



P&A News

E-MAIL NEWSLETTER FROM JIM MCGAUGHEY
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United States Department of Justice files Amicus Brief supporting OPA's Nursing Home Law Suit

The United States Department of Justice (DOJ) has filed an Amicus Curiae brief supporting OPA's position in a federal lawsuit aimed at the warehousing of people with psychiatric disabilities in certain Connecticut nursing homes. *OPA v. Connecticut* was originally filed in early 2006. It was subsequently re-filed as a class action naming specific individuals as plaintiffs along with OPA. Applying principles adopted by the U.S. Supreme Court in its famous *Olmstead* decision, the complaint asserts that, "[i]ndividuals with mental illness are needlessly isolated, segregated, and institutionalized in these facilities" in violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The state agency defendants have moved to have the case dismissed. In its amicus brief, DOJ argues against dismissing the case, and also urges the Court to find that OPA has "associational standing" to act as a plaintiff in its own right.

OPA and the individual plaintiffs are being represented by OPA's in-house counsel, by pro bono counsel from the firm of Strook & Strook & Lavan, and by lawyers from the Judge Bazelon Center for Mental Health Law.

The DOJ brief is posted on OPA's website at: <http://www.ct.gov/opapd/cwp/view.asp?Q=452308&A=3147>

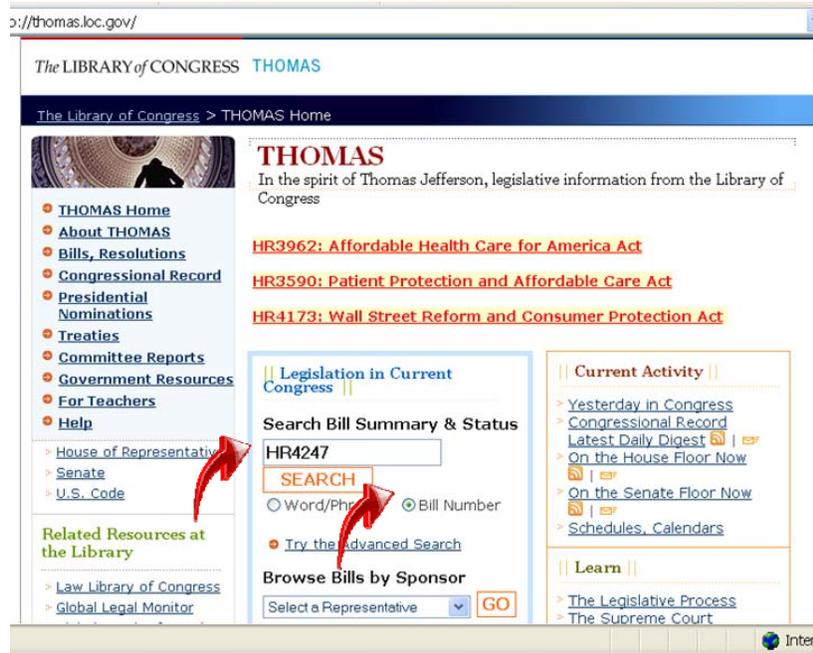
Restraint and Seclusion Legislation introduced in Congress

Connecticut Senator Chris Dodd has joined forces with Congressman George Miller of California to propose legislation strictly limiting the use of restraints and seclusion in public schools. H.R. 4247, the Preventing Harmful Restraint and Seclusion in Schools Act would prohibit restraining or secluding a student unless his or her behavior poses an immediate danger of physical injury and other less restrictive measures would not work. It also requires training, including training on positive behavior supports for any school staff who may use restraint, immediate parental notification of any incident involving restraint or seclusion, a "de-briefing" following any incident, and the development of state plans to gather data, monitor practices and enforce rules. Connecticut Congressman Joe Courtney has signed on as a co-sponsor.

This legislation was developed in the wake of investigative reports and a Congressional hearing last Spring. The reports – one by National Disability Rights Network (NDRN), another by the Congressional Government Accountability Office (GAO) and a third by the Council of Parent Attorneys and Advocates (COPAA) - described shocking situations in multiple school systems where untrained teachers and other staff caused psychological trauma, physical injuries and sometimes even death of students by inappropriately using restraints and seclusion. Some of the stories contained in the NDRN report come from parents and guardians in Connecticut. When the report was released, NDRN arranged for those parents to attend a press conference hosted by Senator Dodd, where they told their stories to the national press. Dodd has had a longstanding interest in this issue. In 2000, he was instrumental in introducing and securing passage of earlier federal legislation limiting the use of restraints and seclusion in hospitals and residential treatment environments.

Connecticut adopted state legislation addressing the use of restraint and seclusion in public schools in 2007. While our State law addresses many of the same issues as the proposed federal legislation, it does not require that school systems train teachers and other staff, or that they hold a de-briefing session to ascertain what led to the episode of restraint or seclusion and how to avoid future incidents. When the state legislation was being considered attempts were made to include a training requirement. However, the projected costs were quite high, and the bill that passed did not mandate training. So, even though Connecticut is one of the few states that has legislated in this area, students and their families will still

benefit if this federal proposal becomes law. The full text of HR4247, and information about its status may be found at the Congressional website, Thomas: <http://thomas.loc.gov/> Go to the center of the page, under "Legislation in Current Congress", check off "Bill Number" and enter "HR4247" in SEARCH box.



State Moves to Dismiss Assisted Suicide Case

In early October, lawyers from Compassion and Choices, a successor organization to the Hemlock Society, filed a lawsuit in State Superior Court on behalf of two doctors who want to be able to prescribe lethal prescriptions to patients who have terminal diseases and want to commit suicide. Captioned as *Blick v. Criminal Justice Division*, the suit targets the Connecticut statute that prohibits intentionally assisting another person to commit suicide. The plaintiffs seek a declaratory ruling to the effect that the statute does not apply to doctors, and an injunction prohibiting prosecutors from proceeding against doctors who provide lethal prescriptions. Each of Connecticut's State's Attorneys (prosecuting attorneys) is named as a defendant. They are being represented by the Attorney General's Office, which is vigorously defending the case, which has filed a motion to dismiss based on evidence of legislative intent.

The suit follows on the heels of an unsuccessful bid to change the statute through the legislative process earlier this year. Across the country Compassion and Choices has been aggressively pursuing legislative proposals and, in some places, litigation, in order to challenge state laws regarding assisted suicide. Numerous disability groups have adopted positions against such changes, and are actively organizing in opposition.

Because this is such a controversial issue, and because the concerns of leading disability advocacy groups that oppose legalization are not well understood, I am attaching a brief essay I wrote which includes links to reference material.

Conviction For Assaulting Woman with Disabilities Overturned; Prosecutors Appeal to Supreme Court



In early 2008, trial began in Bridgeport Superior Court of a person accused of sexually assaulting a woman with physical, intellectual and communications disabilities. The incident giving rise to that prosecution had initially been reported to OPA, which coordinated its investigation with law enforcement authorities. The OPA investigator assigned to the case testified at the trial, as did the woman herself. Because the woman used a communication board to spell her responses to questions, a camera arrangement was set up in the courtroom that allowed jurors to directly see what she was saying. The jury convicted the man of attempted sexual assault in the second degree and sexual assault in the fourth degree under sections of the Criminal Code that address sexual assaults against persons who are "physically helpless".

The defendant appealed his conviction. In November the Appellate Court announced its decision, overturning the jury's verdict. In an opinion published in the November 17, 2009 *Connecticut Law Journal*, the Court stated:

Given the uncontradicted evidence in the record that the complainant could communicate using various nonverbal methods, including screeching, biting, kicking and scratching, and the failure of the state to present any evidence probative of whether the complainant was unable to use these forms of communication at the time of the alleged assault, no reasonable jury could have concluded that she was physically helpless as defined [in law]...

We reverse the defendant's conviction in this case because we are not persuaded that the state produced any credible evidence that the complainant was either unconscious or so uncommunicative that she was physically incapable of manifesting to the defendant her lack of consent to sexual intercourse at the time of the alleged sexual assault. *State v. Richard Fourtin, AC29899*

As disability advocates are becoming aware of the decision, questions are surfacing about its implications: Does it mean that, as a practical matter, under Connecticut's Criminal Code a competent person with a significant communication disability must physically resist a sexual assault in order to communicate non-consent? Why wouldn't a jury that had heard (and seen) the testimony of the woman in the courtroom have been able to conclude that, under the circumstances of a sexual assault, she was, in fact "physically helpless", at least with respect to communicating? The Appellate Court's opinion cites several other cases where the interpretation of the term "physically helpless" was at issue, and also cites cases from other jurisdictions. The decision may ultimately lead to statutory changes. The State's Attorney has petitioned the Connecticut Supreme Court to review that decision, and OPA will be closely following that Court's response.

OPA Annual Report Posted

As required in our enabling legislation, OPA has filed its annual report with the Governor and Co-Chairs of the Human Services Committee. To save precious resources the report is not being printed this year. Rather, it can be viewed and downloaded from the OPA website at:

www.ct.gov/opapd/cwp/view.asp?Q=451514&A=1757

In addition to the mandated summary on the status of services for people with disabilities, the report revisits a number of clients whose stories were recounted in previous annual reports.



Alternative Formats available in alternate format upon request.

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