



## **“Legal Issues Relating To Transition Planning And Post-Age 21 Services For Individuals With Autism”**

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### **I. Introduction**

The difficulties in transitioning individuals with Autism from school age to post-school programming are particularly acute and present serious challenges to their families. Under the Individuals with Disabilities Education Act (IDEA), children with Autism can generally receive special education and related services through their local school district from identification of the disability until age twenty-one (3- 21). Beginning no later than age sixteen (16), school districts are required to begin transition planning for children with disabilities. Under amendments to IDEA in 1999 and 2004, transition planning is required to be far more robust than in the past, and school districts are required to conduct meaningful assessments of students to identify the specific instruction and services which students will receive to become independent and self-sufficient at graduation.

Unfortunately, transition planning is rarely extensive within this Commonwealth, but typically involves providing limited information to families about agencies such as MH/MR, the Office of Vocation Rehabilitation, and other programs which serve adults with disabilities. Unless a parent vigorously advocates with knowledge and skill on behalf of the child, transition planning seldom involves the intensive assessment, instruction, and services which IDEA specifically requires. More and more parents are pursuing due process hearings against their local school districts over this very issue, because transition is so critical in moving a child with disabilities to independence and self-sufficiency.

Once the child reaches the age of twenty-one (21), families encounter an entirely new set of roadblocks as they move from the educational system to the Mental Health/Mental Retardation system, which until very recently has been the only adult system which might serve adults with Autism. Although many individuals with Autism could qualify for services within the MH/MR system because of limited cognitive or social skills/adaptive behaviors, county agencies often assert that they have no responsibility to individuals within the Autism spectrum. Unfortunately, no user-friendly dispute resolution system exists in the MH/MR program--such as in the educational due process system--to challenge decisions made by county agencies, and therefore

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determinations of county agencies are effectively final unless the family hires an attorney to pursue a claim in the local Court of Common Pleas. Even then, no clear legal structure exists upon which the court can adjudicate such matters short of a commitment petition.

In order to address these deficiencies, the Department of Education should conduct intensive monitoring of school district transition programs, and legislation should be proposed to create a clear, independent, fair and user-friendly system by which individuals can contest the determinations of county administrators concerning eligibility and entitlement to services.

## **II. Historical Overview**

The movement to educate children with disabilities as an entitlement took root in the early 1970s with the court decisions in PARC v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F.Supp. 279 (E.D. Pa. 1972), and Mills v. Board of Education, 348 F. Supp. 866 (D. D.C. 1972). However, the nationwide commitment to educating all children with disabilities was not established until the Education for All Handicapped Children Act (EHA) of 1975. Public Law 94-142, currently codified as amended at 20 U.S.C. Section 1400 *et. seq.* The EHA guaranteed access to public education for all school-age children (generally between the ages of six and eighteen), and with broader age ranges in states which provided guarantees to younger or older children (most typically, the ages of 5 to 21). The overwhelming emphasis of the EHA was to provide "access" to special education for children with disabilities, as over a million children with disabilities received no educational programming in 1975.

The EHA did not mandate transition services to establish a "bridge" between services provided to school age children and post-graduation life. Notably, in most states, the great majority of programs for adults with disabilities in 1975 included only institutional services in large, segregated, remote institutions which often involved inhumane treatment in overcrowded settings, or living with family members in circumstances where the person with disabilities rarely left home, either for lack of support services to permit integration with the community or due to nonacceptance by the community of persons with disabilities.

In 1990, Congress first mandated transition services via the "Education of the Handicapped Act Amendments of 1990" which also retitled the statute as "The Individuals With Disabilities Education Act" (IDEA). The 1990 Act amended the definition of "Individualized Education Program" to require that Individualized Education Plans (IEPs) provide "a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency's responsibilities or linkages (or both) before the student leaves the school setting". Transition services were further defined as:

A coordinated set of activities for a student, designed with an outcome-oriented process, which promotes movement from school to

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post-school activities, including post secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. A coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

Interestingly, Congress recognized that state agencies responsible for post-school programming might not always be willing partners in transition planning, and therefore provided that "in the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives."

Unfortunately, the 1990 federal mandate for transition planning yielded very disappointing results. Transition assessment, planning, and services remained (and remain to this day) the poor stepchild of the IEP process, with little meaningful assessment, planning, and services provided in the overwhelming majority of IEPs. In far too many circumstances, "transition planning" has involved only the identification of linkages with post-graduation programs, and transition services rarely have differed from services offered elsewhere in the IEP. In the author's experience, only when parents aggressively demand and pursue these matters does true transition planning in the IEP reach meaningful levels.

Congress has clearly recognized these deficits in the transition planning process. Amendments to IDEA in 1997 and 2004 have legislatively strengthened the mandate for transition planning and services. For example, in 1997 IDEA was modified to explicitly require that "Transition Services" involve the full array of "Related Services" under IDEA which include a wide variety of therapeutic and other supportive services "as may be required to assist a child with a disability to benefit from special education." The 1997 Act also mandated that "beginning at least one year before the child reaches the age of majority under state law, [the IEP Team must provide] a statement that the child has been informed of his or her rights under this title, if any, that will transfer to the child upon reaching the age of majority."

Notably, the 1997 Act explicitly changed the focus of special education from "access" to special education services (which was the keystone of the EHA in 1975) "to improv[ing] educational results" and producing measurable progress through "high expectations" to move students with disabilities toward "independent living and economic self sufficiency." The Congressional findings which were made part of the Act explicitly found that "before the date of the enactment of the Education for All Handicapped Children Act of 1975 . . . more than one-half of the children with disabilities in the United States did not receive appropriate educational

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services [and] one million of the children with disabilities in the United States were excluded entirely from the public school system.” Congress further found that “since the enactment and the implementation of the [EHA], this Act has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and improving educational results for children with disabilities.” (Emphasis supplied). The Congressional findings went on to state that “the implementation of this Act has been impeded by low expectations and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities. Over 20 years of research and experience have demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children . . . to enable them . . . to be prepared to lead productive, independent, adult lives, to the maximum extent possible.”

This statement represented a dramatic change in the fundamental purpose of special education in this nation. It reflects a Congressional finding that “mere access” to special education is no longer sufficient, and that abundant research existed by 1997 to promote higher expectations of children with disabilities and grade-level achievement through proper individualized instruction of children with disabilities.

Over the next seven years, the emphasis upon research-based practices and grade-level achievement reached a critical mass. In 2000, the National Reading Panel commissioned by Congress issued dramatic and comprehensive findings in “Teaching Children to Read” which emphasized that the overwhelming majority of children can learn to read at or near grade level through the use of scientifically-based instruction. The findings of this Panel led to the enactment of The No Child Left Behind Act (NCLB), which requires the use of scientifically-based instruction in public schools and which provides significant financial and programmatic incentives for school districts to make Adequate Yearly Progress in reading, writing, and mathematics. In 2004, the mandate of NCLB was extended to students with disabilities by way of a major individual entitlement to research-based services through amendments to IDEA. Congress again issued findings similar to those quoted above from the 1997 Act, including a very direct tie between “having high expectations for . . . children [with disabilities] . . . in order to meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children”. . . “to be prepared to lead productive and independent adult lives to the maximum extent possible.” (Emphasis supplied) The 2004 Act expressly required, for the first time, that IEPs must provide “special education and related services and supplementary aids and services based on peer-reviewed research to the extent practicable.” (Emphasis supplied) Notably, the United States Department of Education has strongly suggested in its Comments to the IDEA regulations that “to the extent practicable” means to the extent that such research exists, and that school districts should not avoid this major new mandate of IDEA by claiming insufficient trained personnel to provide research-based services. The Department of Education found that the phrase “to the extent practicable” refers to circumstances where no research exists to support a particular form of programming: “The phrase ‘to the extent practicable’, as used in this context, generally means that services and supports should be based on peer-

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reviewed research to the extent that it is possible, given the availability of peer-reviewed research." 71 Federal Register 46665 (August 14, 2006) (emphasis supplied). Consequently, school officials should not rely upon a purported insufficiency of resources to implement research-based programming.

The 2004 amendments again strengthened the requirement of transition planning in IEPs. The 2004 amendments require that the transition component of an IEP include "appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills." Consequently, the 2004 amendments now require far more meaningful transition planning and programming. Measurable annual transition goals are now a required component of IEPs, and these goals must be based upon specific assessments designed to identify transition needs and appropriate transition services. The definition of "Transition Services" was also strengthened in 2004 to focus upon actual results and measurable student achievement. For example, the 1997 Act defined Transition Services with a focus on procedures used in developing the Plan: "The term 'Transition Services' means a coordinated set of activities for a student with a disability that is designed with an outcome-oriented process which promotes movement from school to post-school activities. . . ." However, in 2004, the focus changed to the results of the transition planning process: "The term 'transition services' means a coordinated set of activities for a child with a disability that is designed to be within a result-oriented process, that is focused on improving the academic and functional achievement of the child . . . ."

### **III. Judicial and Administrative Decisions with Respect to Transition Planning and Services.**

Relatively few judicial decisions have been reported which interpret IDEA's mandate for transition planning. A somewhat greater number of non-precedential decisions has been reported in administrative due process hearings concerning transition. These decisions have resulted in no common thread of analysis with respect to transition planning and transition services. Because relatively few decisions have been reached which hinge upon transition issues, and given that no clear consistent line of analysis appears in these decisions, a list of the leading judicial decisions with a brief parenthetical summary is set forth below.

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## **PENNSYLVANIA CASES**

1. Marple Newtown Sch. Dist. v. Rafael N., No. 07-0558, 2007 WL 2458076, at \*11 (E.D.Pa. Aug. 23, 2007).

The IEP was deemed inappropriate due to an inadequate transition plan which included generic goals that remained static year-to-year. The IEP lacked a community component to model behavior with non-disabled peers and lacked a component to prepare Student for medical self-monitoring. Most importantly the IEP did not take into account the Student's strengths or preferences.

2. Brett S. ex rel. Charles S. v. W. Chester Area Sch. Dist., No. CIV.A.04-5598, 2006 WL 680936, at \*12 (E.D.Pa. Mar. 16, 2006).

To address transition from one school to another, District planned through the IEP to give Student a tour of new school, arranged for Student to meet with new teachers and provided a schedule of new classes. Court found the District's transition plans were reasonably calculated to ensure Student's transition would not interfere with his ability to obtain a meaningful educational experience.

3. Sinan L v. Sch. Dist. of Phila., No. 06-1342, 2007 U.S. Dist. LEXIS 47665, at \*31 (E.D.Pa. Jun. 29, 2007).

Hearing officer found transition plan's focus on college planning to the exclusion of practical training was appropriate given Parent's rejection of any vocational outcome. Since IDEA requires functional and vocational planning only "when appropriate," court affirmed hearing officer; transition plan for student focusing on college planning was appropriate given Student's needs, interests, and preferences at the time.

4. East Penn Sch. Dist. v. Scott B., No. 97-1989, 1999 U.S. Dist. LEXIS 2683, 1999 WL 178368, at \*5-6, 9 (E.D.Pa. Feb. 23, 1999).

Upheld an Appeals Panel award of compensatory education on the ground that a school district failed to provide adequate post-secondary transition planning. The IEP included vocational goals, but the IEP failed to consider Student's transportation, recreational, and personal needs.

## **OTHER JURISDICTIONS**

5. Bd. of Educ. v. Ross, 486 F.3d 267, 2007 WL 1374919, at \*7-8 (7<sup>th</sup> Cir. 2007).

School district's failure to provide a transition plan in an IEP is a mere procedural flaw and does not violate any substantive rights.

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6. Yankton Sch. Dist. v. Schramm, 93 F.3d 1369 (8<sup>th</sup> Cir. 1996).

Transition plan failed to comply with IDEA because it lacked specific goals and objectives to enable Student to attend college.

7. Urban v. Jefferson County Sch. Dist., 89 F.3d 720, (10<sup>th</sup> Cir. 1996).

Student's IEP lacked an explicit statement of transition services and did not designate a specific outcome for Student when he turned 21 or a specific set of activities for meeting that outcome. However, this procedural violation did not amount to a denial of an appropriate education because the IEP contained language which addressed Student's transitional needs, such as community awareness, job site training, daily living skills, and the ability to pay for purchases.

#### **IV. Adult Mental Health/Mental Retardation Services in Pennsylvania: Is There an Entitlement To Services?**

In 1966, Pennsylvania enacted the Mental Health and Mental Retardation Act (MH/MR Act) which established a system of care for persons with mental illness and mental retardation. 50 P.S. Section 4201 *et. seq.* At the time, Pennsylvania's system was considered progressive, although in hindsight the 1966 Act's heavy reliance on institutional programs and involuntary commitments was nearly obsolete at the time of its enactment. Within the next decade Pennsylvania would begin to dramatically reduce its institutional population, largely as a result of the efforts of advocacy groups and federal court litigation involving the Pennhurst Center.

It is highly notable that Pennsylvania has recently made enormous strides with respect to services for individuals with Autism through the establishment of a specific office for autism services, enacting insurance legislation which mandates extensive services to individuals with Autism, and securing a federal Medicaid waiver to fund services to individuals with Autism.

However, because many individuals with Autism also have a dual diagnosis of mental retardation, and since the MH/MR Act remains the primary vehicle for disability services in Pennsylvania, a review of that Act is useful. In the years since 1966, Pennsylvania has placed an increasing emphasis upon community-based programming for adults with mental retardation and mental illness, yet has allocated inadequate resources to meet the needs of all eligible citizens with mental disabilities. As a result, a line of court cases developed which hold that the right to mental retardation and mental health services in Pennsylvania constitutes a legal entitlement. However, the Department of Public Welfare and local county Mental Health/Mental Retardation administrations steadfastly assert that no such entitlement to services exists in Pennsylvania, and that services are provided solely within the confines of appropriated funds, with the county governments deciding who, where, and when services will be provided.

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Since the 1966 MH/MR Act makes no specific provision for individuals with Autism, such individuals have been required to seek services by “fitting into” the definitions of “mental retardation” or “severely mentally disabled”. The term “mental retardation” is defined in the 1966 Act as follows:

“Mental retardation” means subaverage general intellectual functioning which originates during the developmental period and is associated with impairment of one or more of the following: (1) maturation, (2) learning and (3) social adjustment.

In 1976, Pennsylvania enacted the Mental Health Procedures Act (MHPA) which superceded the 1966 MH/MR Act in many respects concerning individuals with mental illness. The MHPA governs treatment of persons with mental illness, and uses the term “severely mentally disabled,” which is defined as follows:

A person is severely mentally disabled when, as a result of mental illness, his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a clear and present danger of harm to others or to himself.

While many, and perhaps most, individuals with Autism might “fit into” one of the two definitions noted above, Pennsylvania has not, until the last several months, appropriated monies or designed programs to specifically meet the individual needs of persons with Autism. Consequently, in order to receive services under the Mental Health or Mental Retardation systems in Pennsylvania (which systems have the most established funding streams and at least some judicial history of interpreting these laws as entitlements), individuals with Autism have been required to pursue funding under laws relating to other disabilities which are, at best, a very inexact fit.

The judicial decisions with respect to an entitlement to services under the 1966 MH/MR Act are relatively far reaching. The mandatory nature of the responsibilities of local county Mental Health and Mental Retardation Offices and the Pennsylvania Department of Public Welfare (“DPW”) to provide Pennsylvania’s mentally retarded citizens with appropriate residential treatment under the Pennsylvania Mental Health and Mental Retardation Act, 50 P.S. §4101 et. seq., has been repeatedly recognized by every appellate court in the Commonwealth. See, In re Joseph Schmidt, 494 Pa. 86, 429 A.2d 63 (1981); In re April Sauers, 68 Pa. Cmwlth Ct. 83, 447 A.2d 1132 (1982); affirmed unanimously, 500 Pa. 342, 456 A.2d 997 (1983); County of Allegheny v. Commonwealth of Pennsylvania, 507 Pa. 360, 490 A.2d 402 (1985); In re Michael Pope, 69 Pa.Cmwlth.Ct. 572, 452 A.2d 581 (1982) (adopting opinion of lower court at 23 D & C 3<sup>rd</sup> 328); Bahain by Bahain v. DPW, 89 Pa.Cmwlth.Ct. 644, 493 A.2d 803, 807 (1985); In re the Interest of Treva Stover, 297 Pa.Super. 116, 121, 443 A.2d 327, 329 (1982);

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Commonwealth v. Peter Maggio, 353 Pa.Super. 157, 509, A.2d 383 (1986); Babco v. Rice, 13 Pa. D & C, 3 441 (1980); In re Joyce Z., 4 Pa. D & C.3d 596 (1975); Eubanks v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1978), modified and vacated, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 61 L.Ed.2d 694 (1981), on remand, 673 F.2d 647 (3<sup>rd</sup> Cir. 1982), reversed and remanded on other grounds, 456 U.S. 89, 104 S.Ct. 900, 79 L.Ed. 29 73 (1984); Clark v. Cohen, 613 F. Supp. 684 (E.D. Pa. 1985), aff'd 794 F.2d 79 (3<sup>rd</sup> Cir. 1986).

The mandatory nature of these obligations under the Mental Health/Mental Retardation Act is so clear and obligatory that the courts have repeatedly held that an appropriate residential facility must actually be created for a mentally retarded person if none presently exists, Schmidt, Sauers, Pope, Maggio, Halderman, Clark, Joyce Z., supra, and that a purported unavailability of funds does not relieve the state of its obligations under the 1966 Act. Schmidt, Sauers, Halderman, Joyce Z., Babco, supra. See also, Maggio, Pope, supra; County of Allegheny v. Commonwealth of Pennsylvania, 507 Pa. 360, 490 A.2d 402, 410-411 (1985) (citing Schmidt). Pennsylvania has recognized that persons who are mentally retarded enjoy a liberty interest in placement in the least restrictive and most normalized facility which appropriately meets the needs of the individual. Schmidt, Stover.

The Pennsylvania Supreme Court has spoken definitively in this area on several occasions. For example, in In re Joseph Schmidt, the Supreme Court stated the following:

We start the inquiry with the realization that the mentally retarded are in no way responsible for their dependence, and that society's concern for their welfare should not be grudgingly or reluctantly given. . .

It is evident that the dichotomy sought to be achieved under the Act was intended to separate and yet coordinate state/county responsibilities to ensure the services of all of the residents of the state in need of such services. The state, through the Department, was given the responsibility for the overall supervision and control of the program. Read together, Section 201(1), (4) of the Act, 50 P.S. Section 4202(B), impose the duty and grant the authority to ensure adequate services for the mentally retarded. Under Section 201 (1) of the Act, 50 P.S. Section 4201(1), the state has the obligation to provide adequate mental health services and the Department is charged with the duty to implement that obligation.

It is the state's responsibility to find a placement for Joseph with a staff-patient ratio suitable to his needs. The state will not be allowed to ignore that responsibility and that obligation by stating that an appropriate facility is not immediately available. Section 201(1) of

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the Act, 50 P.S. Section 4201(1), requires the state to provide adequate mental retardation services for persons in need of them. Joseph Schmidt has clearly demonstrated his need and the state must respond to it.

Schmidt, 494 Pa. at 91, 94, 98, 429 A.2d at 633, 635, 637 (some emphasis in original). See also, Bell v. Thornburgh, 491 Pa. 263, 270, 420 A.2d 443, 447 (1980) ("DPW must assure the availability and equitable provision of adequate mental health and mental retardation services for all persons in the state who need them.") (Emphasis added).

The Pennsylvania Supreme Court and the Commonwealth Court again specifically and unanimously recognized the entitlement of mentally retarded persons to necessary services in In re April Sauers, supra. In Sauers, the Commonwealth Court en banc examined Sections 4201, 4301, 4508, 4509, and 4510 of the Mental Health/Mental Retardation Act and held that the state is unconditionally required to provide adequate residential placements to meet the varied needs of every mentally retarded person; the Pennsylvania Supreme Court unanimously affirmed this decision without further opinion. The Commonwealth Court's decision emphasized the absolute and mandatory nature of the state's obligations under the Mental Health/Mental Retardation Act even in situations where initially budgeted monies fall short of the need for essential services:

Several sections of the Act expressly apportion the financial liability for provision of mental health services. Section 507, 50 P.S. Section 4507, requires the Commonwealth to pay the entire cost of certain mandated programs. Section 509, 50 P.S. Section 4509(1), obligates the Commonwealth to defray 90% of the cost of county programs authorized by the Act. Section 510, 50 P.S. Section 4510, authorized the Department to make supplemental grants to the counties to assist them in meeting their obligations under approved plans. Additionally, there is statutory machinery which authorizes county administrators to apply for relief from their financial liabilities under Section 301, 50 P.S. Section 4301, when it would be economically unsound to hold them to their obligations. 50 P.S. Section 4508. Moreover, Sections 508, 510 and subsection (5) of 509 of the Act all contemplate the possibility that unbudgeted, unappropriated fiscal demands might be made on the State Treasury to pay for essential services which the Act requires the Commonwealth to provide under Section 201, 50 P.S. Section 4201(1).

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Sauers, 168 Pa.Cmwlth.Ct at 89-90, 447 A.2d at 1135-36 (emphasis supplied). In light of these well-settled legal principles, the Supreme Court and Commonwealth Court both upheld the trial court's order that unbudgeted monies be expended by the Commonwealth to create and provide a residential placement for April Sauers.

In County of Allegheny v. Commonwealth, 507 Pa. 360, 490 A.2d 402 (1985), the Pennsylvania Supreme Court reiterated its interpretation of Schmidt:

[T]he State bears the primary responsibility and the State must provide the political subdivision with the taxing power, or the appropriations, see In re Schmidt, 494 Pa. 86, 429 A.2d 631 (1981)

necessary to discharge its statutorily delegated duty to provide detention facilities. [W]here the political subdivision can demonstrate that its resources for these purposes are clearly inadequate, it is the duty of the State to either provide additional facilities or to allocate to the political subdivision reasonable funds to discharge its delegated responsibility. See, In re Schmidt (some citation omitted).

Moreover, in Bahian, the Commonwealth Court recently reiterated the state's mandatory responsibility to provide appropriate residential placements for the mentally retarded:

"As we have previously held, the Department does have the obligation to provide funding for services, including residential placement, where, as is alleged here, commitment to an institution is unnecessary." 89 Pa.Cmwlth.Ct. at 650, 493 A.2d at 807.

Finally, the Pennsylvania Superior Court has also clearly held that the state's obligations to the mentally retarded are mandatory in nature. In the Interests of Treva Stover, supra, the Court stated that:

We agree with appellant that she is entitled to placement in the least restrictive alternative available. This is so as a matter of state law, without regard to any rights afforded by federal law or the state or federal constitutions.

Stover, 297 Pa. Super. at 121, 443 A.2d at 329 (citations omitted and emphasis added).

In City of Philadelphia v. Department of Public Welfare, 128 Pa. Cmwlth.Ct. 565, 564 A.2d 271 (1989), the Commonwealth Court found that the Pennsylvania Department of Public Welfare (DPW) "breached its duty under the Act to assure the availability and equitable provision of adequate mental retardation services for all persons who need them." 564 A.2d at 275. President Judge Crumlish excoriated DPW's budget process which conducts "no

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investigation, analyses or audit

. . . to assess the actuality or legitimacy” of counties’ funding needs, and also found DPW to possess “utter disregard of the needs of mentally retarded persons and their families.” *Id.* at 274-275. (Emphasis in original). The court stated that DPW’s inaction in providing necessary services “is a classic case of bureaucratic inertia which has allowed a clearly foreseeable crisis to occur without employment of statutorily authorized procedures and remedies.” *Id.* at 275. In order to effectuate relief to the plaintiffs before the court, the court ordered the Department of Public Welfare to immediately seek an interim grant of approximately seven and one-half million dollars from the Pennsylvania General Assembly. The rationale behind the court’s order was clear--inasmuch as DPW had failed to seek adequate appropriations to meet the substantial needs of the plaintiff’s class, the court mandated DPW’s compliance with its responsibilities under the MH/MR Act, i.e. to immediately seek adequate funds through the appropriations process so that the Legislature may act to remedy the situation. The court left little doubt that it would act if additional judicial action was necessary, as it also ordered the City of Philadelphia to immediately reinstate necessary programs pending receipt of additional state monies:

The crying needs of and imminent harm to the individuals at issue here, unable to speak out for themselves, cannot be ignored while the intricacies of the General Assembly’s budgetary process unfold.

*Id.* at 275-276.

The courts’ holdings in Schmidt, Sauers, et al. were grounded upon clear and comprehensive statutory language. Section 4201 of the Pennsylvania Mental Health and Mental Retardation Act leaves no confusion in this area:

The department shall have the power and its duty shall be: (1) to assure within the state the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them. . . .

The legislative history of the 1966 Mental Health/Mental Retardation Act firmly supports the holdings in Schmidt and Sauers. For example, Senator Pechan, the principle sponsor of the Act--an Act developed as the sole item of business of a Special Session of the Pennsylvania Legislature--stated the following in prepared remarks on the Senate floor in support of the measure:

The object of this legislation is to make it possible for every mentally disabled person to receive the kind of treatment he needs, when and where he needs it. It will make those services available to every citizen in every community. . . .

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1966 P. Legis.J. 3 D.Spec.Sess., No. 33, 76 (September 27 1966).

It is also significant that shortly after the Supreme Court decided Schmidt, legislation was introduced in the Pennsylvania General Assembly which would have amended the Mental Health/Mental Retardation Act to eliminate the entitlement to mental retardation services mandated by the Act and Schmidt. House Bill 1824, Session of 1981. The purpose of H.B. 1824 was unquestionably to remove this entitlement, as the proposed legislation provided as follows:

Persons eligible for services under this Act shall receive the level of service determined by the Department or the counties as the case may be, within the limits of the resources available to the Commonwealth. It is the intention of the General Assembly that the Department or the counties may not be compelled in individual cases, or on behalf of any class of individuals, to provide services, treatment, or habilitation for which funding has not been provided by the General Assembly.

The enactment failed to gain the approval of the Pennsylvania Legislature, and did not become law. The failure of H.B. 1824 to gain the approval of the Pennsylvania Legislature is another circumstance which supports the conclusion that Pennsylvania's mentally retarded citizens enjoy an entitlement to those services which their condition requires.

No reported appellate decision exists in which a mentally retarded person was denied necessary services in any judicial proceeding due to funding constraints. Indeed, every court which has addressed this issue has held that Pennsylvania law mandates that each mentally retarded individual is entitled to those services which his condition requires. See, cases cited supra.

Further, DPW has recognized an entitlement to services on the part of mentally retarded citizens. After the Pennsylvania Supreme Court decided Schmidt, DPW sought reargument before that Court. In DPW's Petition for Reargument, the Department stated unequivocally that the Schmidt holding had created an entitlement to services:

The Court's reliance on §201(1) of the MH/MR Act, 50 P.S. §4201(1) to establish an unqualified right to services is erroneous in that. . .no unconditional right to services--irrespective of funding--can or does exist under the Act. Thus, the Court erred in finding a limitless duty on either the Commonwealth or the County.

Petition for Reargument of Department of Public Welfare at 5-6 (emphasis supplied). The

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Pennsylvania Supreme Court was unmoved by the Department's claim that this "unqualified" and "unconditional right to services irrespective of funding" which places a "limitless duty" on the Department was an improper interpretation of the Mental Retardation/Mental Health Act, as the Supreme Court denied DPW's Petition for Reargument. Moreover, in DPW's Petition for Allowance of Appeal in Sauers, DPW stated in unmistakable terms that Sauers created an entitlement to services:

In the instant case, Commonwealth Court has held, in effect, that there is a right to the least restrictive alternative which could be created, irrespective of the availability of funds. (Emphasis in original petition of DPW).

The Pennsylvania Supreme Court agreed to hear the Sauers case, and the matter was briefed before that Court<sup>1</sup>. In DPW's brief to the Pennsylvania Supreme Court, the Department again clearly and unequivocally stated that the Commonwealth Court's decision had created an entitlement to services:

Orders such as that under review here are clearly issued without the necessary concern for the availability of resources. They embrace a view that the obligations under the MH/MR Act are without limit.

Brief of DPW in In re April Sauers, at 20-21.

The federal courts have also explicitly recognized the obligatory nature of the state/county obligations under the Mental Retardation/Mental Health Act. In Halderman v. Pennhurst, the Court discussed the mandatory obligations of the state and county to provide and fund appropriate mental retardation services under the Act:

The Schmidt court made clear that the Pennsylvania law imposed the obligation on both levels of government to provide habilitation in the environment providing the least restriction of personal liberty consistent with habilitation. Insofar as financial burdens are concerned, it merely referred to Sections 508 and 509 of the MH/MR Act of 1966, which impose funding duties on both levels of government, and which provide mechanisms for the allocation of appropriated funds among the counties. 429 A.2d at 633. The Commonwealth was ordered to find a placement for Schmidt in an institution with a staff-patient ratio suitable to his needs. There is no suggestion in the Schmidt opinion that this order

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<sup>1</sup>DPW's filings in the Supreme Court in Schmidt and Sauers are, of course, matters of public record.

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would be qualified by the necessity for appropriations. Obviously the Schmidt Court anticipated that the adjustment mechanisms of Sections 508 and 509 would be operated in good faith. Nothing in the record which is before us on this appeal suggests that those mechanisms will be dismantled, will be operated other than in good faith, or are inhibited by the provisions of the judgement. On the record we, like the Supreme Court of Pennsylvania, must assume that the Pennsylvania legislature intends compliance with its statutes.

Halderman, 673 F.2d at 654-656 (emphasis supplied).

Consequently, the entitlement of mentally retarded persons to receive necessary residential treatment, and the obligation of local MH/MR administrations and DPW to provide and finance such appropriate treatment for the mentally retarded persons are clearly established in the statutory and decisional law.

#### **V. Proposal to Improve Transition Services for Persons with Autism and for All Children with Disabilities.**

The difficulty in transitioning individuals with Autism from school age to post-school programming is particularly acute and represents one of the most serious challenges which families face. Unfortunately, because transition planning is rarely extensive in Pennsylvania, and typically involves merely providing links to agencies such as MH/MR and the Office of Vocation Rehabilitation, transition planning seldom involves intensive assessment, instruction, and services.

After the child reaches the age of 21, families are frequently denied services within the Mental Health/Mental Retardation system. While many individuals with Autism should qualify for services within the MH/MR system because of their limited social skills and adaptive behaviors, county agencies often assert a lack of funding and/or a lack of responsibility to program for individuals within the Autism spectrum. Because no user-friendly dispute resolution system exists in the MH/MR program to challenge decisions made by county agencies, the determinations of county agencies are usually effectively final. Families are thus left with one manifestly inappropriate option--commitment proceedings.

In order to address these deficiencies, the author proposes that the state Department of Education should conduct intensive monitoring of school district transition programs by reviewing randomly selected IEPs of students age 16 or over in specific school districts, so that each school district has such a review at least every five years.

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The current compliance monitoring by the Pennsylvania Department of Education uses the following questions (to be answered "yes" or "no") with regard to transition planning in IEPs:

### **Transition Planning**

The following information is included:

- 121. Evidence of age-appropriate transition assessment(s).
- 122. Measurable post secondary goals (outcomes) for education or training and employment, and, as needed, independent living.
- 122a. Location, Frequency, Projected Beginning Date, Anticipated Duration, and Agency Responsible for Activity/Service identified.
- 123. Transition activity/services (including courses of study) that focus on improving academic and functional achievement of the child to facilitate their movement from school to post school.
- 124. Measurable annual goals that will reasonably enable the child to meet the desired post-school goals.
- 125. For transition services that are likely to be provided or paid for by other agencies, evidence that representatives of the agency(ies) were invited to attend the IEP meeting.

While these compliance monitoring questions provide a minimally adequate basis for evaluating IEPs on the issue of transition, it is respectfully submitted that greater emphasis upon issues such as measurable goals for transition services, the use of specific assessments to identify transition needs, and the utilization of research-based instruction for transition programming should become more integral parts of PDE's evaluative processes.

In order to address the gaps in transition planning for individuals with disabilities in general, and for adults with Autism in particular, remedial legislation appears necessary. This legislation should involve a clear, independent, fair and user-friendly system by which parents can contest the determinations of county administrators concerning eligibility and entitlement to services. This fact finding/adjudicative process could be modeled after the special education due process system which presently exists, and has been successfully utilized for over 30 years under federal and state laws related to special education. See 20 U.S.C. Section 1415; 34 C.F.R. Sections 300.500 to 300.520; 22 Pa. Code Section 14.162.

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**V. Conclusion.**

Transition services for children with disabilities are in a state of legal and programmatic evolution. When considered in concert with Pennsylvania's entitlement through the MH/MR system, it is clear that a more structured and transparent system to allow access to services for persons with Autism is required. Although many fundamental protections already exist through IDEA's emphasis upon transition services and Pennsylvania's judicial interpretations of an entitlement to MH/MR services, it is also clear that legislative initiatives to buttress transition planning and to obtain meaningful oversight of school districts' efforts in this field are necessary. This paper has presented meaningful solutions to these current gaps, and Pennsylvania state government is encouraged to consider remedial proposals in these areas.

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