



P&A News

E-MAIL NEWSLETTER FROM JIM MCGAUGHEY
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RESTRAINTS BACK IN THE NEWS

It has been more than 12 years since Andrew McClain, age 11, and Robert Rollins, age 12, died while being restrained in psychiatric facilities. More than 10 years have passed since the General Assembly enacted legislation to address what the Hartford Courant's award-winning investigative series called the problem of "Deadly Restraints". During this period, awareness of the frequency with which restraints have led to death has spread throughout the country. More and more former patients have come forward to explain how traumatic and psychologically scarring it is to be restrained or subjected to seclusion, and how difficult it is to return for help to a system that has so unselfconsciously inflicted so much harm. Encouraged by federal oversight agencies, many states' mental health service systems have pursued efforts to eliminate the use of restraint and seclusion altogether. Although Connecticut's Department of Mental Health and Addiction Services (DMHAS) has experienced some success with such an initiative aimed at its Young Adult Services program, many hospitals, residential facilities and schools in our State remain dangerously over-dependent on restraint and seclusion practices.

The Office of Protection and Advocacy for Persons with Disabilities (OPA) recently investigated the restraint-related death of a young man with intellectual and psychiatric disabilities who died of a pulmonary embolism after spending five days in continuous restraint, most of that time in his local hospital emergency department. (The formation of internal blood clots which can block circulation in limbs and vital organs is one of the risks inherent in immobilizing someone by using restraints for prolonged periods. Pulmonary embolism is a well known cause of restraint-related fatality.) The man had been experiencing a psychiatric crisis and was brought to the hospital by his group home staff. Although the hospital had beds available in its psychiatric unit, where his clinical needs could have been much better addressed, he was kept in the Emergency Department, in four-point restraints, while hospital staff negotiated for his placement into a distant State psychiatric hospital. After the State hospital had agreed to admit the man, he was moved from the ED to the local hospital's psychiatric unit. However, while he was there he was still held in restraints. He died shortly after being transported to the State hospital.

This was not an isolated incident. Over the past several years, OPA has received a number of reports concerning children who have sustained serious injuries – fractured bones, severe lacerations, broken teeth and even a frightening episode where one child lost consciousness and became unresponsive for a period of ten minutes – all while being restrained or "escorted" to seclusion rooms in residential, hospital or school facilities. Investigations into these incidents have revealed that most of the children who sustained injuries did not have effective, individualized treatment and educational programs to address their problems. Or, in some cases they had clinical treatment plans and educational plans, but those plans did not *share* professionally acceptable approaches. Instead, the facilities that housed or educated them relied on generic de-escalation procedures, often inadvertently creating barriers to the children's own self-identified methods for "cooling down". OPA has also found that face-down prone restraint techniques are taught and used in some of these programs. This despite growing evidence that prone restraint is a dangerous practice, and a number of agencies (including Connecticut's DDS and DMHAS) have banned its use.

Information contained in a recent news report is equally disturbing. According to a December 6, 2010 report in the newly-launched, on-line news service Connecticut Health Investigation Team (C-HIT), data reported to the Connecticut Department of Education (SDE) indicates that there were 18,000 incidents of restraint and seclusion in Connecticut schools last year. (See full story at: http://newhavenindependent.org/index.php/health/entry/restraints_story/). SDE was quick to point out that the data it supplied in response to the reporter's FOI query has not been audited or verified. Which raises the question: "Why not?" Since passage of **Public Act 07-147. AN ACT CONCERNING RESTRAINTS AND SECLUSION IN PUBLIC SCHOOLS**, all schools have been required to keep frequency data on restraint and seclusion use, and to notify parents and guardians whenever a child is secluded or restrained. (Segregated special education schools were already covered by earlier legislation.) The C-HIT article also reported widespread non-compliance with parental notification requirements. The law

authorizes the SDE to collect the data and issue a summary report, but does not require it to do so. With raw data this disturbing, however, SDE needs to make this a priority.

The over-use of restraints and seclusion is pervasive and the risks are great. Because the problem cuts across service and educational systems and because resolving it will require a major collaborative effort by private providers, school systems, professional organizations and State agencies, the OPA Advisory Board has recommended that the incoming Malloy administration organize a Governor-level initiative to address the problem. (See reference to the Board's other policy recommendations below.)

SOUTHBURY SETTLEMENT OPENS DOOR TO COMMUNITY LIVING

Following an October 4, 2010 Fairness Hearing, U.S. District Court Judge Ellen Bree Burns has officially signed off on an agreement settling a longstanding lawsuit over the rights of residents of Southbury Training School. *Messier v. Southbury Training School*, was originally filed in 1994. In addition to Richard Messier, who was able to move from Southbury into a home of his own shortly after the suit was filed, the case was pursued by a number of other individual plaintiffs, and by several organizational plaintiffs including the ARC of Connecticut, Danbury-based WeCAHR, Inc., and People First of Connecticut. Following two rounds of hearings, Judge Burns issued a ruling in 2008 which found that Southbury residents' rights to be considered for community placement under the ADA were being systematically violated by policies and practices that the State had adopted in the mid-1990s. The Court held a further hearing in February, 2010, in order to determine what kind of remedial order it should issue.



OPA advocates Brian O'Rourke, Christine Gaynor and Lorna Quiros-Dilan testified, confirming that practices at STS still operated to thwart real consideration of community placement, that many individuals whom they represent could benefit from opportunities to consider living elsewhere, and that major changes in planning team practices, placement development procedures, and some kind of outside intervention and monitoring would be necessary in order to effect change. After that hearing, the parties began to earnestly negotiate a settlement, which they ultimately reached in July. At the October Fairness Hearing, OPA testified in support of the Settlement Agreement. The Agreement calls a halt to the policies and practices that effectively blocked placement consideration for STS residents. It names a Remedial Expert to oversee implementation, and calls for extensive staff training, affirmative development of community living options, and direct involvement of DDS regional officials in placement development processes. It does not require that STS residents be placed into community living arrangements or that Southbury close. The Settlement Agreement may be viewed on the OPA website at: <http://www.ct.gov/opapd/cwp/view.asp?O=471232&A=3147>

OPA QUESTIONS INAPPROPRIATE USE OF VIDEO RELAY INTERPRETING IN HOSPITALS.



OPA's Deaf Advocacy Advisory Group and the Connecticut Hospital Association (CHA) met in November to address problems arising from over-reliance on Video Relay Interpreter (VRI) services by Connecticut hospitals. VRI involves internet-based audio and video connections with interpreters who are stationed in a remote location – often out-of-state. Although the technology is potentially very useful, especially for initial triage and other brief transactions, it has inherent limitations. Over the past year OPA has received repeated complaints about VRI from deaf individuals who have sought care at hospitals. Some of the problems relate to technical issues with picture quality or the inability of harried hospital staff to establish satisfactory internet connections with the VRI service provider. But most of the complaints involve attempts to use VRI in situations where the seriousness and importance of the

medical information to be communicated, or the level of illness being experienced by a deaf person were such that remote interpreting just could not be effective. Several deaf patients were too ill to sit up and sign into a camera or to view the interpreter on the computer screen; others were experiencing acute symptoms of a mental illness and could not successfully attend to the equipment, and one hospital even

attempted to use VRI to communicate with a deaf patient who also has significant visual impairment and could not see the screen. One man reported being asked about a living will as part of his pre-admission screening for surgery, but he felt confused because the interpreter was apparently using abbreviations common to her region of the country, not Connecticut, and he could not initially understand what was being asked.

In fact, one of the underlying issues with VRI involves interpreter qualifications. Connecticut law requires anyone who works as an interpreter to be registered with the Commission on the Deaf and Hearing Impaired (CDHI). In order to register with CDHI, interpreters must be certified by a national accrediting group - credentialing that is particularly important for interpreters who must work in complex, high-stakes, jargon-filled environments like hospitals and court rooms, where the consequences of interpreting errors can be life-defining. CDHI considers the Connecticut requirement for registration to apply to interpreters working for VRI providers operating in Connecticut, and, at the meeting Hospital Association representatives agreed. Yet CDHI reports that no out-of-state VRI interpreters have ever registered with them.

Many of the problems reported to OPA could have been avoided if hospital staff were more aware of the limitations inherent in VRI, and were trained to call for an on-site interpreter when one was needed. Recognizing this, Connecticut Hospital Association (CHA) representatives have agreed to promote a training program that has been developed by Family Services Woodfield (FSW), an interpreting agency in Bridgeport. The training, which is based on emerging national standards, was reviewed by the OPA Deaf Advocacy Advisory Group, addresses the relevant points, and is available to hospitals without charge. In addition to the training program, improvements have recently been noted in the availability of qualified, local interpreters to respond to urgent calls for on-site interpreting from hospitals. CHA agreed to meet with CDHI and FSW, the two principle interpreting agencies in Connecticut, to review coverage data, and to inform its member hospitals about this. A follow-up meeting has been scheduled for March.

LEGAL CASE UPDATES

Nursing Home Case Moves Forward

In February, 2006, OPA filed suit in Federal District Court on behalf of people with mental illness who were being warehoused in certain nursing homes. Naming various state agencies as defendants, the suit asserts that people who can and want to live in community are being needlessly confined in institutional settings in violation of their rights under the ADA and Section 504 of the Rehabilitation Act. OPA is being joined in representing the affected residents by lawyers from the Judge David L. Bazelon Center for Mental Health Law, and by pro-bono counsel from the New York firm of Stroock, Stroock and Lavan. After four years of preliminary legal maneuvering, the "discovery" phase of the litigation is now beginning in earnest.



U.S. Supreme Court Hears Case Concerning Virginia P&A's Recourse to Federal Courts

In a case that has particular importance for state-agency P&A systems (like OPA), the U.S. Supreme Court recently heard oral arguments in an appeal brought by the Virginia Office of Protection and Advocacy (VOPA). VOPA had sought a federal court order compelling the commissioner of Virginia's mental health and developmental services department to allow access to records it needed in order to pursue abuse and neglect investigations. Federal law authorizes P&As to investigate abuse and neglect, and, in recognition of their unique watchdog role, the law further authorizes P&As to have access to internal service system records. When Virginia's Department of Behavioral Health and Developmental Services refused to recognize VOPA's federal authority, VOPA took it's commissioner to Federal Court using the hundred-year-old *Ex Parte Young* doctrine which allows state officials to be sued for injunctive relief in federal courts. At the Federal District Court, VOPA won an injunction ordering access. However, the Commonwealth of Virginia appealed, claiming that federal courts are not appropriate forums to settle "intramural disputes" between state agencies. After the Fourth Circuit Court of Appeals reversed the District Court's injunction, VOPA appealed to the Supreme Court. [Note: OPA won a similar case at the Second Circuit Court of Appeals in 2006. See *OPA v. Department of Mental Health and Addiction Services*, 448 F.3d 119 (2d Cir. 2006)]

Like OPA, the Virginia Office of Protection and Advocacy (VOPA) is a state agency. P&As in all but eight other states are constituted as private, not for profit organizations that are officially designated by their states' governments to fulfill federal P&A mandates. The authority of those private, non-profit P&As to sue state officials in federal court was not raised directly in the appeal. In addition, because she had previously served as Solicitor General of the U.S., and had taken a position on VOPA's side, newly-appointed Justice

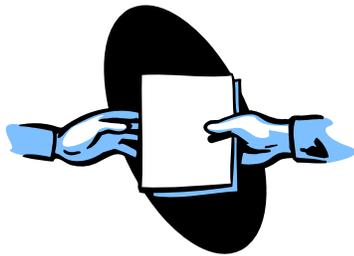
Kagan recused herself from the case. This leaves only six Justices to decide the outcome, opening the possibility of a 3-3 tie. A tie vote would merely leave the 4th Circuit's decision intact, and would not have precedential value in other Circuits. However, if a majority of the Justices agree with the State of Virginia's arguments, their decision will have significant implications for all state-agency P&As, which will likely be prohibited from suing other state agencies in their own name.

Sexual Assault Appeal Still Pending; Legislative Proposal Ready for 2nd Attempt

As of this writing, the Connecticut Supreme Court has yet to schedule oral argument in State v. Fourtin, a case involving a young woman with significant disabilities who testified using assistive communications equipment, in the trial of a man who was accused of sexually assaulting her. The jury also heard testimony from the OPA investigator and the police detective who investigated the matter. The defendant was her mother's boyfriend. Although the jury convicted him, and he was sentenced to a term in prison, the Appellate Court reversed the conviction. In its decision, the Court cited the mother's testimony that her daughter could communicate using "various nonverbal methods, including screeching, biting, kicking and scratching", and ruled that the young woman was therefore not "physically unable to communicate unwillingness to an act." The State's Attorney appealed that ruling to the State Supreme Court. OPA filed an *amicus* brief supporting the prosecutor's argument.

The Fourtin case has stirred considerable outrage within the disability community. Department of Justice statistics indicate that people with disabilities are more than twice as likely to be victims of sexual assault as are people without disabilities. A Bill to clarify the statutory language cited by the Appellate Court passed in the State Senate last year, but, unfortunately was not called for a vote in the House of Representatives. The proposal had been vetted by a number agencies and advocacy groups, including OPA, to ensure that it implied no limitation of the ability of someone with a significant communications disability to enter into consensual relationships. It also would have corrected some arcane terminology still present in the Connecticut Criminal Code (e.g. references to "mentally defective" people). OPA has recently been in touch with a representative of the Chief State's Attorney's Office who confirms their intention to pursue the Bill again in the upcoming legislative session.

OPA BOARD MAKES POLICY RECOMMENDATIONS TO MALLOY ADMINISTRATION.



In an effort to identify issues and develop policy recommendations for the Malloy Administration, its Transition Team's Policy Committee established a number of Working Groups to address particular subject areas. To share OPA's experience and raise awareness of disability issues, the OPA Advisory Board made a number of specific recommendations to the Working Groups on Human Services, Healthcare, Education, Housing, Children's Issues, Public Safety and Jobs and Economic Development. The full text of the recommendations can be accessed through the following links to the OPA Website. In addition to policy recommendations, the Board also recommended that Governor-Elect Malloy establish a senior disability advisor position within his Office. (<http://www.ct.gov/opapd/cwp/view.asp?Q=470416&A=1742>)

OPA BOARD ESTABLISHES PRIORITIES FOR 2011; ECONOMIC REALITIES REQUIRE DOING MORE WITH LESS.

When Congress established the nation-wide P&A system, it imbued state-level P&A agencies with broad authority to investigate abuse and neglect, affirmatively reach out to underserved communities, educate policy makers, and pursue legal and administrative remedies on behalf of people with disabilities. When coupled with strict statutory requirements for structural independence, this broad grant of authority is what defines the P&A system as an effective watchdog and agent for progress. However, having authority to do these things does not mean that OPA has the resources to do all of them all at once. In fact, funding for the P&A system has always been extremely limited – a situation that is unlikely to improve anytime soon. So, along with the broad grant of authority, Congress also established a requirement for an annual priority-setting process, which includes opportunities for public input. In Connecticut, that priority-setting process is conducted by the P&A



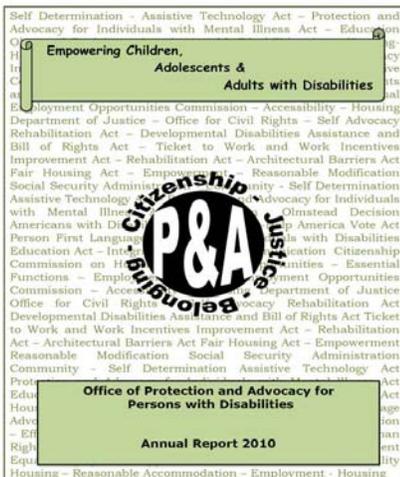
Advisory Board, and involves biennial public forums, surveys and focus groups, as well as a review of OPA's case experience and intake data. After considerable work and deliberation, the Board has adopted priorities for 2011. A complete listing may be found on the OPA website at: <http://www.ct.gov/opapd/cwp/view.asp?a=3649&q=426426>

This year's priorities include a new initiative to address employment discrimination – one that will require volunteer support from Connecticut's legal community. Disability-based employment discrimination is real, but is often expensive to fight and difficult to prove. Lawyers who represent victims of employment discrimination usually need to engage in extensive "motion and discovery practice" - requesting records, formally posing written questions (called interrogatories), deposing the employer's supervisory staff and other key personnel. All of that costs money, usually a lot of money. In fact, pursuing legal action through the courts costs more than most people can afford, and often more than what would be awarded as compensation to a victim of employment discrimination. For most people, the only affordable way to contest employment discrimination is through administrative agencies like the Commission on Human Rights and Opportunities (CHRO) and the federal Equal Employment Opportunity Commission (EEOC). While those agencies allow individuals to bring their own complaints without having to hire lawyers, in OPA's experience, the process works much better if complainants have experienced counsel. Because OPA has only a small legal staff (counting our Managing Attorney, we currently have only two lawyers) the agency is launching a drive to recruit a panel of *Pro Bono* lawyers and/or paralegals from private law firms who could assist people with disabilities to file and pursue CHRO complaints.

The newly adopted priorities also reflect a renewed commitment to another area of longstanding concern – Special Education. Complaints from parents raise familiar issues: failures to implement provisions of IEPs; lack of appropriate evaluations, including Functional Behavioral Assessments; lack of transition planning; discriminatory exclusion from vocational/technical schools; inappropriate segregation and disciplinary practices. While these problems reflect clear violations of law, little is being done to correct them. In fact, some school systems that are claiming success in well publicized campaigns to "turn around" dismal overall performance, appear to be blatantly ignoring their legal obligations to special education students. This past year OPA conducted an investigation into complaints of abuse and neglect of Hartford students with behavioral and emotional disabilities. The results confirmed that the needs – and legal rights - of those students were being systematically ignored. (See "Left Behind" <http://www.ct.gov/opapd/cwp/view.asp?a=1757&q=462758&opapdPNavCtr=|50812|#52021>) In pursuing this priority, much of OPA's effort will be devoted to securing compliance with legal requirements of the federal Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act.

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?a=1757&q=469240&opapdPNavCtr=|50816|#52155



Alternative Formats available in alternate format upon request.

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