision which calls for the reporting the numbers of people on waiting list; it specifies that figures regarding persons on waiting lists are to be provided in the following categories according to how long they have remained on the list: “for less than 3 months, between 3 and 6 months, between 6 months and one year, and by 6-month increments thereafter” [FN502] This scheme clearly expects some people to have remained on a waiting list for two years, two and one-half years, and beyond. For those who wind up on the lists, there is no guarantee that services and supports will be provided promptly; delays for months or years are a likely possibility. And there is no deadline and no incentives for phasing out and eliminating waiting lists. Nor is there a requirement that people on waiting lists receive alternative supports and services in the interim. Despite language in the bill about eligibility for supports and services and responsibility for providing them, time spent on a waiting list is simply time that is spent *330 being denied supports and services. In short, Bill 18-501 permits and, indeed, requires waiting lists, while providing insufficient impetus for getting people off of the lists and into the supports and services they need and are eligible for, and extends an expectation that waiting lists will be used in the District into the near and long-term future. All of which is troubling and disappointing.

If enacted, the DDRA would have a very positive impact in increasing eligibility for services and supports. What is less certain is the extent to which it would create or foster entitlement to, or reasonably certain receipt of, services and supports. The two-year roll-out provision means that an otherwise eligible person can have his or her access to services delayed for up to two years. The use of waiting lists means that an eligible person can have services delayed for an indefinite period. If this legislation was in effect, an attorney reading it could not say to a client, “If you apply for services and the comprehensive screening results in a determination that you have a developmental disability, you will be legally entitled to receive services within such-and-such a period.” People with developmental disabilities in the District of Columbia deserve to have the law tell them exactly what they can expect to receive from the government agencies designed to serve them and when, particularly when the services at stake are so critical to the people and families who need them.

One way of addressing such problems is through a “*Burlington* remedy,” a term attorneys and educators use to refer to an obligation devolving on government entities that have not fulfilled their legal obligations to provide services and programs, to pay for such services obtained elsewhere. This approach grew out of decisions in which the Supreme Court of the United States held that school districts are required to reimburse parents of children with disabilities for the costs of private placements in nonpublic schools when the public schools failed to provide an appropriate special education program. [FN503] The Court ruled that authority accorded to courts to “grant such relief as the court determines is appropriate” [FN504] included authority to order defendant school systems that did not provide a free appropriate public education program to the plaintiff children to reimburse parents for their expenditures in obtaining appropriate private special education services. In 2009, the Supreme Court reaffirmed its rulings in those earlier cases and made clear that the authority of courts to order reimbursement for privately provided services as part of “appropriate” relief applies: (1) even where the private placement is arranged by the parents without approval of the public authorities; [FN505] (2) even though the child has not previously received special*331 education services from the public schools and has not received an individualized education plan; [FN506] and (3) even where the public schools fail to identify the child as having a disability and refuse to recognize that the child is eligible for services. [FN507] In the Court’s view, the ultimate issue is whether the services the law calls for are provided by the public agencies, and, if not, it ruled the family should be reimbursed for getting them elsewhere - an outcome that “merely requires the district ‘to belatedly pay expenses that it should have paid all along.’” [FN508]

When the parties in the *Evans* case negotiated the “*Evans* Legislative Principles” [FN509] that were appended to the 2001 Plan, they expressly included a *Burlington* remedy. [FN510] Professor Joseph Tulman, who was counsel for the plaintiffs at the time the parties developed the Legislative Principles, has stated that he considered the *Burlington* remedy the most important element of them, and took seriously the provision in the 2001 Settlement Agreement which declared that if the Council did not enact legislation implementing the Legislative Principles, “the parties will accomplish the objectives of the Principles through alternative means,” [FN511] which he understood to mean that they would be implementable by Order of the *Evans* court. [FN512] In any event, it is clear that the parties in *Evans* agreed to the provision of a *Burlington* remedy as part of their effort to resolve the litigation, and that this type of remedy provides a practical way to facilitate the timely delivery of appropriate services to individuals with developmental disabilities, to motivate the District to comply with its responsibilities under the Act, and to afford families an effective avenue of recourse if the District falls short. Such a provision should be added to the DDRA proposal. [FN513]

*332 Other minor but useful additions that would improve the DDRA legislation would be to include a provision, modeled on a requirement of the federal DDABRA law, [FN514] to require activities and programs funded under the Act and the buildings in which they are operated to meet program and facility accessibility requirements, [FN515] and, to underscore the applicability and importance of standards in federal regulations governing “Intermediate Care Facilities For the Mentally Retarded (ICFMR)” and “Long Term Care Facilities (LTCF),” to add a provision requiring that residential facilities

where supports and services under the DDRA are provided shall comply with the standards and requirements established in federal ICFMR and LTCF regulations.

VI. Conclusion

For more than 30 years, the District of Columbia has had among the worst, if not the worst, developmental disability laws in the country. Its 1978 law grew out of the exigencies of the *Evans* lawsuit and of the huge sinkhole called Forest Haven, and it has been frozen in time ever since. In 1970, the official federal definition of “developmental disability” was expanded to include “cerebral palsy” and “epilepsy” in addition to intellectual disability; “autism” was added in 1975; in 1978, the current definition, focused on severity, duration, age of manifestation, resulting functional limitations, and need for ongoing services, was adopted. D.C. law, however, has covered only people with intellectual disabilities (the law still says “mental retardation”); people with other developmental disabilities have been left out in the cold. Despite major developments in law and policy in regard to disability services, disability civil rights laws, and the social role of people who have disabilities, the 1978 law has continued in place, almost *333 completely unaltered, as the years and decades have gone by. Under that statute, the administrators of the District's pretense of a developmental disabilities service system have, until very recently, done a markedly poor job.

Now, the District is finally ready to revise its woefully out-of-date law; its citizens can finally hope to get the supports, services, and rights that they ought to have been receiving all along. A number of people, inside D.C. government and without, have made Herculean efforts to craft a new, better law that reflects the guidance and choices of residents with disabilities and their families, as well as the optimum practices of service professionals and from other jurisdictions, in pursuit of the “model system” our officials speak of. Several years of dialogue, research, drafting, consultation, revision, and negotiation have brought us to where we are today. Without doubt, people with developmental disabilities in D.C. will be considerably better off if Bill 18-501 is enacted into law, and let us hope that the overwhelming majority of Councilmembers who co-sponsored the legislation will move prudently and rapidly to pass it.

A sober look at the bill indicates that there is a great deal to commend in it. It is, however, neither the elusive and illusory “perfect bill” nor a panacea. In addition to discussing strengths of the DDRA bill and the urgent need for its passage, this article has analyzed a few areas of concern including, in particular, the “two-year roll-out period” that disadvantages people with developmental disabilities other than intellectual disabilities; the acceptance of waiting lists without sufficient incentives and timelines for eliminating them as soon as possible and stringent standards for narrowing who gets put on the list; and the lack of a clear and solid linkage between eligibility for services and actually getting them. Others have other reservations or apprehensions. People who are in the *Evans* class or have been committed to a D.C. facility under the current law, and their families and advocates, have concerns about losing certain rights, including the right to legal representation, a court-appointed advocate, and an annual court review, if and when commitment is eliminated. [FN516] Such issues are continuing to be negotiated, and will

no doubt continue to be until the Council votes on the bill. One hopes that any changes adopted will strengthen, not water down, the bill that is finally enacted.

Mayor Fenty has been quoted as saying: “People with disabilities deserve a support system that enables them to live, work and fully participate in their communities. I commend the Department on Disability Services as they strive to *334 make radical improvements to provide and protect our most vulnerable residents.” [FN517] By definition, people with developmental disabilities need services and supports, services and support that are largely underwritten by federal funding for developmental disabilities and Medicaid waiver programs. To protect the District's vulnerable residents and provide them a support system to enable them to live and thrive in their communities, they need a functional, effective, dynamic, inclusive developmental disabilities program. One essential step to getting there is to put in place an enlightened, up-to-date, expansive developmental disabilities law.

FOOTNOTES

[FN1]. Professor of Law and Director of the Legislation Clinic, University of the District of Columbia, David A. Clarke School of Law. Professor Burgdorf has worked for over thirty-seven years in the field of disability rights and developmental disabilities law and has written numerous published works and appellate briefs. The United States Supreme Court has recognized Professor Burgdorf as ‘the drafter of the original ADA bill introduced in Congress in 1988.’ *Sutton v. United Airlines*, 527 U.S. 471, 484-85 (1999). This article grew out of a paper Professor Burgdorf delivered at the February 26, 2010, UDC-DCSL Annual Law Review Symposium as part of a panel on Developmental Disability Law and Rights: Why D.C. Needs Legislation Now.

[FN2]. Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, § 101, 114 Stat. 1678, 1680 (codified at 42 U.S.C. § 15001 (2006)). 42 U.S.C. § 15001-09 is the current federal developmental disabilities law.

[FN3]. D.C. Dep't on Disability Servs., Mgmt. Advisory Committee, Legislative Comm., Report on Focus Groups on Services for Residents with Developmental Disabilities and their Families 4 (2008), available at [http:// www.arcddc.net/FocusGroupReportJan08.pdf](http://www.arcddc.net/FocusGroupReportJan08.pdf).

[FN4]. Dep't on Disability Servs., Gov't. of the Dist. of Columbia, Fenty Administration's DDS Reform Plan 2 (2007), available at [http:// www.dc.gov/mayor/pdf/showpdf.asp?pdfName=Fenty_Admin_Reform_Plan_042407.pdf](http://www.dc.gov/mayor/pdf/showpdf.asp?pdfName=Fenty_Admin_Reform_Plan_042407.pdf).

[FN5]. Quoted in Henri E. Cauvin, D.C. Council Moves on Disabilities Statute, Wash. Post, Oct. 21, 2009, available at [http:// www.washingtonpost.com/wp-dyn/content/article/2009/10/20/AR2009102003651.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/10/20/AR2009102003651.html).

[FN6]. Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, D.C. Code § 7-1301.02 et seq. (2001). For a discussion of the characterization of the enactment as “1978,” see text accompanying infra notes 18-22.

[FN7]. As discussed below (see text accompanying infra notes 29-33), the official definition of “developmental disability” has not been limited to “intellectual disability” (formerly “mental retardation”), since 1970, when “cerebral palsy” and “epilepsy” were included. “Autism” and some forms of dyslexia were added in 1975, and, in 1978, Congress expanded the definition once more, essentially to its current, broad, generic version.

[FN7]. D.C. Code § 7-1306.05 (2001).

[FN8]. Merriam-Webster's Collegiate Dictionary 52 (11th ed. 2005).

[FN9]. Webster's Online (Wordnet) Dictionary, available at <http://www.webster-dictionary.org/definition/antediluvian>.

[FN10]. Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, D.C. Law 2-137, D.C. Code §§ 7-1301.02-1304.10 (2001).

[FN11]. On July 25, 2003, President George W. Bush signed Executive Order No. 13309 changing the name of the President's Committee on Mental Retardation to the President's Committee for People with Intellectual Disabilities. Exec. Order No. 13,309, 3 C.F.R. 240 (2003), reprinted in 42 U.S.C. § 15001 note (2006).

[FN12]. The author wrote:

The development of terminology applied to [disabilities] has tended to follow an evolutionary pattern. New terms are selected, generally from medical or social science, to describe a particular condition; the innovative terminology is often acclaimed as the ultimate, precise, scientific name for the condition. The new term is introduced into the vocabulary of the leading professionals and gradually is absorbed into general usage. Over the course of many years, the term becomes associated with social stereotypes and acquires derogatory connotations. Eventually, it is replaced by a new term, which does not yet have any such negative implications, and the process begins all over again.

As an example, mentally retarded persons were called feeble-minded in the early decades of this century. In law and in common usage, these feeble-minded people were divided into three subclasses: idiots, morons, and imbeciles. This terminology eventually became undesirable because the stereotypic images and social opprobrium associated with them were undermined by advances in knowledge about mental retardation. In an effort to clear the slate and employ neutral and precise terminology, the feeble-minded became mentally deficient, and categories of educable, trainable, and subtrainable replaced idiots, morons, and imbeciles. Another turn of this terminological wheel found the educable, trainable, and subtrainable classifications of mental deficiency in need of replacement because of the negative connotation these terms had acquired. The result was the currently [now previously] acceptable formulation: mental retardation encompassing subcategories of mild, moderate, severe, and profound. Indications are that the evolution of these terms is far from completed.

Robert L. Burgdorf Jr., *The Legal Rights of Handicapped Persons: Cases, Materials, and Text*, 46-47 (1980).

[FN13]. See AAIDD, *World's Oldest Organization on Intellectual Disability Has a Progressive New Name*, http://www.aaid.org/news/news_item.cfm?OID=1314; AAIDD (last visited Apr. 27, 2010); AAID, *FAQ on Intellectual Disability*, http://www.aaid.org/content_104.cfm (last visited Apr. 27, 2010) (“What role does AAIDD play in defining mental retardation and intellectual disability?”).

[FN14]. *Id.* AAIDD changed the name of its journal, the *American Journal on Mental Retardation*, to the *American Journal on Intellectual and Developmental Disabilities*. AAIDD, *Journals*, http://www.aaid.org/content_577.cfm?navID=154 (last visited Apr. 27, 2010).

[FN15]. See AAIDD, *About the Book*, http://www.aaid.org/IntellectualDisabilityBook/content_2347.cfm (last visited Apr. 27, 2010).

[FN16]. See AAIDD, *Definition of Intellectual Disability*, http://www.aaid.org/content_100.cfm?navID=21 (last visited Apr. 27, 2010); AAIDD, *FAQ on Intellectual Disability*, http://www.aaid.org/content_104.cfm (last visited Apr. 27, 2010). See also *The Arc, Fact Sheets: Introduction to Intellectual Disabilities*, <http://www.thearc.org/NetCommunity/Page.aspx?pid=2131> (last visited Apr. 27, 2010) (“The Arc's mission statement does not use the term ‘mental retardation.’ Instead it

says that we advocate for the rights and full participation of children and adults with intellectual and developmental disabilities. The term ‘mental retardation’ was offensive to many people, so we changed our language.”).

[FN17]. According to the American Association on Intellectual and Developmental Disabilities, which represents developmental disability professionals worldwide, “[i]ntellectual disability forms a subset within the larger universe of developmental disability” AAIDD, FAQ on Intellectual Disability, http://www.aaidd.org/content_104.cfm?navID=22 (last visited Apr. 27, 2010).

[FN18]. D.C. Code § 7-1301.02 note: Legislative History (2001).

[FN19]. *Id.*

[FN20]. Section 1-206.02.

[FN21]. See, e.g., Jamin Raskin, Lawful Disenfranchisement: America's Structural Democracy Deficit, *Hum. Rts. Mag.*, Spring 2005, available at <http://www.abanet.org/irr/hr/spring05/lawful.html>.

[FN22]. Jesse Jackson, Statehood for the District of Columbia Would End Its Unfair Colonial Status, *L.A. Times*, Jul. 24, 1989, available at http://articles.latimes.com/1989-07-24/local/me-16_1_colonial-status.

[FN23]. See The Arc of Massachusetts, “A National Plan to Combat Mental Retardation,” <http://www.arcmass.org/jfk/tabid/635/Default.aspx> (last visited Apr. 27, 2010).

[FN24]. President's Message, 88th Cong., 1st Sess. reprinted in 1963 U.S.C.C.A.N. 1466, 1467-68 (Feb. 5, 1963).

[FN25]. *Id.* at 1468.

[FN26]. Maternal and Child Health and Mental Retardation Planning Act, Pub. L. No. 88-156, 77 Stat. 273 (1963).

[FN27]. Mental Retardation Facilities and Community Mental Health Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282 (1963).

[FN28]. See The Arc of Massachusetts, “A National Plan to Combat Mental Retardation,” <http://www.arcmass.org/jfk/tabid/635/Default.aspx> (last visited Apr. 27, 2010).

[FN29]. Mental Retardation Amendments of 1967, Pub. L. No. 90-170, 81 Stat. 527 (1967).

[FN30]. The Developmental Disabilities Services and Facilities Construction Amendments of 1970, Pub. L. No. 91-517, 84 Stat. 1316, established the following definition of the eligible class:

The term ‘developmental disability’ means a disability attributable to mental retardation, cerebral palsy, epilepsy, or another neurological condition of an individual found by the Secretary to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, which disability originates before such individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial handicap to such individual.

Id. § 102(5), 84 Stat. 1325).

[FN31]. The Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, § 125, 89 Stat. 497, formulated the definition as follows:

The term ‘developmental disability’ means a disability of a person which -

(A)(i) is attributable to mental retardation, cerebral palsy, epilepsy, or autism; (ii) is attributable to any other condition of a person found to be closely related to mental retardation because such condition results

in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons requires treatment and services similar to those required for such persons; or (iii) is attributable to dyslexia resulting from a disability described in clause (i) or (ii) of this subparagraph;

(B) originates before such person attains age eighteen;

(C) has continued or can be expected to continue indefinitely; and

(D) constitutes a substantial handicap to such person's ability to function normally in society.

[FN32]. Section 503 (b)(1) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 3004, provides:

The term "developmental disability" means a severe, chronic disability of a person which -

"(A) is attributable to a mental or physical impairment or combination of mental and physical impairments;

"(B) is manifested before the person attains age twenty-two;

"(C) is likely to continue indefinitely;

"(D) results in substantial functional limitations in three or more of the following areas of major life activity; (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic sufficiency; and

"(E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.'

[FN33]. H.R. Conf. Rep. No. 95-1780, at 104-05 (1978), reprinted in 1978 U.S.C.C.A.N. 7375, 7415-16.

[FN34]. Pub. L. No. 91-517, § 102(5), 84 Stat. 1325.

[FN35]. Developmentally Disabled Assistance And Bill of Rights Act, Pub. L. No. 94-103, § 125, 89 Stat. 497.

[FN36]. Employment Opportunities for Handicapped Individuals Act Rehabilitation, Comprehensive Services And Developmental Disabilities Amendments of 1978 Pub. L. No. 95-602, § 503 (b)(1), 92 Stat. 3004.

[FN37]. *Id.*, § 502, 92 Stat. 3004.

[FN38]. 42 U.S.C. § 15001(a)(3) (2006).

[FN39]. Developmental Disabilities Assistance And Bill of Rights Act of 2000, Pub. L. No. 106-402, 114 Stat. 1677, 1683-84 (2000).

[FN40]. 42 U.S.C. § 15002(8)(A) (2006).

[FN41]. Developmentally Disabled Assistance And Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975).

[FN42]. The provisions of DDABRA were previously codified at 42 U.S.C. §§ 6000-6081, but are now found at 42 U.S.C. §§ 15001-09 (2006).

[FN43]. See Deborah F. Buckman, Annotation, Validity, Construction, and Operation of Developmental Disabilities Assistance and Bill of Rights Act, 193 A.L.R. Fed. 513 (2004) (citations omitted), available at http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&serialnum=2004271013&fn=_Top&sv=split&tc=-1&pb=B2C4C48D&ordoc=10314495&findtype=Y&db=0000106&vr=2.0&rp=%2ffind%2fdefault.wl&mt=208&RLT=CLID_FQRLT39582561612&TF=756&TC=1&n=1 ("It was repealed in the year 2000 and replaced by the [DDABRA] of 2000 though most of the provisions of the earlier act were

preserved” and “the substance of most of the amended statutory sections does not differ in significant ways”).

[FN44]. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 11 (1981).

[FN45]. 42 U.S.C. §§ 15021-15027 (2006).

[FN46]. *Id.* § 15002(28).

[FN47]. *Buckman*, *supra* note 43, citing 42 U.S.C. § 15024 (2006).

[FN48]. 42 U.S.C. § 15001(b) (2006).

[FN49]. Section 15024(c)(1).

[FN50]. Section 15001(b)(1)(B).

[FN51]. Sections 15025(c)(4), (5)(A).

[FN52]. Section 15025(c)(5)(L).

[FN53]. 42 U.S.C. §§ 15025(c)(1), (2).

[FN54]. Sections 15025(c)(7)(A), (B) & (C).

[FN55]. Section 15024(c)(3).

[FN56]. E.g., §§ 15001(a)(7), (b), (b)(1)(8) & (c)(1); §§ 15002(8)(A)(v) & (16); § 15021(2); § 15024(c)(3)(B); §§ 15025(a), (b)(5)(B), (b)(5)(C) & (c)(5)(L).

[FN57]. Section 15001(c)(2).

[FN58]. 42 U.S.C. § 15024(c)(5)(G).

[FN59]. 42 U.S.C. § 15009. The denomination of this statutory section as “Bill of Rights” is reflected in the short title of the Act: “Developmental Disabilities Assistance and Bill of Rights Act of 2000.” Pub. L. No. 106-402, § 101, 114 Stat. 1678. The section heading of § 15009, § 101 of Pub. L. No. 106-402, is “Rights of Individuals with Developmental Disabilities.”

[FN60]. 42 U.S.C. § 15009(b).

[FN61]. Sections 15009(1) & (2).

[FN62]. Sections 15009(a)(3)(A) & (B).

[FN63]. Section 15009(a)(3)(B).

[FN64]. Section 15009(a)(4)(A).

[FN65]. 42 U.S.C. § 15009(a)(4)(B)(i).

[FN66]. Section 15009(a)(4)(B)(ii).

[FN67]. Section 15009(a)(4)(B)(iii).

[FN68]. See Buckman, *supra* note 43.

[FN69]. H.R. Rep. No. 94-473, at 42 (1975) (Conf. Rep.), reprinted in 1975 U.S.C.C.A.N, 919, 961.

[FN70]. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 11-32 (1981). The author of this article filed, on behalf of 45 state protection and advocacy systems and their national association, a brief amicus curiae with the Supreme Court in the *Pennhurst* case, in which he contended that “Congress Intended the Developmental Disabilities Bill of Rights to Be Enforceable.” Amicus Curiae Brief of National Association of Protection and Advocacy Systems and Forty-Five Individual State Developmental Disabilities Protection and Advocacy Systems, at 3-9, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (Nos. 79-140, 79-1408, 79-1415, and 79-1489), available at 1980 WL 339797, at *3-*9.

[FN71]. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. at 27.

[FN72]. 42 U.S.C. §§ 6011(a) & § 6063(b)(5)(C) (1976 ed., Supp.III).

[FN73]. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. at 27 n. 20.

[FN74]. *Id.*

[FN75]. *Id.* at 28-29.

[FN76]. *Id.* at 27-28.

[FN77]. *Id.* at 29-30.

[FN78]. *Id.* at 30 (“These are all difficult questions. Because the Court of Appeals has not addressed these issues, however, we remand the issues for consideration in light of our decision here”).

[FN79]. *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 647, 654, 656 (3d Cir.1982) (en banc) (holding that Pennsylvania Mental Health/Mental Retardation Act of 1966, 50 Pa. Stat. Ann. §§ 4101-4704 (West 2001), accorded Pennsylvania's citizens with intellectual disabilities right to adequate habilitation in least restrictive environment).

[FN80]. *Halderman v. Pennhurst State Sch. and Hosp.*, 465 U.S. 89 (1984) (reversing and remanding judgment of the Third Circuit, and holding that Eleventh Amendment barred federal court from ordering prospective injunctive relief against state officials based on violations of state law, even if state law claims were properly brought into federal court under pendant jurisdiction).

[FN81]. See *Halderman v. Pennhurst State Sch. & Hosp.*, 610 F. Supp. 1221 (D.C. Pa. 1985).

[FN82]. 672 F. Supp. 1249 (W.D. Mo.,1987).

[FN83]. *Id.* at 1257.

[FN84]. *Id.* at 1261.

[FN85]. 522 F. Supp. 171 (D.N.H. 1981).

[FN86]. 672 F. Supp. at 1261-62.

[FN87]. *Id.* at 1257-1258.

[FN88]. *Id.* at 1258.

[FN89]. *Id.* at 1260.

[FN90]. *Id.* at 1258.

[FN91]. 672 F. Supp. at 1257-58.

[FN92]. See, e.g., *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1349 (E.D.N.Y.1983) (court found that Pennhurst decision “did not preclude the possibility of statutory liability arising from violations of other sections of the DD Act,” but, in light of constitutional dimensions of its decree, did not need to decide the statutory claim); *Jose P. v. Ambach*, 557 F. Supp. 1230, 1234 (E.D.N.Y. 1983) (noting that the Supreme Court in Pennhurst “assumed ... that the statute's express conditions on funding created substantive rights”); *Nicoletti v. Brown*, 740 F. Supp. 1268, 1278 (N.D. Ohio 1987) (after having reviewed ‘statutory language, the legislative history, and applying settled principles of statutory interpretation,’ court found that individuals with intellectual disabilities had private right of action under DDABRA enforceable in federal court through Section 1983); *Mihalcik v. Lensink*, 732 F. Supp. 299, 304(D. Conn. 1990) (holding “the Supreme Court did not preclude the possibility of statutory liability arising from violations of other sections of the DDA”); *Haw. Disability Rights Center v. Cheung* 513 F. Supp. 2d 1185, 1197(D. Haw. 2007) (noting that “numerous courts since Pennhurst ... have decided the issue of a private right of action in favor of disabled individuals, finding that such rights exist for ‘persons’ pursuant to the Act and § 1983”). See also, *William S. v. Gill*, 536 F. Supp. 505, 510-11 (N.D. Ill. 1982) (finding Pennhurst I inapplicable because providing free appropriate education is an express condition for receipt of funds under the Education for all Handicapped Children's Act).

A decision reaching a different result was *Clift v. Clift v. Fincannon*, 657 F. Supp. 1535(E.D. Tex. 1987), in which the court declared that “after reviewing the purpose of the Act and several provisions therein ... the Court in Pennhurst I held that only one provision of the Act [formerly codified at 42 U.S.C. § 6068 (1976 ed., Supp.III), subsequently repealed; an analogous provision is now found at 42 U.S.C. § 15028 (2006)], creates a cause of action.” 657 F. Supp. at 1543. The court explained that “[t]hat section provides a State, whose federal funds have been terminated or reduced by the Secretary of the Department of Health and Human Resources for failure to comply with the provisions of § 6063, with the right to appeal the Secretary's decision to the federal court of appeals.” *Id.* The court indicated that “since Plaintiffs do not come under that particular section, it is clear that they have no cause of action against the State...” *Id.* What the Supreme Court actually said regarding § 6068 in Pennhurst was that “[n]o other cause of action is recognized in the Act.” *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 14(1981) (emphasis added). This formulation leaves open the possibility of rights established in DDABRA, other than in the bill of rights provision, being enforceable through mechanisms available outside the literal text of the Act, such as a private right of action or a suit under § 1983. See also, *Henkin v. S.D. Dep't. of Social Servs.*, 498 F. Supp. 659, 665 (D.S.D. 1980) (holding that DDABRA provisions enforceable by private right of action), vacated without opinion, 676 F.2d 703 (Table) (8th Cir. 1981).

[FN93]. See Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. Pa. L. Rev. 237, 241-42 n. 22 (2008) (“Willowbrook became notorious, largely due to Geraldo Rivera's Peabody Award-winning exposé, *Willowbrook: The Last Great Disgrace* (WABC television broadcast Jan. 6, 1972)”); National Disability Rights Network, History, <http://www.napas.org/aboutus/history.htm> (last visited Apr. 27, 2010) (“The Protection and Advocacy concept was triggered by a series of local television news broadcasts, which Geraldo Rivera did for the ABC News affiliate in New York City. Rivera's investigative reporting exposed abuse, neglect and lack of programming at Willowbrook, a state institution for people with developmental disabilities on Staten Island.”).

[FN94]. *N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), consent judgment approved sub nom., *N. Y. State Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715, 718-719(E.D.N.Y. 1975), judgment affd., 596 F.2d 27, 39(2d Cir.1979).

[FN95]. See Heilman, *supra* note 93, at 241-42; Melissa Bowman, Note, Open Debate over Closed Doors: The Effect of the New Developmental Disabilities Regulations on Protection and Advocacy Programs, 85 Ky. L.J. 955, 959 (1997); Ala. Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr., 97 F.3d 492, 494 (11th Cir. 1996) (“Disturbed by the inhumane and despicable conditions discovered at New York’s Willowbrook State School for persons with developmental disabilities, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act ... to protect the human and civil rights of this vulnerable population.”).

[FN96]. Pub. L. No. 94-103, § 203, 89 Stat. 496, 504 (1975) (originally codified at 42 U.S.C. § 6012), repealed & replaced by Pub. L. No. 106-402, Title I, §§ 141-45, Oct. 30, 2000, 114 Stat. 1712-18.), codified as amended at 42 U.S.C. §§ 15041-45 (2006). See National Disability Rights Network, *supra* note 93 (“These [Rivera’s] broadcasts galvanized the state’s senior senator, Jacob Javitts [sic], to action, incorporating a P&A System in the renewal of federal developmental disabilities legislation enacted in 1975.”).

[FN97]. Pub. L. No. 106-402, 114 Stat. 1677, codified as amended at 42 U.S.C. §§ 15001-09. (2006).

[FN98]. 42 U.S.C. § 15043(a)(1) (2006).

[FN99]. Section 15043(a)(2)(G).

[FN100]. Section 15043(a)(2)(A)(i).

[FN101]. Section 15043(a)(2)(B).

[FN102]. Section 15043(a)(2)(A)(ii).

[FN103]. 42 U.S.C. §§ 15043(a)(2)(I) & (J).

[FN104]. National Disability Rights Network, The P&A/ CAP System, http://www.napas.org/aboutus/PA_CAPext.htm (last visited Apr. 27, 2010).

[FN105]. *Id.*

[FN106]. Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Tit. I, § 113, 98 Stat. 20 (1984) (codified as amended at 29 U.S.C. § 732 (2006)).

[FN107]. 29 U.S.C. § 732(a).

[FN108]. Protection and Advocacy for Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, §§ 101-402., 100 Stat. 478 (codified as amended at 42 U.S.C. §§ 10801-07 (2006)).

[FN109]. 42 U.S.C. § 10802(3) (“The term ‘facilities’ may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons”).

[FN110]. Children’s Health Act of 2000, Pub. L. No. 106-310, § 3206(b)(1)(B)(iv), 114 Stat. 1101, 1194 (codified as amended at 42 U.S.C. § 10802(4)(B)(ii) (2006)).

[FN111]. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 510, 106 Stat. 4344, 4430 (1992) (codified as amended at 29 U.S.C. § 794(e) (2006)).

[FN112]. See National Disability Rights Network, *supra* note 104 (“With PAIR, the P&As were thus

authorized to serve persons with all types of disabilities.”).

[FN113]. Technology-Related Assistance for Individuals with Disabilities Act of 1988, Pub. L. No. 100-407, 102 Stat 1044 (1988).

[FN114]. Technology-Related Assistance for Individuals with Disabilities Amendments of 1994, Pub. L. No. 103-218, § 102(7)(I), 108 Stat 50, 63, 67-68 (codified as replaced and amended at 29 U.S.C. §§ 3004(a) & 3002(12)) (definition of “protection and advocacy services”).

[FN115]. Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat 1860 (codified as amended at 42 U.S.C. §§ 1320b-19, 1320b-19 note, 1320b-20, 1320b-21, & 1320b-22 (2006 & Supp. III 2009)).

[FN116]. *Id.*, §122, 113 Stat 1860, 1890 (codified as amended at 42 U.S.C. § 1320b-21 (2006 & Supp. III 2009)).

[FN117]. Child. Health Act of 2000, Pub. L. No. 106-310, § 1305, 114 Stat. 1141 (codified as amended at 42 U.S.C. § 300d-53 (2006 & Supp. II 2008)).

[FN118]. See National Disability Rights Network, *supra* note 104.

[FN119]. Help America Vote Act of 2002, Pub. L. No. 107-252, § 291, 116 Stat 1666 (codified at 42 U.S.C. § 15461 (2006)).

[FN120]. See National Disability Rights Network, *supra* note 104.

[FN121]. 42 U.S.C. § 15462(a) (2006) (“none of the funds provided by this subsection shall be used to initiate or otherwise participate in any litigation related to election-related disability access, notwithstanding the general authorities that the protection and advocacy systems are otherwise afforded under subtitle C of title I of the Developmental Disabilities Assistance and Bill of Rights Act of 2000”).

[FN122]. National Disability Rights Network, About Us, [http:// www.napas.org/aboutus/default.htm](http://www.napas.org/aboutus/default.htm) (last visited Apr. 27, 2010).

[FN123]. U.S. Department of Health and Human Services, Fact Sheet: Administration on Developmental Disabilities, http://www.acf.hhs.gov/opa/fact_sheets/add_factsheet.html (last visited Apr. 27, 2010).

[FN124]. U.S. Gen. Acct. Off., Protection & Advoc. Agencies: Involvement in Deinstitutionalization Lawsuits on Behalf of Individuals with Developmental Disabilities, GAO-03-1044 6 (2003) [hereinafter GAO P&A Report], [http:// www.gao.gov/new.items/d031044.pdf](http://www.gao.gov/new.items/d031044.pdf).

[FN125]. Equip for Equality, What is the Protection and Advocacy System?, <http://www.equipforequality.org/about/pandasystem.php> (last visited Apr. 27, 2010) (Equip for Equality is the name of the Illinois P&A agency.).

[FN126]. Heilman, *supra* note 93, at 238-39.

[FN127]. Heilman, *supra* note 93, at 239.

[FN128]. National Disability Rights Network, *supra* note 104.

[FN129]. National Disability Rights Network, *supra* note 104.

[FN130]. GAO P&A Report, *supra* note 124, at 5-6.

[FN131]. National Disability Rights Network, *supra* note 104.

[FN132]. National Disability Rights Network, *supra* note 104.

[FN133]. Equip for Equality, *supra* note 125.

[FN134]. NDRN, Resources - Annual and Program Reports, <http://www.napas.org/pub/AnnRpt/default.htm> (last visited Apr. 27, 2010).

[FN135]. Mental Retardation Facilities Construction Act, Pub. L. No. 88-164, §§ 121-125, 77 Stat. 282, 284-285 (1963).

[FN136]. *Id.* at § 121, 77 Stat. 284.

[FN137]. Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, 114 Stat. 1677 (2000).

[FN138]. *Id.* at §§ 151-156, 114 Stat. 1719-1725 (codified at 42 U.S.C. §§ 15061-15066 (2006)).

[FN139]. 42 U.S.C. § 15063(a) (2006).

[FN140]. Section 15063(a)(1).

[FN141]. *Id.*

[FN142]. Section 15063(a)(2). See U.S. Department of Health and Human Services, *supra* note 123.

[FN143]. See The Arc, AAIDD, AUCD, UCP, NACDD, and SABE, Fact Sheet: Developmental Disabilities Assistance and Bill of Rights Act (D.D. Act) (2009), <http://www.ucp.org/uploads/6DD.pdf>. For a more detailed description of activities and examples of accomplishments of UCEDDs, see Hearings on Fiscal Year 2010 Appropriations for the Dep't of Health and Human Servs. Before the Subcomm. on Labor, Health and Human Servs., Educ. and Related Agencies of the House Comm. on Appropriations, 111th Cong. 1-5 (Mar. 18, 2009) (statement of Michael Gamel-McCormick, Ph.D., President of Board of Association of University Centers on Disabilities), available at http://www.aucd.org/docs/policy/appropriations/2009_0318_2010approps_testimony_mgm.pdf.

[FN144]. 42 U.S.C. §§ 15081-15083 (2006).

[FN145]. Section 15081(2)(D).

[FN146]. Sections 15081(1) & (2).

[FN147]. Sections 15081(2)(A) - (D).

[FN148]. Section 15081(2)(D).

[FN149]. Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, Title II, §§ 201-210, 114 Stat. 1728-1733 (2000) (codified at 42 U.S.C. §§ 15091-15101 (2006)).

[FN150]. 42 U.S.C. § 15093(a) (2006).

[FN151]. Section 15091(c).

[FN152]. Section 15091(b).

[FN153]. See The Arc, AAIDD, AUCD, UCP, NACDD, and SABE, *supra* note 143.

[FN154]. Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, Title III, §§ 301-305, 114 Stat. 1734-1737 (2000) (codified at 42 U.S.C. §§ 15111-15 (2006)).

[FN155]. 42 U.S.C. §§ 15113(a) & (b).

[FN156]. Sections 15113(d)(1)(A) & (2).

[FN157]. Sections 15113(d)(2) & (e).

[FN158]. Section 15114(a).

[FN159]. Section 15001(b).

[FN160]. 42 U.S.C. § 15002(8)(A)(v) (2006).

[FN161]. Section 15001(b).

[FN162]. National Association of State Directors of Developmental Disabilities Services, Health Care Reform: Long-Term Services and Supports for Citizens with Developmental Disabilities 1-2, <http://www.nasddd.org/pdf/HealthCareReform.pdf>.

[FN163]. See, e.g., Florida Developmental Disabilities Council, Developmental Disabilities Awareness Day 2009, <http://www.fddc.org/news/developmental-disabilities-awareness-day-2009> (last visited Apr. 27, 2010) (quoting Fla. Lt. Governor referring to “critical services and programs” and Chair of state Developmental Disabilities Council referring to “essential services to people with developmental disabilities” and calling for “access to critical services they need to live inclusive and productive lives, integrated with our society rather than isolated from it”); National Association of Councils on Developmental Disabilities, Who We Are: What are Developmental Disabilities?, http://www.nacdd.org/pages/who_we_are.htmpurpose (last visited Apr. 27, 2010) (“[Developmental] disabilities are almost sure to result in a lifetime of dependence on publicly funded services, unless families receive sufficient support, children receive appropriate education, and adults receive appropriate services that enable them to live and work in their local communities”); Denver Fox, Eliminate Waitlists for Individuals with Developmental Disabilities, <http://www.gopetition.com/petitions/noewait.html> (last visited Apr. 27, 2010) (“vital and critical services and supports”); U.S. Department of Health and Human Services, Administration for Children and Families, Fact Sheet: Administration on Developmental Disabilities, http://www.acf.hhs.gov/opa/fact_sheets/add_factsheet.htmlpas (last visited Apr. 27, 2010) (the Administration on Developmental Disabilities has written that the State Councils on Developmental Disabilities are “charged with identifying the most pressing needs of people with developmental disabilities” and “work[ing] to address those needs....”).

[FN164]. Press Release, Department on Disability Services, Fenty Praises Dramatic Increases in Quality Standards and Improved Community-Based Disability Services (Dec.17, 2009), available at <http://newsroom.dc.gov/show.aspx/agency/dds/section/2/release/18818>.

[FN165]. 42 U.S.C. § 15026 (a) (2006). Eligibility and funding considerations for the basic developmental disabilities grant program to states are summarized in Federal Grants Wire, Developmental Disabilities Basic Support and Advocacy Grants (93.630), <http://www.federalgrantswire.com/developmental-disabilities-basic-support-and-advocacy-grants.html> (last visited Apr. 27, 2010).

[FN166]. See 42 U.S.C. § 1915, amended by Pub. L. No. 97-35, §§ 2175(b), 2176, 2177(a), 95 Stat. 809,

812, 813 (1981), (current version at 42 U.S.C. § 1396n (2006)); 42 C.F.R. § 441.300 440.180 (defining kinds of services that may be subject of waiver). See also, Maryland Department of Health and Mental Hygiene, Waiver Programs, [http:// www.dhmh.state.md.us/mma/waiverprograms/](http://www.dhmh.state.md.us/mma/waiverprograms/) (last visited Apr. 27, 2010); Oklahoma Department of Human Services, Developmental Disabilities Services Division: Medicaid Waiver, <http://www.okdhs.org/programsandservices/dd/docs/waiver.htm> (last visited Apr. 27, 2010); Maureen O'Connell & Sidney Watson, Home and Community Based Waiver Programs, <http://www.nls.org/conf/waiver.htm> (last visited Apr. 27, 2010) (Conference Handout, Neighborhood Legal Services, Inc., Bridges to Better Advocacy Conference, April 4-6, 2001),

[FN167]. D.C. Mun. Regs., tit. 29, § 1900 (2008), available at http://www.dds.dc.gov/dds/lib/dds/provider/waiver/General_Provisions_Covered_Services_etc.pdf.

[FN168]. TASH, Supporting Individuals and Families to Self Direct Their Lives Through the Maryland New Directions Medicaid Waiver, [http:// www.tash.org/mdnewdirections/medicaid.htm](http://www.tash.org/mdnewdirections/medicaid.htm) (last visited Apr. 27, 2010) (product of My Life: Going FAR project),

[FN169]. Pub. L. No. 68-460, 43 Stat. 1135 (1925). See Leon Dash, Forest Haven: 200 Wait Mindlessly for Death, Wash. Post, May 26, 1971, at A1; Pub. L. No. 91-490, 84 Stat. 1087 (1970) (Congress changed the name of the facility to “Forest Haven” in 1970.)

[FN170]. See, e.g., Dan Haga, Urban Atrophy--Forest Haven Asylum, <http://www.urbanatrophy.com/?cat=6> (last visited Apr. 27, 2010) (“in the 1920s Forest Haven was known as a state-of-the-art treatment facility”); Wikipedia, Forest Haven, Feb. 22, 2010, http://en.wikipedia.org/wiki/Forest_Haven (“During the early years, Forest Haven was considered a ‘state of the art’ facility”) (tertiary authority); See, also, Tom Pelton, Haunting Symbol of Neglect Forest Haven: Ruins of a D.C. Mental Institution in Anne Arundel County Are a Magnet for Young Ghost-Hunters, Arsonists and Vandals, Balt. Sun, Dec. 3, 1998, available at http://articles.baltimoresun.com/1998-12-03/news/1998337136_1_forest-haven-arundel-county-anne-arundel (“Some of those who built Forest Haven as a replacement for the Washington Home may have had good intentions. Residents lived in tree-shaded dorms with bucolic names such as Elm or Poplar Cottage. Counselors taught residents to tend crops, milk cows and work in the laundry room. There were baseball fields, a pool and gymnasium. But as the years went on and the district suffered from financial crises, all recreation and education stopped.”)

[FN171]. Id.

[FN172]. Pelton, *supra* note 170 (quoting Mr. Tony Records).

[FN173]. Id.

[FN174]. See Alice Bonner, Forest Haven: 40 Years of Neglect, Wash. Post, Apr. 28, 1976, at A1.

[FN175]. Id.

[FN176]. See Dash, *supra* note 169.

[FN177]. See Dash, *supra* note 169.

[FN178]. Cauvin, *supra* note 4.; Vincent Gray, Speech at the UDC Non Profit Program, available at [http://www.dccouncil.washington.dc.us/gray/Speeches%5CUDC% C^{\[FN\]}ol-Profite%20Program.htm](http://www.dccouncil.washington.dc.us/gray/Speeches%5CUDC%20C^[FN]ol-Profite%20Program.htm).

[FN179]. See Dash, *supra* note 169.

[FN180]. Jack Anderson, Washington Merry-Go-Round: Disgraceful Fate of the Retarded, Anchorage Daily News, Jun. 7, 1978 at 28.

[FN181]. Alice Bonner, Forest Haven Called “Depressing,” Wash. Post, Mar. 7, 1976, at B1.

[FN182]. Lewis M. Simons, Overcrowding, Insufficient Staff, Wash. Post, May 18, 1978, at A1.

[FN183]. Bonner, *supra* note 174, at A1.

[FN184]. Richard Cohen, Forest Haven Problem: Promises, Promises, Wash. Post, Jun. 15, 1976, at C1.

[FN185]. J.Y. Smith, Forest Haven Fund Cut Threatened, Wash. Post, Mar. 13, 1976, at A1.

[FN186]. See Charles R. Babcock, HEW Sends Team to Aid Forest Haven, Wash. Post, Jul. 22, 1976, at C1.

[FN187]. Forest Haven: Joint Oversight Hearings on Legislative and Oversight Jurisdiction over Forest Haven, District of Columbia Institution for the Mentally Retarded... Before the Subcomm. on Educ., Labor, and Social Servs. and the Comm. on the District of Columbia, 94th Cong. (1976), available at http://openlibrary.org/b/OL17796902M/Forest_Haven.

[FN188]. See Alice Bonner, Forest Haven Rated Low, Study Calls for Closing, Wash. Post, Dec. 30, 1976, at B4; See also, Martha M. Hamilton, School Study Criticizes Programs at Forest Haven, Wash. Post, Feb. 28, 1975, at C1 (finding that 47 children residing at Forest Haven were unserved by education programs and others were served in inadequate programs).

[FN189]. *Evans v. Fenty*, 480 F. Supp. 2d 280 (D.D.C., 2007).

[FN190]. See *id.*; Civil Rights Litigation Clearinghouse, Case Summary: *Evans & U.S. v. W. Washington*, <http://www.clearinghouse.net/detail.php?id=443> (last visited Apr. 27, 2010). Joy Evans was committed to Forest Haven when she was 8 years old in 1976, she died there at the age of 17. See Karlyn Barker, Parents Continue Forest Haven Crusade, Wash. Post, Mar. 23, 2006, at T03, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/22/AR2006032200790_pf.html. The other named plaintiffs were Venita Felton, Christine Exton, Joseph Scates, William Brown, and John Kennedy, Jr. Complaint for Declaratory and Injunctive Relief at 1, 3-6, *Evans v. Washington*, 459 F. Supp. 483 (D.D.C. 1978) (Civil Action No. 76-8293) [hereinafter *Evans Complaint*].

[FN191]. *Evans v. Fenty*, 480 F. Supp. at 282 n.5. For testimony by the parents of plaintiff Joy Evans to the Council of the District of Columbia that the conditions at Forest Haven were “terrible and inhumane,” see Sense of the Council Regarding Rights and Services for Residents with Intellectual and Developmental Disabilities and Their Families Resolution of 2007: Hearing Before the Committee of the Whole and the Committee on Human Services on PR 17-428, Council Period 17 (D.C. 2007), available at www.arcddc.net/EvansTest103007-PR17-428.pdf.

[FN192]. *Evans v. Williams*, 206 F.3d 1292, 1293 (D.C. Cir. 2000).

[FN193]. Sued in their individual and official capacities, were D.C. officials Joseph P. Yeldell, Director of the Department of Human Resources; Jefferson R. McAlpine, Administrator of the Mental Health Administration, Leonard W. Allen, Chief of the Bureau of Developmental Disabilities; and Roland J. Queen, Director of Forest Haven, District of Columbia Children's Center at Laurel, Maryland. *Evans Complaint*, *supra* note 190, at 1, 8-9.

[FN194]. *Evans v. Washington*, 459 F. Supp. 483 (D.D.C. 1978).

[FN195]. *Id.*

[FN196]. *Evans v. Barry*, No. CIV. A.76-293, 1990 WL 201488 (D.D.C. Nov. 28, 1990).

[FN197]. *Evans v. Kelly*, 979 F.2d 248 (D.C. Cir. Nov. 16, 1992) (unpublished table decision).

[FN198]. *Evans v. Barry*, No. CA 76-293 SSH, 1996 WL 451054 (D.D.C. Aug. 2, 1996).

[FN199]. *Evans v. Williams*, 35 F. Supp. 2d 88 (D.D.C. 1999), rev'd 206 F.3d 1292 (D.C. Cir. 2000), on remand, 139 F. Supp. 2d 79 (D.D.C. 2001), additional proceeding, No. CIV. 76-293, 1999 WL 1212884 (D.D.C. Aug. 20, 1999), additional proceeding 238 F.R.D. 1 (D.D.C. 2006).

[FN200]. *Evans v. Fenty*, 480 F. Supp. 2d 280 (D.D.C., 2007).

[FN201]. *Evans v. Washington*, 459 F. Supp. 483; Jack Anderson, *Washington Merry-Go-Round: Disgraceful Fate of the Retarded*, Anchorage Daily News, Jun. 7, 1978, at 28 (noting death of Joy Evans); Karlyn Barker, *Parents Continue Forest Haven Crusade*, Wash. Post, Mar. 23, 2006, at T03 (discussing death of Joy Evans in 1976 at 17 years of age), available at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/22/AR2006032200790_pf.html. For a discussion without decision, in an unreported decision in *Evans*, of the impact of the death of Joy Evans on the designation of the plaintiff class as “Joy Evans et al.” in circumstances where “the parties, during many years of litigation, customarily used the same designation ..., apparently without causing any confusion about the identity of the litigants,” see *Evans v. Kelly* 979 F.2d 248 (D.C. Cir. Nov. 16, 1992) (unpublished table decision).

[FN202]. *Evans v. Fenty*, 480 F. Supp. 2d at 281; Pam Belluck, *John H. Pratt, 84, Federal Judge Who Helped Define Civil Rights*, N.Y. Times, Aug. 14, 1995 (obituary), available at <http://www.nytimes.com/1995/08/14/obituaries/john-h-pratt-84-federal-judge-who-helped-define-civil-rights.html?pagewanted=1>.

[FN203]. *Evans v. Fenty*, 480 F. Supp. 2d at 285.

[FN204]. *Id.* at 280; Henri E. Cauvin, *Judge Continues Oversight of Washington's Care of Disabled*, Wash. Post, Dec. 19, 2009, at B03.

[FN205]. Center for Public Representation, *Community Integration: Evans Case Non-Compliance Order*, <http://www.centerforpublicrep.org/community-integration> (last visited Apr. 27, 2010) (“CPR and the DC P&A, University Legal Services, represent the plaintiffs”).

[FN206]. Univ. Legal Servs., *Segregated & Secluded: An Investigation of D.C. Residents at the Florida Institute for Neurologic Rehabilitation*, 2 (2008), <http://www.uls-dc.org/finr.pdf> (“Since 1996, University Legal Services, Inc. (ULS) a private, non-profit organization, has been the federally mandated protection and advocacy (P&A) program for individuals with disabilities in the District of Columbia.”).

[FN207]. University Legal Services, *PADD Objectives and Priorities 2010*, <http://www.uls-dc.org/PADD.htm> (last visited Apr. 27, 2010) (“10. Continue to represent the plaintiffs in *Evans v. Fenty* to ensure that class members receive appropriate services and supports.”); Sandy Bernstein, *ULS Seeks the Appointment of a Receiver to Address Systemic and Long-Standing Problems in the Supports Provided to Evans Class Members, The Protection & Advocacy Program for the District of Columbia*, No. 1-1, at 1 (University Legal Services, Fall 2006) (“ULS represents the plaintiffs in the *Evans* case, along with the Center for Public Representation and the law firm of Holland and Knight”), available at http://www.uls-dc.org/Newsletters/p_aneawltrsummer2006.pdf.

[FN208]. *Evans v. Fenty*, 480 F. Supp. 2d at 280-81. See also, Alice Bonner, *U.S. Asks to Join Suit on Forest Haven Care*, Wash. Post, Jun. 26, 1976, at B1.

[FN209]. See, e.g., *Evans v. Fenty*, 480 F. Supp. 2d at 280.

[FN210]. Evans Complaint, supra note 190, at 2, P 1.

[FN211]. Id.

[FN212]. Id., at 10, P 17.

[FN213]. Id.

[FN214]. Id., at 10-11, P 18.

[FN215]. Id., at 11-13, PP 19-22.

[FN216]. Evans Complaint, supra note 190, at 14-15, PP 25-30.

[FN217]. See supra note 42.

[FN218]. Pub. L. No. 68-460, 43 Stat. 1135 (1925), as amended by Pub. L. No. 91-490, 84 Stat. 1087 (1970) (codified at 32 D.C. Code § 601 et seq. at the time the lawsuit was filed).

[FN219]. Evans Complaint, supra note 190, at 16.

[FN220]. Id.

[FN221]. Evans v. Washington, 459 F. Supp. 483 (D.D.C. 1978).

[FN222]. E.g., Evans v. Barry, No. CIV. A.76-293, 1990 WL 201488 (D.D.C. Nov. 28, 1990) (referring to “Consent Orders entered by this Court in 1978, 1981, and 1983”).

[FN223]. See Evans v. Fenty, 480 F. Supp. 2d 280, 282 (D.D.C. 2007) (referring to the “1978 Consent Order”); Evans v. Williams, 206 F.3d 1292, 1293 (D.C.Cir. 2000) (referring to “consent decree” and “consent judgment”).

[FN224]. United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.10 (1975). The Evans court would later recognize that “[u]nder Rule 23(e) of the Federal Rules of Civil Procedure, a compromise of a class action may not be effectuated without approval of the court.” Evans v. Williams, 139 F. Supp.2d 79, 81, 85 (D.D.C. 2001).

[FN225]. Local Number 93, Int'l Ass'n of Firefighters, etc. v. Cleveland, 478 U.S. 501, 517-19 (1986).

[FN226]. Id. at 519.

[FN227]. Evans v. Washington, 459 F. Supp. at 484.

[FN228]. Id.

[FN229]. Id. at 484, 490 P 19.

[FN230]. Id. at 490 P 18.

[FN231]. Id. at 484 PP 1-3.

[FN232]. Evans v. Washington, 459 F. Supp. at 484 P 3.

[FN233]. Id.

[FN234]. Id.

[FN235]. Id. P 4.

[FN236]. Id at pt. II (“PROVISION OF COMMUNITY LIVING ARRANGEMENTS AND SERVICES NECESSARY AND SUFFICIENT TO THE INDIVIDUALIZED HABILITATION OF CLASS MEMBERS”).

[FN237]. *Evans v. Washington*, 459 F. Supp. at 484-85 P 5(a).

[FN238]. Id. at 485 P 5(b).

[FN239]. Id. P 5(c).

[FN240]. Id. at 486-87 P 7.

[FN241]. Id. at 485 P 5(d); 487 PP 8, 9; 485 P 5(e); 485-486 P 6.

[FN242]. *Evans v. Washington*, 459 F. Supp. at 487 P 10(a)-(c).

[FN243]. Id. at 488 P 12.

[FN244]. *Evans v. Williams*, 206 F.3d 1292, 1293 (D.C. Cir. 2000).

[FN245]. *Evans v. Washington*, 459 F. Supp. at 488 pt. III.

[FN246]. Id. at 488 P 13.

[FN247]. Id. at 488-89 P 14.

[FN248]. Id.

[FN249]. Id.

[FN250]. D.C. Law 2-137 (1979), codified as amended at D.C. Code § 7-1301.02 et seq. (2001).

[FN251]. The court would later observe that the 1978 Final Judgment and Order “unfortunately proved to be about as final as peace in the Balkans.” *Evans v. Williams*, 139 F. Supp. 2d 79, 84 (D.D.C. 2001).

[FN252]. *Evans v. Fenty*, 480 F. Supp. 2d 280, 281 (D.D.C. 2007).

[FN253]. See id. at 283-84.

[FN254]. The Court of Appeals denied the writ because it deemed the two months that elapsed between final briefing on the contempt motion and the filing of the mandamus writ was too short a period to establish that the petitioner met the standard of having a “clear and indisputable” right to have the writ issued. *In re U.S.*, 925 F.2d 490 (Table), 1991 WL 17225, at * 2 (D.C. Cir. 1991) (unpublished opinion).

[FN255]. See *Evans v. Fenty*, 480 F. Supp. 2d at 283, describing *Evans v. Barry*, No. 76-293, Consent Order at 1 (D.D.C. June 25, 1981) (unpublished).

[FN256]. See id. (describing *Evans v. Barry*, Consent Order at 8-14 (D.D.C. Feb. 8, 1983) (unpublished)).

[FN257]. See *id.* at 284 (describing *Evans v. Barry*, Consent Order at 8-14 (D.D.C. Jan. 30, 1989) (unpublished)).

[FN258]. See *id.*, (describing *Evans v. Barry*, Consent Order (D.D.C. Apr. 9, 1990) (unpublished)).

[FN259]. See *id.*

[FN260]. See *Evans v. Fenty*, 480 F. Supp. 2d at 284.(citing *Evans v. Barry*, Consent Order (D.D.C. Apr. 9, 1990) (unpublished)).

[FN261]. See *id.* at 284-85 (describing *Evans v. Barry*, Order to Show Cause at 4 (D.D.C. Apr. 21, 1995) (unpublished)).

[FN262]. See *id.* at 285 (describing *Evans v. Barry*, Findings of Fact & Conclusions of Law at 2 (D.D.C. Oct. 11, 1995) (unpublished)).

[FN263]. See *id.* (describing *Evans v. Barry*, Order to Show Cause at 4 (D.D.C. Apr. 21, 1995) (unpublished)).

[FN264]. See *id.* (describing *Evans v. Barry*, Order of Reference at 1-3 (D.D.C. Oct. 11, 1995) (unpublished)).

[FN265]. *Evans v. Barry*, 1996 WL 451054, at * 1 (D.D.C. Aug. 2, 1996).

[FN266]. *Id.* at * 2.

[FN267]. *Evans v. Fenty*, 480 F. Supp. 2d at 285.

[FN268]. *Evans v. Barry*, 1996 WL 451054, at * 3. See text accompanying *supra* notes 166-68.

[FN269]. *Evans v. Barry*, 1996 WL 451054, at * 3. See also Mental Retardation and Developmental Disabilities Administration, Government of the District of Columbia, MRDDA Waiver Providers/Vendors Relations Policy (Policy Number MRDDA 12.4, Dec. 15, 2006), available at http://dds.dc.gov/dds/frames.asp?doc=/Dds/lib/dds/waiver_providers_vendors_relations_policy.pdf.

[FN270]. *Evans v. Barry*, 1996 WL 451054, at * 2.

[FN271]. *Id.* at *5-*8. These included: “a coercive civil fine of \$5,000 a day” for failures to pay acceptable service provider invoices for outstanding Medicaid payments not paid within 30 days; for overdue non-Medicaid payments, “a coercive civil fine of twice the amount overdue”; for failing to conclude outstanding contract negotiations with each vendor providing services to class members without a contract, or submitting unconcluded contracts to binding arbitration, a fine of \$1,000 per day; for failing to provide sufficient case managers to comply with a required ratio by September 30, 1996, “a coercive civil fine of \$1,000 a day” that would increase to \$3,000 a day, beginning November 1, 1996; and for failure to meet obligations under the Remedial Plan after January 1, 1997, “a civil penalty of \$2,000 per day for each day of violation.” *Id.*

[FN272]. *Evans v. Williams*, 35 F. Supp. 2d 88, 90 (D.D.C. 1999). On April 21, 1997, plaintiff-intervenor, the United States, filed a memorandum in support of plaintiffs' motion for sanctions. *Id.* n. 2.

[FN273]. *Id.* at 94. The court also adopted the Special Master's proposal that provisions of the Remedial Plan be modified to increase the per diem fine for overdue Medicaid payments to \$10,000 and to double the sanction for delinquent non-Medicaid payments to a fine of \$1,000 per diem for each unpaid invoice. *Id.* at

96.

[FN274]. *Evans v. Williams*, 206 F.3d 1292, 1294-95, 1297 (D.C. Cir. 2000).

[FN275]. *Evans v. Williams*, 35 F. Supp. 2d 88, 97, 98 (D.D.C.1999).

[FN276]. *Evans v. Williams*, 139 F. Supp. 2d 79, 85, 81 (D.D.C. 2001).

[FN277]. *Id.* at 85.

[FN278]. *Id.* at 81.

[FN279]. *Id.*

[FN280]. *Id.* at 85.

[FN281]. *Evans v. Williams*, 139 F. Supp. 2d at 85.

[FN282]. *Id.*

[FN283]. *Id.* at 96-98. See also *Evans v. Fenty*, 480 F. Supp. 2d 280, 287-88 (D.D.C., 2007).

[FN284]. *Evans v. Williams*, 139 F. Supp. 2d at 87-88 n.1.

[FN285]. See *Evans v. Fenty*, 480 F. Supp. 2d 280, 287-288 (D.D.C. 2007) (describing 2001 Plan, at 5-10).

[FN286]. *Evans v. Williams*, 139 F. Supp. 2d at 83.

[FN287]. *Id.* at 82.

[FN288]. *Id.* at 83.

[FN289]. *Id.*

[FN290]. *Id.* at 82.

[FN291]. *Evans v. Williams*, 139 F.Supp.2d at 83. The defendants further agreed to provide \$2 million per year to the Quality Trust for the first five years and then gradually decreasing amounts of funding: in 2006, \$1.9 million; in 2007, \$1.8 million; in 2008, \$1.7 million; in 2009, \$1.6 million; and in 2010, \$1.5 million. *Id.* at 83-84.

[FN292]. *Id.* at 82-83. Legal representation and lay advocacy services provided by the Quality Trust are expressly to supplement, not supplant, services already legally required. *Id.* at 83.

[FN293]. *Id.* at 82.

[FN294]. Margaret Farrell, U.S. District Court for D.C., 2001 Plan for Compliance and Conclusion of *Evans v. Williams*, App., 68-74 (2001).

[FN295]. *Id.*

[FN296]. *Evans v. Williams*, 139 F. Supp. 2d at 96.

[FN297]. The Mental Retardation and Developmental Disabilities Rights Amendment Act of 2001.(A

Proposed Draft Bill 2001), a paper including explanatory narrative, a “Section-by-Section Summary of Provisions and their Sources,” and the draft bill, is on file with the author.

[FN298]. Id. at 2.

[FN299]. Id. at 2-4.

[FN300]. See *Evans v. Fenty*, 480 F. Supp. 2d at 289-90.

[FN301]. Id. at 291.

[FN302]. Id. at 289.

[FN303]. Id. at 281.

[FN304]. Id. at 281-94.

[FN305]. *Evans v. Fenty*, 480 F. Supp. 2d at 297-325.

[FN306]. Id. at 298.

[FN307]. Id.

[FN308]. Id. at 324.

[FN309]. Id. at 326-27.

[FN310]. *Evans v. Fenty*, 480 F. Supp. 2d at 326-27.

[FN311]. Id. at 326 (quoting *District of Columbia v. Jerry M.*, 738 A.2d 1206, 1213 (D.C. 1999)).

[FN312]. *Evans v. Fenty*, 480 F. Supp. 2d at 326-27.

[FN313]. Id. at 327.

[FN314]. Elizabeth Jones, Quarterly Report to the Court in the Matter of *Evans et al. v. Fenty et al.*, No. CA 76-293 (ESH), (2008), [http:// www.nasdds.org/pdf/QuarterlyReportToTheCourt\(05-8-08\).pdf](http://www.nasdds.org/pdf/QuarterlyReportToTheCourt(05-8-08).pdf).

[FN315]. Id. at 2.

[FN316]. Id.

[FN317]. Transcript of Status Hearing at 3-16, *Evans v. Fenty*, No. CA 76-293 (D.D.C. May 15, 2008), available at [http:// www.nasdds.org/pdf/EvansStatusTranscript\(05-15-08\).pdf](http://www.nasdds.org/pdf/EvansStatusTranscript(05-15-08).pdf).

[FN318]. Id. at 24.

[FN319]. Id. at 24-26, 29.

[FN320]. Id. at 27 (“If you want her to do something and you want me to order people who are actually my agents to do something for you, you would think that somebody might ask either me ... or the monitor”).

[FN321]. Id. at 28 (“you forget that you are a plaintiff interven[or]. There is another plaintiff. I find it remarkable. What am I to do with them, ignore them in favor of your agreement ...?”); Id. at 31 (“I will not

approve it. It will not be a court order. You can enter into a contract, you can settle, you can withdraw. You are a plaintiff interven[or]. You are not driving this litigation.”).

[FN322]. Transcript of Status Hearing, *supra* note 317, at 29-30.

[FN323]. *Id.* at 35, 36, 37.

[FN324]. *Id.* at 48-49.

[FN325]. *Id.* at 49.

[FN326]. *Id.* at 50.

[FN327]. Special Masters' Recommendation Regarding a Remedy for Defendants' Noncompliance with Court Orders, *Evans v. Fenty*, No. CA 76-293 (D.D.C. May 22, 2009), described in Special Masters' Report and Recommendation regarding a Remedy for Defendants' Noncompliance with Court Orders at 3, n. 2, *Evans v. Fenty*, No. CA 76-293 (D.D.C. Aug. 14, 2009), available at <http://www.washingtonpost.com/wp-srv/metro/evansreport.pdf>.

[FN328]. Special Masters' Report and Recommendation regarding a Remedy for Defendants' Noncompliance with Court Orders, *Evans v. Fenty*, No. CA 76-293 (D.D.C. Aug. 14, 2009), available at <http://www.washingtonpost.com/wp-srv/metro/evansreport.pdf>.

[FN329]. *Id.* at 121.

[FN330]. *Id.* at 121-133.

[FN331]. *Id.* at 122.

[FN332]. *Id.* at 133.

[FN333]. Special Masters' Report and Recommendation regarding a Remedy for Defendants' Noncompliance with Court Orders, *supra* note 328, at 134.

[FN334]. Special Masters' Report and Recommendation regarding a Remedy for Defendants' Noncompliance with Court Orders, *supra* note 328, at 134.

[FN335]. See Henri E. Cauvin, Plaintiffs Seek Administrator for D.C. Disabilities Agency, *Wash. Post*, Dec. 17, 2009, at B02; Cauvin, *supra* note 204, at B03.

[FN336]. See Cauvin, *supra* note 204, at B03.

[FN337]. See Cauvin, *supra* note 204, at B03.

[FN338]. An October 2009 article summarized the situation in the following terms:

Still alive today is a 1976 class action lawsuit filed against the District over its care of the developmentally disabled. Forest Haven, the facility that was the home of the disabled and that was the focus of the lawsuit, was closed by court order in 1991. But nearly 20 years later, the city's developmental disabilities agency remains under the supervision of a federal judge. And far from seeking an end to the lawsuit, advocates are asking the court to ratchet up its oversight of the Department of Disability Services.

Cauvin, *supra* note 4.

[FN339]. D.C. Law 2-137 (1979), codified as amended at D.C. Code § 7-1301.02 et seq. (2001).

[FN340]. *Nelson v. Nelson*, 548 A.2d 109, 116 (D.C. 1988), quoting Comm. on Human Res. and Aging of the Council of the Dist. of Columbia, Report on Bill 2-108 Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, 5 (Jul. 20, 1978).

[FN341]. See *id.*

[FN342]. *Id.* at 4, quoting *Evans v. Washington*, 459 F. Supp. 483, 485 (D.D.C. 1978) (P 5(b)).

[FN343]. *Id.*

[FN344]. *Id.* at 15.

[FN345]. Comm. on Human Res. and Aging of Council of the Dist. of Columbia, *supra* note 340, at 1.

[FN346]. District Panel Approves Bill on Patients at Forest Haven, *Wash. Post*, Jul. 19, 1978, at B5.

[FN347]. D.C. Code § 7-1301.02 note (2001).

[FN348]. D.C. Law 2-137 (1979), tit. 2, § 201, codified as amended at D.C. Code § 7-1302.01 (2001).

[FN349]. *Id.* at tit.3, §§ 301-314, codified as amended at D.C. Code §§ 7-1303.01- 7-1303.14 (2001).

[FN350]. *Id.* at tit.4, §§ 401-413, codified as amended at D.C. Code §§ 7-1304.01- 7-1303.13 (2001).

[FN351]. *Id.* at tit.5, §§ 501-513, codified as amended at D.C. Code §§ 7-1305.01- 7-1305.05 (2001).

[FN352]. *Evans v. Washington*, 459 F. Supp. at 488 pt. III.

[FN353]. Helping Mentally Retarded Citizens, *Wash. Post*, Nov. 7, 1978, at A18.

[FN354]. *Id.*

[FN355]. Gray, *supra* note 178.

[FN356]. Press Release, Council of the District of Columbia, DC Council to Consider Changes to 1978 Law (Oct. 19, 2007), available at <http://newsroom.dc.gov/show.aspx/agency/dds/section/2/release/12021/year/2007>.

[FN357]. See discussion of DDS MAC Legislative Committee and the Developmental Disabilities Reform Act *infra* Part V.

[FN358]. Dist. of Columbia Dep't on Disability Servs., Mgmt. Advisory Comm., Draft 1 Overview: Developmental Disabilities Reform Act of 2008 1 (2008), <http://www.arcadc.net/DDRA.Draft%201.Overview.12-18-08.pdf>.

[FN359]. Comm. on Human Res. and Aging of Council of the Dist. of Columbia, *supra* note 340, at 5 .

[FN360]. Comm. on Human Res. and Aging of Council of the Dist. of Columbia, *supra* note 340, at 22.

[FN361]. Helping Mentally Retarded Citizens, *Wash. Post*, Nov. 7, 1978, at A18.

[FN362]. Comm. on Human Res. and Aging of the Council of Dist. of Columbia, *supra* note 340, at 8. See also District Panel Approves Bill on Patients at Forest Haven, *Wash. Post*, July 19, 1978, at B5 (“The bill also removes a longtime requirement that the family must relinquish guardianship of a patient to the D.C.

government in order to gain admission to a city-financed residential facility.”).

[FN363]. Comm. on Human Res. and Aging of the Council of the Dist. of Columbia., *supra* note 340, at 18 (referring to § 604, later redesignated as § 606).

[FN364]. D.C. Law 2-137, § 606 (1979) (codified as amended at D.C. Code § 7-1306.05 (2001)).

[FN365]. *Id.* § 312 (codified as amended at D.C. Code § 7-1303.12 (2001)).

[FN366]. *Id.* § 313 (codified as amended at D.C. Code § 7-1303.13 (2001)).

[FN367]. *Id.* tit. 5, §§ 501-514 (codified as amended at D.C. Code §§ 7-1305.01-7-1305.15 (2001)).

[FN368]. Comm. on Human Res. and Aging of the Council of the Dist. of Columbia, *supra* note 340, at 5.

[FN369]. A gathering called the Stockholm Symposium of the International League of Societies for the Mentally Handicapped adopted a “Bill of Rights for the Retarded” in 1967; in 1969, the Pennsylvania Association for Retarded Children proposed a “Bill of Rights for Retarded Citizens. See Dennis E. Haggerty, Lawrence A Kane Jr., & David K. Udall, *An Essay on the Legal Rights of the Mentally Retarded*, 6 *Fam. L.Q.* 59, 62 (1972). As discussed above, the U.S. Congress included a Developmental Disabilities Bill of Rights in DDABRA in 1975. See text accompanying *supra* notes 59-69 (discussing 42 U.S.C. § 15009 (2006)).

[FN370]. 459 F. Supp. at 488-90.

[FN371]. D.C. Law 2-137, § 501(a) (codified as amended at D.C. Code § 7-1305.01(a) (2001)).

[FN372]. *Id.* § 103(v), repealed by D.C. Law 11-52, § 506(b) (1995).

[FN373]. *Id.* § 513(a) (codified as amended at D.C. Code § 7-1305.13(a) (2001)).

[FN374]. *Id.*

[FN375]. *Id.* § 513(b) (codified as amended at D.C. Code § 7-1305.13(b) (2001)).

[FN376]. Comm. on Human Res. and Aging of the Council of the Dist. of Columbia, *supra* note 340, at 1.

[FN377]. *Id.* at 1-2 (quoting D.C. Code, § 21-1107 (1925), 68th Cong., ch. 460, 43 Stat. 1135). Actually, the 1925 law imposed a standard of whether commitment “is for the best interest of the alleged feeble-minded person or of other persons or of the community.” D.C. Code § 21-1107 (1925), 68th Cong., ch. 460, § 10, 43 Stat. 1136.

[FN378]. D.C. Law 2-137, §§ 102(a)(2) (“habilitation as will be suited to the needs of the person”) (codified as amended at D.C. Code § 7-1301.02(a)(2) (2001)), 302(c) (individual to be discharged if “discharge would be in [their] best interest”) (codified as amended at D.C. Code § 7-1303.02(c)(4) (2001)), 501(a) (persons with intellectual disability “have a right to habilitation and care suited to their needs”) (codified as amended at D.C. Code § 7-1305.01(a) (2001)).

[FN379]. *Id.* §§ 102(b), 103(t) (“normalization principle”) (codified as amended at D.C. Code §§ 7-1301.02(b), 7-1301.03(20) (2001)).

[FN380]. *Id.* § 102(a)(4) (codified as amended at D.C. Code § 7-1301.02(a)(4) (2001)).

[FN381]. *Id.* § 102(a)(4) (codified as amended at D.C. Code § 7-1301.02(a)(5) (2001)).

[FN382]. Id. §§ 304(b), 403 (codified as amended at D.C. Code §§ 7-1303.04, 7-1304.03 (2001)).

[FN383]. D.C. Law 2-137, §§ 103(f), 403 (codified as amended at D.C. Code §§ 7-1301.03(6), 7-1304.03 (2001)).

[FN384]. Comm. on Human Res. and Aging of the Council of the Dist. of Columbia, *supra* note 340, at 5.

[FN385]. D.C. Law 2-137, § 102(b)(2) (codified as amended at D.C. Code § 7-1301.02(b) (2001)).

[FN386]. Id. § 102(a)(2) (codified as amended at D.C. Code § 7-1301.02(a)(2) (2001)).

[FN387]. Id. § 311, (codified as amended at D.C. Code § 7-1303.11 (2001)).

[FN388]. Id. § 601, repealed by D.C. Law 11-52, § 506(y) (1995).

[FN389]. Comm. on Human Res and Aging of Council of D.C., *supra* note 340, at, 17.

[FN390]. Id. at 11.

[FN391]. D.C. Law 2-137, § 501(a) (codified as amended at D.C. Code § 7-1305.01(a) (2001)).

[FN392]. *Evans v. Washington*, 459 F. Supp. at 484, pt. I P 1.

[FN393]. D.C. Law 2-137, § 501(a) (codified as amended at D.C. Code § 7-1305.01(a) (2001)).

[FN394]. D.C. Law 2-137, § 501(b) (codified as amended at D.C. Code § 7-1305.01(b) (2001)).

[FN395]. D.C. Code §§ 7-1305.01(a) & (b) (2001).

[FN396]. Sections 7-1305.01(c) & (d).

[FN397]. D.C. Law 2-137, § 513(b) (codified as amended at D.C. Code § 7-1305.13(b) (2001)).

[FN398]. D.C. Code § 7-1305.13(b) (2001).

[FN399]. D.C. Law 2-137, § 311 (codified as amended at D.C. Code § 7-1303.11 (2001)).

[FN400]. D.C. Law 11-52, § 506(i) (1995) (codified as amended at D.C. Code § 7-1303.11 (2001)). Law 11-52 also repealed the provision giving a right to advance notice and an opportunity for a hearing to persons who might have increased financial responsibility due to a judicially ordered change in residential placement. Id. § 506(y) (codified at D.C. Code § 7-1306.01 (2001)).

[FN401]. D.C. Law 11-52, § 506(z) (1995), amending D.C. Law 2-137, § 603 (codified as amended at D.C. Code § 7-1306.03 (2001)).

[FN402]. E.g., D.C. Law 11-52, §§ 506(b), (g), (h), (m), (n), (o) (1995) (codified as amended at D.C. Code §§ 7-1301.03(3), 7-1303.08, 7-1303.09, 7-1305.01, 7-1305.02, 7-1305.03 (2001)).

[FN403]. D.C. Law 11-52, § 506(b) (1995) (codified as amended and renumbered at D.C. Code § 7-1301.03(6B) (2001)).

[FN404]. See, e.g., Steve Holburn, Anne Gordon & Peter M. Vietze, *Person-Centered Planning Made Easy* (Paul H. Brookes Publishing Co. 2007); Helen Sanderson, Jeanette Thompson & Jackie Kilbane, *Person*

Centred Practice for Professionals (Open University Press 2008).

[FN405]. 85 Iowa Law Rev. 1691 (2000).

[FN406]. 42 U.S.C. § 15001(a)(1) (2006). Congress added that a purpose of the law was to provide citizens with developmental disabilities and their families access to a variety of “needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life” Id. at § 15001(b).

[FN407]. Id. at § 15001(c).

[FN408]. See, e.g., id. at §§ 15002(15) (definition of “inclusion”), 15002(16) (definition of “individualized supports”), 15002(17) (definition of “integration”), 15002(27) (definition of “self-determination activities”).

[FN409]. Pub. L. No. 99-435, 100 Stat. 1080 (1986) (codified at 49 U.S.C. § 1374(c) (2006)).

[FN410]. Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified at 42 U.S.C. §§1973eeB1973ee-6 (2006)).

[FN411]. Pub. L. No. 100-430, 102 Stat. 1619 (1988).

[FN412]. 47 U.S.C. § 255 (requires manufacturers of telecommunications equipment and to providers of telecommunications services to ensure that such equipment and services are accessible to and usable by individuals with disabilities, if doing so is readily achievable).

[FN413]. Pub. L. No. 105-220, 112 Stat 936 (1998) (codified at 29 U.S.C. § 794d (2006)) (requires federal agencies to make their electronic and information technology accessible to people with disabilities).

[FN414]. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2006).

[FN415]. *Tennessee v. Lane*, 541 U.S. 509 (2004).

[FN416]. *Pa. Dep't. of Corrections v. Yeskey*, 524 U.S. 206 (1998).

[FN417]. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

[FN418]. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

[FN419]. 344 F. Supp. 373 (M.D.Ala. 1972).

[FN420]. Comm. on Human Res. and Aging of the Council of the Dist. of Columbia, *supra* note 340, at 2-5.

[FN421]. 457 U.S. 307, 309-10, 324 (1982).

[FN422]. For an in-depth, prophetic exposition of the central significance of the integration component of the ADA, see Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393 (1991).

[FN423]. 527 U.S. 581, 593, 597-601 (1999).

[FN424]. Id. at 587. Justice Stevens joined in the opinion of the Court as to parts I, II, and III-A, and concurred in the judgment. Justices Breyer and Kennedy also concurred in the judgment. Id. For an extensive analysis of the *Olmstead* decision and its implications, see Nat'l Council on Disability, *Olmstead*:

Reclaiming Institutionalized Lives (Full-Length On-Line Version) (2003), available at <http://www.ncd.gov/newsroom/publications/2003/reclaimlives.htm>

[FN425]. 28 C.F.R. § 35.130(d) (2009).

[FN426]. Exec. Order No.13,217, 66 Fed. Reg. 33,155 (Jun. 21, 2001).

[FN427]. *Id.* at 33,155, §§ 1(a) & 1(c); 33,155-33,156, §§ 2(a)-(c).

[FN428]. In *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 187-88, 314 (E.D.N.Y. 2009), for example, the court, relying extensively on the *Olmstead* ruling, the “integration mandate” of Title II of the ADA, and federal regulations, ruled, after a five week bench trial, that the plaintiffs had proven that the defendant administrators of New York’s mental health service system had failed to provide services in the most integrated setting appropriate to their needs to some 4300 individuals in for-profit, residential adult care facilities; and ruled that the plaintiffs were entitled to declaratory and injunctive relief.

[FN429]. D.C. Law 16-239 (Mar. 8, 2007), (codified as amended at D.C. Code § 2-1431.01 (2009)).

[FN430]. *Id.*, D.C. Code §§ 2-1431.02(b), 2-1431.01(9) (2007).

[FN431]. *Id.*, D.C. Code §§ 2-1431.03(a) & (b); 2-1431.04(1), (4), (5), & (8) (2007).

[FN432]. D.C. Law 16-264 (Mar. 14, 2007), (codified as amended at D.C. Code § 7-761.01 (2007)).

[FN433]. Bill No. 16-398 (2005). See Dep’t on Disability Servs., Gov’t of the Dist. of Columbia, *supra* note 3, at 5 (“Bill 16-398 ... had previously been introduced by then Councilmembers Fenty and Gray in July 2005.

D.C. Law 16-264 (Mar. 14, 2007) (codified as amended at D.C. Code § 7-761.01 (2007)).

[FN434]. D.C. Code § 7-761.03

[FN435]. *Id.* at §§ 7-761.05(1) & (2).

[FN436]. D.C. Code §§ 7-761.08, 7-761.10.

[FN437]. D.C. Law 16-169 (September 29, 2006), (codified as amended at D.C. Code §§ 2-631- 2-633 (2006)).

[FN438]. Dist. of Columbia Dep’t on Disability Servs., Mgmt. Advisory Comm., *supra* note 358, at 2.

[FN439]. See David Nakamura, *Fenty Vows Mental Health Reforms*, Wash. Post, Apr. 26, 2007, at B04. From 1993 to 2001, Ms. Heumann had served as the Assistant Secretary for the Office of Special Education and Rehabilitative Services in the Department of Education in the Clinton Administration. See *id.*; Office on Women’s Policy and Initiatives, Government of the District of Columbia, *Women in District of Columbia Government*, <http://owpi.dc.gov/owpi/cwp/view,a,3,q,574255,owpiNav,%7C33266%7C.asp#9> (last visited Apr. 27, 2010).

[FN440]. DDS MAC and Project ACTION, *Community Meeting: Shaping a Vision, Meeting Notes*, at 1 (May 5, 2007), available at <https://docs.google.com/fileview?id=0B8Tv86YeVgvbMWEyMjFIOGYtNTEyMS00Njg3LWUyYj&hl=en>. See *id.* at 4-10 for notes from the breakout sessions at the meeting.

[FN441]. D.C. Council Res. 17-457 §§ 2(g) & (h) (Dec. 11, 2007).

[FN442]. *Id.* § 2(f).

[FN443]. *Id.* § 2(b).

[FN444]. See Dist. of Columbia Dep't on Disability Servs., Mgmt. Advisory Comm., *supra* note 358 at 2; DDS MAC, Report on Focus Groups on Services for Residents with Developmental Disabilities and their Families (2008), available at <http://www.arcddc.net/FocusGroupReportJan08.pdf>.

[FN445]. See Dist. of Columbia Dep't on Disability Servs., Mgmt. Advisory Comm., *supra* note 358, at 2.

[FN446]. Dist. of Columbia Dep't on Disability Servs., Mgmt. Advisory Comm., *supra* note 358, at 2. Activities in this area included compiling laws from all fifty states related to services and supports for individuals with developmental disabilities; researching key topics in eighteen states recognized as providing effective, quality services; and requesting students at the American University, Washington College of Law, to undertake a fifty-state review of commitment procedures. Dist. of Columbia Dep't on Disability Servs., Mgmt. Advisory Comm., *supra* note 358, at 4.

[FN447]. See Dist. of Columbia Dep't on Disability Servs., Mgmt. Advisory Comm., *supra* note 358, at 2; Developmental Disabilities Services, Fenty e-Transition - What's Happening 1 Year Later?, Community Meeting (Jan. 12, 2008), available at http://www.arcddc.net/One_Year_Later_Meeting_Notes.pdf.

[FN448]. See Susie Cambria & C. Mustaafa Dozier, Human Services Transition Team: Final Report and Recommendations (2006), available at http://www.arcddc.net/One_Year_Later_Meeting_Notes.pdf (report of Developmental Disability Services Work Group).

[FN449]. D.C. Department on Disability Services, Management Advisory Committee, DDRA, Draft 1, http://www.arcddc.net/DDRA_Draft_1_12-18-08_LARGE_PRINT.pdf (last visited Apr. 27, 2010) ("A Bill: Developmental Disabilities Reform Act of 2008. DDS MAC simultaneously issued an Overview and Section-by-Section Summary, available at <http://www.arcddc.net/DDRA.Draft%201.Overview.12-18-08.pdf>).

[FN450]. D.C. Dep't on Disability Servs., Mgmt. Advisory Comm., Developmental Disabilities Reform Act Draft 2: Section-By-Section Summary of Changes from Draft 1, at 4 (2009), available at http://www.scribd.com/full/19145433?access_key=key-mm9l2tes26q2uri67bh.

[FN451]. *Id.*

[FN452]. A list of these meetings is found at Department on Disability Services, Management Advisory Committee, Community Meetings on Draft 1 of the Developmental Disabilities Reform Act (DDRA): January -July 2009, http://www.scribd.com/full/19400321?access_key=key-2ndqwnsyrdyzubgky0 (last visited Apr. 27, 2010).

[FN453]. Dist. of Columbia Dep't on Disability Services, Mgmt. Advisory Comm., DC Developmental Disabilities Bill: Welcome, <http://dc-ddleg.blogspot.com/> (last visited Apr. 27, 2010).

[FN454]. See Dist. of Columbia Dep't on Disability Servs., Mgmt. Advisory Comm., *supra* note 358, at 4; Dist. of Columbia Dep't on Disability Services, Mgmt. Advisory Comm., Developmental Disabilities Reform Act Expert Review Panel 1 (May 19, 2009), available at <http://www.scribd.com/doc/15818246/Expert-Review-Panel-Summary-Bios-May-09LARGE-PRINT>.

[FN455]. DDS MAC Legislative Committee, Expert Review Panel, Meeting 1: Meeting Notes (Dec. 11, 2007) (on file with the author).

[FN456]. See *id.* The other members are James F. Gardner, President and CEO of the Council on Quality

and Leadership in Supports for People with Disabilities; Tony Records, President of Tony Records and Associates, Inc.; Michael Smull, Chair of the Learning Community for Person Centered Practices and Partner in Support Development Associates, L.L.C.; and Nancy Thaler, Executive Director of the National Association of State Directors of Developmental Disabilities Services. Id. at 1-2.

[FN457]. The students were Mollie Byron, Wallace Canter, and Mary Schoenfuhs.

[FN458]. On file with the author.

[FN459]. Id. at 57, Recommendation 1.

[FN460]. D.C. Department on Disability Services, Management Advisory Committee, DDRA, Draft 2, http://www.scribd.com/full/19145441?access_key=key-ni9q7too8hg8e60ffy9 (last visited Apr. 27, 2010) (“A Bill: Developmental Disabilities Reform Act of 2009”).

[FN461]. D.C. Dep't on Disability Servs., Mgmt. Advisory Comm., *supra*, note 450.

[FN462]. Id. at 8.

[FN463]. Press Release, Council of the District of Columbia, Gray Introduces Bills to Promote New Emphasis on Community Living & Respect for People with Disabilities (Oct. 20, 2009) (hereinafter “Press Release: Gray Introduces Bills”), available at <http://www.scribd.com/doc/21520371/2009-10-21-Gray-DDRA-Press-Release>.

[FN464]. D.C. B. No. 18-501 (1999), available at <https://docs.google.com/fileview?id=0B8Tv86YeVgvbN2U0ZGFmYTAtYmIyYy00MWRILWExMT&hl=en>.

[FN465]. See, DC Department on Disability Services, Management Advisory Committee, DC Council Introduces the DDRA!, <http://dc-ddleg.blogspot.com/2009/10/dc-council-introduces-ddra.html> (last visited Apr. 27, 2010).

[FN466]. Press Release: Gray Introduces Bills, *supra* note 463, at 1-2.

[FN467]. Id. at 2.

[FN468]. Press Release, Councilmember Tommy Wells, Councilmember Tommy Wells Introduces Legislation to Overhaul District Laws for Developmentally Disabled Individuals (Oct. 21, 2009), available at http://www.scribd.com/full/21520368?access_key=key-98iqq34d7dn8oeole2e.

[FN469]. Henri E. Cauvin, D.C. Council Moves on Disabilities Statute, Wash. Post, Oct. 21, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/20/AR2009102003651.html>.

[FN470]. Id.

[FN471]. Id.

[FN472]. A list of the revised fact sheets list and links to them are available at DC Developmental Disabilities Bill: Fact Sheets on Bill 18-501 Available Now, <http://dc-ddleg.blogspot.com/2009/10/fact-sheets-on-bill-18-501-now.html> (last visited Apr. 27, 2010).

[FN473]. Dist. of Columbia Dep't on Disability Servs, Mgmt. Advisory Comm., Developmental Disabilities Reform Act B. 18-501: Overview and Section-By-Section Analysis (Dec. 8, 2009), available at <http://docs.google.com/fileview?id=0B8Tv86YeVgvbOGRhNzczMzMtZGY0My00ZWIIILWewMT&hl=en>.

[FN474]. Press Release: Gray Introduces Bills, *supra* note 463, at 2-3.

[FN475]. D.C. B. No. 18-502 (1999) (hereinafter Bill 18-502), as introduced, available at <http://www.dccouncil.us/images/00001/20091030103026.pdf>.

[FN476]. Department on Disability Services, Management Advisory Committee, People 1st Language Bill - Links Update; FAQs, available at <http://dc-ddleg.blogspot.com/2009/11/people-1st-language-bill-links-update.html> (last visited Apr. 27, 2010).

[FN477]. D.C. Law 16-169 (Sept. 29, 2006), (codified as amended at D.C. Code §§ 2-631-2-633). See *supra* note 437.

[FN478]. See Press Release: Gray Introduces Bills, *supra* note 463, at 2.

[FN479]. Department on Disability Services, Management Advisory Committee, *supra* note 476.

[FN480]. See text accompanying *supra* notes 11-16.

[FN481]. See Department on Disability Services, Management Advisory Committee, *supra* note 465; Press Release--Councilmember Wells, *supra* note 468.

[FN482]. The blogsite is found at <http://dc-ddleg.blogspot.com/> (last visited Apr. 27, 2010).

[FN483]. Department on Disability Services, Management Advisory Committee, Overview of Developmental Disabilities Reform Act: Bill 18-501, http://www.scribd.com/full/21818699?access_key=key-7glzf0rrzk54bg1xepg (last visited Apr. 27, 2010).

[FN484]. Ms. Sutcliffe is also one of the people responsible for the array of documents and information available on DDS MAC Legislative Committee's blogsite, and, as the author was working on this article, she was very helpful in helping him to track down some fairly obscure documents for which he is sincerely grateful.

[FN485]. Department on Disability Services, Management Advisory Committee, Side-by-Side Comparison with D.C. Law 2-137, available at http://www.scribd.com/full/21818702?access_key=key-2h91uql9ooxih8xmw3sh.

[FN486]. *Id.*

[FN487]. Bill 18-501 § 106(b). The person's intellectual disability must be one that also meets the definition of developmental disability.

[FN488]. *Id.* at § 106(c).

[FN489]. *Id.* at § 106(d).

[FN490]. Eleanor Holmes Norton, May 1979 Statement to the President's Committee on Employment of the Handicapped, quoted in U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 147 (1983).

[FN491]. See *Williams v. Wasserman*, 937 F. Supp. 524, 530 (D.Md. 1996) (“while the ADA does not place an affirmative obligation on the state to create or fundamentally alter a program of community-based treatment options, the ADA does oblige the defendants to make those options available to otherwise qualified individuals without regard to the severity or particular classification of their disabilities”)

(parenthetical omitted). See also *Messier v. Southbury Training School*, 916 F. Supp. 133, 141-142 (D.Conn. 1996) (“numerous courts have recognized that both Section 504 and the ADA prohibit discrimination on the basis of the severity of a person's disability”), and the authorities cited therein.

[FN492]. DeWayne Davis, Wendy Fox-Grage & Shelly Gehshan, *Deinstitutionalization of Persons with Developmental Disabilities: A Technical Assistance Report for Legislators* 17 (2000), <http://www.mnddc.org/parallels2/pdf/00-DPD-NCS.pdf>.

[FN493]. *United Cerebral Palsy, Case for Inclusion 5* (2007), http://www.ucp.org/uploads/Case_For_Inclusion_Report_2007.pdf.

[FN494]. N.H. Sen. Bill 137 (2007), available at <http://www.gencourt.state.nh.us/legislation/2007/SB0138.html>.

[FN495]. N.J. Stat. Ann. § 30:60D-42. (West 2008).

[FN496]. 2009 Va. Acts ch. 303.

[FN497]. D.C. Law 18-111 (2009), § 5071(a), adding §§ (7) and (8) to D.C. Code § 7-761.05.

[FN498]. Bill 18-501, § 114(a)(1).

[FN499]. *Id.* at §§ 114(b)(1), (3) & (4); (d).

[FN500]. *Id.* at §§ 114(e), (f) & (g).

[FN501]. D.C. Department on Disability Services, Management Advisory Committee, *supra* note 460.

[FN502]. Bill 18-501, § 114(g)(5).

[FN503]. See *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County School Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993).

[FN504]. 20 U.S.C. § 1415(i)(2)(C)(iii) (2006).

[FN505]. *Forest Grove School Dist. v. T.A.*, 129 S. Ct. 2484, 2491 (2009) (characterizing *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993) as “holding that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the State”).

[FN506]. *Forest Grove School Dist.*, 129 S. Ct. at 2491, 2496 (holding that reasoning in *Burlington and Carter* applied to situation in *Forest Grove School Dist.* even though in the latter the plaintiff child had not previously received special education services from the public schools and did not have an individualized education plan).

[FN507]. *Forest Grove School Dist.*, 129 S. Ct. at 2495.

[FN508]. *Id.* (quoting *Burlington*, 471 U.S. at 370-371).

[FN509]. See text accompanying *supra* notes 293-99.

[FN510]. Paragraph 30 of the Legislative Principles provided:

“A hearing officer or judge who finds in favor of the individual shall Order reasonable and appropriate relief in the following form:

A. By directing the District to pay an entity that has provided, is providing, or will provide such services and supports, provided that the relief the Judge or Hearing Officer orders is limited to services available under the District of Columbia Medicaid State Plan or any waiver thereto; and

B. Any other additional relief that is appropriate.”

[FN511]. Evans, 139 F. Supp. 2d at 96.

[FN512]. Interview with Joseph Tulman, Professor of Law, UDC-DACSL, in Wash., D.C. (Apr. 8, 2010).

[FN513]. Incorporation of a Burlington remedy into the DDRA bill might be accomplished by the addition of a provision worded along the following lines:

If the District does not provide supports and services called for in an individual's ISP or otherwise denies or fails to provide an eligible individual supports and services authorized under this act, the individual and the family shall be entitled to reimbursement for expenses incurred in obtaining needed supports and services from another source. In any proceeding growing out of a complaint, request for a fair hearing, appeal of ineligibility, petition for review of an agency action, or an action to compel rights, pursuant to sections 117, 118, 119, or 120 of this act, a presiding hearing officer or judge who finds such a denial or failure by the District shall Order reasonable and appropriate relief that shall include directing the District to pay an entity that has provided, is providing, or will provide appropriate services and supports, provided that such relief shall be limited to services available under the District of Columbia Medicaid State Plan or any waiver thereto.

For a limited and partial Burlington remedy regarding facilities for treatment of children with mental illness, see 20 Ill. Comp. Stat. Ann. § 1705/7.1 (West 2009).

[FN514]. 42 U.S.C. § 15024(c)(5)(F).

[FN515]. The author suggested the following wording of such a provision to the DDS MAC Legislative Committee:

Buildings and other facilities where supports and services under this act are provided shall meet Federal and District accessibility standards, including accessibility requirements under the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794d, and the Fair Housing Act (42 U.S.C. § 3601 et seq.).

[FN516]. Title II of Bill 18-501, § 201 et seq., is denominated the “Transition from Admission and Commitment Act” and establishes a three-year phase out period for transition from the current process to the one that would be put in place under the DDRA. One can only observe that those who were residents of Forest Haven and those who have been otherwise committed in order to receive services have suffered enough indignities to this point, and hope that they will not suffer any significant deprivations or losses as the commitment process is discontinued. If ever there was a class that deserves to be “grandfathered in,” this would seem to be it.

[FN517]. Press Release, Department on Disability Services, Fenty Praises Dramatic Increases in Quality Standards and Improved Community-Based Disability Services (Dec. 17, 2009), available at <http://newsroom.dc.gov/show.aspx/agency/dds/section/2/release/18818>.

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