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This issue deals with the problems of protecting, educating, and nurturing children. The cover picture was taken in a North Carolina preschool program. Photo by Tina Gentry.

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CHILD ABUSE AND NEGLECT: Its Causes and Prevention

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THE CURRENT NATIONAL ATTENTION on child abuse initially focused on the "battered child syndrome,"[1] a clinical condition resulting from serious physical abuse of the child, usually by the parent. Physical signs of abuse were apparent; the task was to convince professionals to notice those signs and to understand that physical trauma in children could be deliberately inflicted as well as accidental.

More recently, broader definitions of child abuse and neglect have stressed less visible but equally devastating forms of maltreatment, including multiple minor evidences of chronic physical abuse and neglect, emotional abuse and deprivation, and sexual assault. The battered child is now recognized as being the most extreme form of a varied and common problem.

This approach also includes an increased awareness of the complexity of the problem and the need to help abusing families.

[The important point to emphasize is] . . . the family's capacity to protect its child, either from the consequences of their own angry feelings toward him, or from the hazards of his nurturing environment. Whether or not an injury is intentionally inflicted is of interest and possibly of importance, but understanding its origin and identifying what can be done to strengthen the child's environment might better be the goals of diagnosis of child abuse.[2]

All forms of abuse have serious consequences for the child. Several of these effects should be emphasized. (1) The child's exposure to abuse and neglect becomes his model for child-rearing, so that the abused child of today becomes the abusing parent of tomorrow. (2) The abused child develops fearful and/or aggressive and often violent ways of dealing with others. (3) Little self-confidence and personal esteem develops in the abused child, so that he comes to view himself as a person of limited value. He comes to feel that he must fight for what he gets or else attain it by luck or deviousness. (4) The child who has been singled out as the target for abuse and neglect develops a sense of isolation from others.

THE STUDIES OF CHILD ABUSE have provided helpful insights into identifiable factors related to the problem. For example, we now know that, contrary to our earlier beliefs, the parents of abused children are rarely seriously disturbed or psychotic. Social isolation, marital stress, unemployment, and other strains associated with living in our complex society are much more frequently found in abusive families than mental aberration. Current information on child abuse is the basis of several precepts that are important in developing ways to help families. (1) Most parents of abused children have personality characteristics no different from those of the general population. (2) The strongest influences on a child's life are those people and settings that directly affect his home life, usually his parents and his peer group. (3) The most effective programs for most abused children actively strengthen these primary influences, the family and the child's immediate environment.

Society, however, seems predisposed to ignore these precepts. Even many people who work with families would rather believe that parents of abused children are "those people," separating abusive parents from themselves as qualitatively different. People have a natural inclination to blame the perpetrators, usually the parent, when they see an abused or neglected child. They also often want to punish. Limiting the problem of abuse to (1) the perpetrator and (2) the immediate acts that account for the child's condition conveniently confines the exclusive responsibility to the perpetrator. It further separates the potential helper from the parents and begins and sustains an adversarial relationship with the family that needs help.

The net effect of such attitudes is further splintering of supports in the child's life, which confirms his belief that people are abusive and reinforces his developing mistrust of others. His view of the world as threatening to his sup-

1. C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller, and Henry K. Silver, "The Battered-Child Syndrome," *Journal of the American Medical Association*, 181 (July 7, 1962), 17-24.

2. Eli H. Newberger and James N. Hyde, Jr., "Child Abuse: Principles and Implications of Current Pediatric Practice," *Pediatric Clinics of North America*, 22 (August 1975), 695-715.

ports is enhanced by punishing his parents or separating them from him. The child is left feeling isolated and powerless. He may feel that he is to blame for the events, and his view of himself as a "bad" person is confirmed.

A more constructive approach to the problem of child abuse and neglect can evolve from an appreciation of factors within families and society that contribute to stresses that result in maltreatment of children. In considering this approach, child abuse can be conceptualized as having three basic components:[3] (1) a potential for abuse, (2) a very special kind of child, and (3) a crisis or series of crises.

The potential for abuse refers particularly to the parents. Their childhood experiences are of primary importance. The child raised in an abusive environment is much more likely to become an abusive parent than a child raised in a home that provided emotional and physical nurturing. Many studies have traced the maltreatment of children so clearly from generation to generation that it could be argued that abusiveness is a hereditary disorder.

This extensive family history of child abuse or neglect among abusing parents appears to be intertwined with other secondary characteristics of parents with a strong potential to abuse. For example, parents are often socially isolated. They never develop the ability to seek help from other people when they are in trouble.

Never having had their normal dependency needs met as children, they carry excessive dependent strivings throughout their adult life. Often in abusive families both parents bring overwhelming dependency needs into the marriage, needs that neither can meet for the other. This same phenomenon explains the unusual way that parents with a strong potential for abuse regard their own children. They expect their children to do things for them and thus often have unrealistic expectations of the children. This atypical way to relating to their children, as though they expected their children to provide the parenting that they never had, is the role reversal that often is described in case studies of child abuse.

Abusing parents often display impaired impulse control, often through identification with violent adult models from their own childhood. They may invoke a moral justification of severe physical punishment learned from their parents to defend their actions. They have the handicap of damaged self-esteem that resulted from the criticism and rejection accorded them by adults during their own childhood.

The parent reared in an abusive setting often marries young in order to escape an intolerable home situation. Unwanted and early pregnancies, as an attempt to cement a tenuous marital bond and or provide parenting through the phenomenon of role reversal, provide added stress to immature parents.

The second component in the triad leading to child maltreatment is the special nature of the target child. Many studies support the finding that children with particular handicaps are more likely than others to be singled out for maltreatment. A common example is the child with a difficult temperament. He is irregular in his habits, unpredictable in his response to parenting, a poor feeder, a poor sleeper, and in general trying to the patience of the most stoic parent. The combination of such a child and immature, inexperienced parents who have expected that their infant would take care of them leads to an explosive situation.

Mentally retarded, congenitally deformed, brain-damaged, hyperkinetic, and emotionally disturbed children are overrepresented among abused and neglected children. The realization that one's child is retarded or imperfect in some other way deals a significant blow to any parent's self-esteem. Since the parents with the potential for abuse already have a low self-image, the birth of such a child may lower their self-image beyond a critical point.

The premature infant is especially vulnerable to maltreatment. Some studies indicate that as high as 40 per cent of abused or neglected children began life as premature or ill new-borns. Frequently, these babies also have congenital defects or mental retardation and are difficult to handle. The separation of mother and infant during the critical early weeks of life adds to the problem of forming an adequate maternal attachment.[4]

Normal children may also become targets for parental abuse. Children sometimes become negatively identified in the mind of the abusing parent. For example, they become the symbol of an unhappy marriage, the reminder of the deserting spouse, or the reflection of the parent's low self-esteem.

The third component of the maltreatment triad is the crisis or series of crises that helps to explain the timing of the maltreatment. Some crises are overwhelming and others seem trivial. They can be longstanding, like unemployment and poverty, or acute, like the breakdown of a washing machine.

Examples of major crises usually involve threats to existing support systems of the parent, like desertion or the temporary loss of a husband when he is called away on military duty.

The trivial crisis might seem absurd to the casual observer. For example, an angry mother described in detail how she spent all morning polishing the floors to a high luster only to have her two-year-old, half-awake from her nap, "deliberately urinate all over my waxed floors" on the way to the bathroom. We can see in the mother's statement some of the hallmarks we have already discussed, such as the unreasonable expectation that a two-

3 *See* C. Henry Kempe and Ray E. Helfer, *Helping the Battered Child and His Family* (Philadelphia and Toronto: J. B. Lippincott Company, 1972).

4 Marshall H. Klaus, Richard Jerauld, Nancy C. Kreger, Willie McAlpine, Meredith Steffa, and John H. Kennell, "Maternal Attachment Importance of the First Post-Partum Days," *New England Journal of Medicine*, 286 (March 1972), 460-63.

year-old will never have accidents. The statement demonstrates the fairly characteristic manner of speaking of the child as though she were an adult with an adult's full capacity for deliberate, purposeful, and organized behavior. It also shows how a very small crisis can set into motion the dynamics that lead to child abuse.

The first step in helping an abusing family is to assess its weaknesses and strengths. This effort should help the parent realize that the goal is to help rather than condemn. It may also relieve parents of some guilt and shame. They are accepted as people and respected even as they talk about themselves and their problems no matter how "bad" they appear. The parents will frequently assume a defensive posture if the interview takes the form of an interrogation rather than a free discussion of family strengths and weaknesses. Those who work with parents must constantly handle their own negative feelings toward adults who have hurt children.

Since the parents being interviewed often have low self-esteem and are afraid to trust, it is important that an open and honest statement be made early in the discussion identifying the problem of suspected abuse or neglect. The words abuse and neglect need not be used, but the existence of conditions that put the child in jeopardy must be stated explicitly. This open stance may require a helpful use of authority. For example, if the therapist is obliged to report the abuse or neglect to an agency charged with protecting children, then the parents should be told this before the report is made. They need to learn that the proper use of authority can release strength and support to them in solving their problem. They need to know that they are respected as people who want to become better parents to their children by accepting help with problems either in the outer physical environment or within themselves, or both. The abusing and neglecting parent, when he places his child in a dangerous or life-threatening situation, is often asking for help. Such parents want help before their capacity to protect the child is totally lost, and therefore signal in this extreme way that they want preventive action to be taken.

Parents need to know early in work with them that, although the protection of the child is a foremost goal, the preservation of their family is equally important. When they know this, the parents may identify their own hopes and plans for changing the home situation. For example, the concerned parent may help identify support systems within the extended family or community.

Many parents, despite their tendency to be socially and emotionally isolated, are able to "borrow strength" to cope with very stressful life situations, both from a one-to-one therapy relationship and from interaction with other helpers. A team of professional and lay people, using the resources of the larger community, can provide a reservoir of strength and support for parents.

THE PRECEDING SECTIONS pointed out characteristics of abusing and neglecting families and ways to help these families increase their ability to protect their children. Two external forces that cause stress in families also need attention. These are the collective and institutional factors that affect family life.

Collective factors include both values held in our society and societal conditions that affect us all. They range from transiency of much of our society to the poverty in which seven million children live in the United States today. The mobility of our society has taken on a cultural value. To move has become equated with promotion, self-sufficiency, and independence. Employers view moving employees from one place to another as their prerogative, no matter what effects the move may have on the family. And they are largely supported in this by their employees, who accept it as part of the American life-style.

The effect of mobility on the family has been tremendous, if not devastating. Roots are pulled, extended families abolished, customs left behind, and skills to cope with new and different settings left to individual invention. One student of society's impact has noted that:

> . . . in recent decades, a number of developments—many themselves beneficent—have conspired to isolate the family and to reduce drastically the number of relatives, neighbors, and other caring adults who need to share in the socialization of American children. Among the most significant forces: occupational mobility, the breakdown of neighborhoods, the separation of residential from business areas, consolidated school districts, separate patterns of social life for different age groups and the delegation of child care to outside institutions.[5]

Another longstanding collective force is the view that adults, especially parents, can treat children as they wish on the basis that they are providing discipline and instilling values. The same acts done to a child, if done to an adult, could result in a law suit for personal assault. Since children are physically and mentally vulnerable, they are the ones exploited when families are in stress.

Institutional practices and policies also contribute to child abuse and neglect. Many of these policies in educational, health, and social agencies arise from the tendency of these institutions to give direct care to children, ignoring the family and thereby interfering with the beneficial aspects of the home environment. These agencies might consider providing less direct care for children and more help to parents to enable them to care more adequately for their children.[6]

Institutional policies and practices reflect the collective societal values. However, more education programs are acknowledging the importance of the children's home environment by including parents with their programs for children, and health and mental health workers in-

5. Eric Bronfenbrenner, as quoted in *Newsweek* (September 22, 1975), 50.

6. Earl Schaefer, "Ecological Perspectives on Family Relationships," in *Intervention Stretegies for High Risk Infants and Young Children*, ed. T. Tjossem, University Park Press, in press.

creasingly focus on dealing with the needs of families rather than on isolated individuals in a home. Given the societal factors discussed earlier, services for families under stress must expand. In brief, the child is best helped when parents are helped to keep the family intact.

With these factors in mind, programs to help families in stress should emphasize (1) the timeliness of help, (2) the need to support the role of the family in the child's life, and (3) the need for alternate ways to meet the varying needs of families in stress.

THIS DISCUSSION of child abuse and neglect would be incomplete without trying to draw some conclusions about how this knowledge can contribute to better programs to prevent and treat the problem. We must first acknowledge that the causes of child abuse and neglect are many and complex, and no single professional approach or agency can adequately deal with all of them. It is important that established agencies and services within the community work together to help these families. The role of the county social services department as the coordinating agency has been established by law, but this agency cannot do the job alone. The first need in providing better care of abused and neglected children is an organization of community groups in each county to coordinate services. At the University of North Carolina School of Medicine a project funded by the National Center on Child Abuse and Neglect is now working with the Area Health Education Center system to hold conferences in all areas of the state. The primary purpose of these conferences is to promote better coordination of services. Many counties in the state have coordinating committees that usually include representatives of the social services department, private and public health-care providers, mental health services, education, and legal services.

Two groups in the state have taken the lead in developing interdisciplinary programs for maltreated children, the hospitals and the developmental evaluation clinics. Both of these groups have staffs with multidisciplinary backgrounds, which has helped their organizations realize the need for a broad approach to the problem of abusing and neglecting families. The state's three university hospitals and several community hospitals now have teams consisting of social workers, physicians, nurses, and mental health workers who help identify and treat abused or neglected children and their families in coordination with county social services departments. The developmental evaluation clinics recently entered into a formal agreement to serve as a consultant to the departments of social service in cases of child abuse and neglect. The interdisciplinary nature of these teams should serve as a role model for coordinated activity in local communities. It is important that coordination extend outside the institutional setting into the community if effective help is to be given these families.

A second major area of need is for community education. The public is usually exposed only to severe cases of abuse, and the natural response is anger toward the parent. The public needs to understand the wide spectrum of child abuse and neglect and the need to help support families rather than to punish them — among other reasons because ultimately the public will have to pay the costs of child abuse and smashed families. Speakers are needed, including properly trained laymen, who will go into the community and talk to a wide range of groups such as parent-teacher associations, church circles, and civic clubs about child abuse and neglect.

The third area of need and the heart of any comprehensive child abuse and neglect program is the development of family support systems. Parents Anonymous is an organization in which groups of parents who have abused, or feel that they are potentially abusing, meet to help each other. This national organization has a North Caroling coordinator and is now forming chapters throughout the state. Parents Anonymous not only is helpful to many stressed families in a direct way but also contributes to greater community awareness of the fact that abusing parents want to solve their problems and improve their parenting skills.

Another important approach to helping families has been the use of lay therapy. Basically, lay therapy consists of the work done with abusing families by nonprofessionals who have been successful parents. These lay therapists emphasize helping the parents deal with life's everyday stresses. The laymen are able to devote a tremendous amount of time and effort to providing the parents with emotional support so that they can mature into effective or protective parents.

The schools can also contribute to developing family support systems by providing parenting education in their school's curriculum and through continuing education programs for adults.

It is particularly important that health professionals who deal with families during the prenatal and immediate postnatal period help support the development of close attachments between the parents and the child, especially for premature or physically defective infants who present particular stress to their parents in providing care.

The fourth major area of effort to help stressed families is respite care. This service gives the stressed family a chance to regroup while the child is provided good care by someone else. The service often involves day care so that the mother can be away from the child for a significant period of time each week. This opportunity can help the stressed family financially and also allow the mother some fulfillment of her own personal ambitions. One particularly innovative approach is day-care centers in high schools, which provides both day care for the children of school-age mothers and a site for teaching child care and development.

Emergency or short-term day care is another need. Potentially abusing parents often recognize when stress

[*Continued on page 14*]

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NORTH CAROLINA'S CHILD ABUSE REPORTING LAW

Mason P. Thomas, Jr.

The author is an Institute faculty member whose fields include social services and juvenile law.

THROUGHOUT HISTORY, the fact of parental child abuse has been repressed and denied. Society and our legal system have assumed that parents will love and protect their own children. Thus, the tradition of the law in North Carolina has been that a parent may do anything to his child in the name of discipline without state interference unless the punishment is malicious and inflicts serious bodily injury.

Periods of recognition and reform have occurred throughout history. For example, about 100 years ago, the case of an abused foster child drew public attention through press reports of her bizarre physical injuries. The foster mother was prosecuted, convicted, and sentenced, and the child was sent to an orphanage. As a result of the wide publicity that this instance of child abuse had, the New York Society for the Prevention of Cruelty to Children was formed to protect abused and neglected children. This private group, which developed considerable power and influence in the court system, had a punitive approach to parents. Its rescue efforts generally resulted in prosecution of the parents and placement of the child in an institution.

Other private groups formed to protect both children and animals in the early part of the twentieth century helped develop public understanding of the problem. These groups have generally declined in influence as government has assumed child protective roles, but they began a less punitive philosophy than the New York Society's approach. In general, they had some understanding of the social, economic, and mental health aspects of parental abuse and neglect. Their approach involved services, economic aid, and help to parents in coping with their problem. Thus, they were the forerunners of the present protective services approach through which a social agency helps the parents to become responsible.

Another period of recognition and concern over child abuse occurred in the United States in the 1960s. The reforms that resulted from it were due to technology rather than to a particular sensationalized case of child abuse. Through X-rays, pediatric radiologists began to identify injuries in children that could not have been accidental. The medical profession took the lead and developed a name for the phenomenon they saw — the "battered child syndrome."

Because of the lack of focus in public concern about child abuse and the confusion over appropriate objectives — whether to punish the parents or protect the children or both — the Children's Bureau of the U.S. Department of Health, Education, and Welfare called an interdisciplinary conference to discuss the problem. The result of this effort was the Children's Bureau model for a child-abuse reporting law. Various groups proposed at least five different models for reporting laws, and public concern was high in all states. Every state adopted some form of a child-abuse reporting law between 1963 and 1967.

North Carolina has had two reporting laws — a voluntary law enacted in 1965 and the mandatory law of 1971, which repealed the 1965 legislation. These two laws have served to increase public awareness and understanding of the problems of child abuse and neglect, and reporting has increased dramatically since the mandatory law was adopted.

SUMMARY OF LAW

Who Reports? Any citizen who knows that a child is abused has a legal duty to report the case to the county department of social services in the county where the child resides. The reporting law is mandatory — it says that one who knows of child abuse *must* report it; yet no criminal penalty is specified for failure to report.

Responsibility of Professionals. One unique feature of North Carolina's law is that it gives professionals a higher duty to report than others. A person classified as a "professional" under the law has the legal duty to report any case if he "has reasonable cause to suspect that any child is an abused or neglected child." Thus, professionals must report even *suspected* cases of abuse or neglect; others must report abuse only when they have actual knowledge.

A "professional person" under the law is defined to include: physician, surgeon, dentist, osteopath, optometrist, chiropractor, podiatrist, physician-resident, intern,

registered or practical nurse, hospital administrator, Christian Science practitioner, medical examiner, coroner, social worker, law enforcement officer, mental health worker, psychologist, public health worker, school teacher, principal, school attendance counselor, and other professional personnel in a public or private school.

What Behavior Is Reportable As Abuse or Neglect? Child abuse is defined by law to include primarily physical injuries to a child and unlawful sex acts upon a child. The reporting law covers all minors (those under 18). Abuse includes nonaccidental physical injuries to a child by a parent or other caretaker who acts in the place of the parent if the injury causes or creates a substantial risk of death or disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ. Child abuse also includes exposing a child to a substantial risk of such nonaccidental physical injuries.

The definition of child neglect that is reportable is taken from the statute defining the juvenile jurisdiction of the district court over neglected children. This definition is broader than the definition of child abuse and more subject to subjective interpretations. A neglected child is "[a]ny child who does not receive proper care or supervision or discipline from his parent, guardian, custodian or other person acting as a parent, or who has been abandoned, or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law."

Report Where? Reports of abuse or neglect are to be made to the county director of social services in the county where the child lives or may be found. A report may be made orally, by telephone, or in writing. The law requires that the report include certain identifying information, including the name and address of the child and his parents, his age, his whereabouts, the nature and extent of his injury or neglect, and any other information known to the reporter that may be helpful in establishing the cause of the injury or neglect.

If the report is made orally or by telephone, the reporter must give his name, address, and profession (if he is a professional person). He is also required to confirm the information about child abuse or neglect in writing when requested by the county director of social services. If the reporter is a professional, his report must include his professional opinion as to the nature, extent, and causes of the injuries or the neglect.

Immunity to Reporters in Good Faith. The reporting law is designed to encourage reporting of child abuse and neglect in order to protect children. Thus two sections of the law grant immunity from civil or criminal liability to anyone who reports in good faith under the reporting law.

Responsibility of County Department of Social Services. The county director must make or arrange for "a prompt and thorough investigation in order to ascertain the facts of the case and to evaluate the extent of the abuse or neglect." After such investigation and evaluation, the director must do one of the following, depending upon his findings in a particular case:

1. If the director or his staff finds that the child has not been abused or neglected, he must notify whoever made the report of his findings.
2. If the investigation reveals abuse or neglect, he must decide whether immediate removal of the child is necessary for the child's protection. If so, the director must initiate a court proceeding to secure custody by signing a juvenile petition; after a juvenile hearing, the child may be placed in the custody of the agency if the court finds the child to be in such jeopardy that he must be removed from his home.
3. If the removal of the child does not seem necessary, the director must provide or arrange for "protective services."
4. If he finds that the child has been abused as reported, he must report his findings to the district attorney, who must determine whether criminal prosecution of the parents or caretaker is appropriate.
5. The director must submit a report of the alleged child abuse or neglect to the Central Registry, which the law requires to be maintained by the Division of Social Services in the Department of Human Resources. The report is to state whether the reported abuse or neglect was confirmed upon investigation.
6. In fulfilling any of these duties, the director is authorized to use the staff of the county department or the resources of any other available public or private community agencies.
7. The director may also consult with available state or local law enforcement agencies, who are to help investigate and evaluate the seriousness of any report of child abuse or neglect when requested by the director.

THRUST OF THE LAW

The thrust of the child-abuse reporting law is to identify children at risk and take appropriate protective action. Thus, in effect the county department of social services must make a social evaluation of the extent to which a child reported to be abused or neglected is at risk. It has been assumed that most cases can be handled through the staff of the county department of social services in providing "protective services"—defined by the statute to mean "casework or other counseling services to parents or other caretakers as provided or arranged by a director utilizing the staff of the county department of social services or other community resources which are designed to help such parents or other caretakers to prevent child

abuse and neglect, to improve the quality of child care, to be more adequate parents or caretakers, and to preserve and stabilize family life." Thus, the bias of the North Carolina law is to avoid unnecessary separation of parent and child – to keep the child in his own home, if it is safe, while protective services are being provided.

Obviously, delicate questions of judgment are involved – and sometimes there are sharp disagreements of opinion among professionals in various local agencies.

PUNISHMENT OF PARENTS

While identifying children at risk and providing protective services is the basic thrust of the reporting law, the philosophy of child protection of some professionals conflicts with the philosophy implied in the reporting law and related criminal statutes. Under the statutes any parent who abuses his child and is subject to being reported under the reporting law is also guilty of a criminal misdemeanor. Further, any parent or other person who contributes to conditions that cause a child to be neglected is guilty of a criminal misdemeanor. Therefore, any child abuse or neglect case may involve criminal prosecution.

The experience within the state under the 1971 reporting law suggests that social services professionals and district attorneys tend to think somewhat differently about child abuse and neglect cases. Social services professionals are trained to think about the social aspects of the case – whether the child is at risk; the chances for keeping the child and family together; whether protective services will be helpful; or whether it is a good idea to place the child in foster care for his protection by agreement with the parents. In general, the social services professionals try to avoid court proceedings, both juvenile cases to secure custody of the child and criminal prosecution of the parents. On the other hand, the district attorney tends to think in terms of whether there is sufficient evidence to convict the parent of the criminal offense of child abuse or neglect. Or he may feel that the purpose of the reporting law is to protect the child – the victim – by separating him from the source of risk, the family, and by prosecuting the parent. In fact, the district attorney may feel that prosecution and imprisonment of the parent is the only effective deterrence to further child abuse. These differences of professional and personal judgments cause conflicts at the community level in administering child protective services.

INFORMATION FROM CENTRAL REGISTRY

The reporting law requires that the Department of Human Resources maintain a central registry of abuse and neglect cases "to compile data for appropriate study of the extent of abuse and neglect within the State and to identify repeated abuses of the same child or other children in the same family." The information in the registry is confidential but may be used for study and research under policies approved by the Social Services Commission.

Table 1 shows the raw data from the registry for each of the last four fiscal year periods since the mandatory reporting law became effective on July 1, 1971. During this four-year period, 95 children died in neglect and abuse cases – 56 from abuse and 39 from neglect.

A number of problems related to the registry should be mentioned. It is an incomplete data base for making conclusions about the problem, since not all cases are reported at the county level and not all counties report cases to the registry as they are legally required to do. Further, the raw data have not been adequately analyzed and used to inform the public about the nature and extent of child abuse and neglect in the state. The registry is maintained by hand, not automation. It could be computerized, with terminals available for information at the county level, so that the history available on each child or parent or perpetrator of abuse or neglect who has ever been reported to the registry can be easily acquired. (At present, a county department of social services that receives a report of child abuse or neglect must telephone the registry to determine whether a previous report concerning this child had been made in another county.) But if the registry were computerized, difficult problems would arise relating to the right to privacy in relation to who has access to information. Further, the registry contains names of parents, children, and perpetrators of abuse or neglect in both *reported* and *confirmed* cases. There is now no procedure for removing a name when the reported neglect or abuse is not confirmed.

QUESTIONS AND ISSUES

We need to remember that the state has not *solved* the complex and difficult problem of parental child abuse and neglect by enacting a reporting law. The reporting law is designed to identify children at risk so that appropriate protection may be provided. It does not deal with

Table 1

Abuse Cases in North Carolina 1971-75

	Number Reported		Number Confirmed		Totals	
	Abuse	Neglect	Abuse	Neglect	Reported	Confirmed
7/1/71-6/30/72	1,100	5,775	657	3,740	6,875	4,397
7/1/72-6/30/73	1,602	8,462	746	5,351	10,064	6,097
7/1/73-6/30/74	1,900	9,572	711	4,987	11,278	5,635
7/1/74-6/30/75	1,946	9,331	1,050	4,724	11,277	5,774

the more difficult and fundamental issues of causation, such as poverty, current concepts of child discipline, or the cyclical nature of child abuse (children who are abused become abusing parents). Thus, the public and private agencies concerned about children cannot relax with the feeling that the problem is solved. Rather, we are just beginning to understand the problem.

Other difficulties are related to the child-abuse reporting law. The law seems to assume, first, that reports will be made and that the protective services approach will be effective, and then that the staff of the county social services department will be both qualified to provide protective services and available when needed after reports of child abuse and neglect. It is not clear which professionals are qualified to provide protective services, nor is it clear that all counties provide services twenty-four hours per day, seven days per week.

Among the other unsettled issues in providing for effective implementation is stable funding. Many counties now depend upon federal funding that may not be secure to pay for protective services.

Another problem may be the capacity of the county social services department and the related public and private agencies with which it cooperates to implement the concept of protective services. Much remains to be done to provide effective coordination at the local level for effective child protective services.

FEDERAL LEGISLATION AND FUNDS

In January 1974, Congress enacted the Child Abuse Prevention and Treatment Act, which established the National Center on Child Abuse and Neglect and provides federal funds for grants to states that meet the requirements of the federal law. North Carolina meets most of these requirements through the Child Abuse and Neglect Reporting Law of 1971, but it is not yet eligible for federal funds because of one deficiency that will require state-level legislation and appropriations: Federal law states that in any abuse or neglect case that results in a judicial proceeding, the state must provide for appointment of a guardian ad litem (guardian of the person) to represent the child in the proceeding. North Carolina statutes dealing with the juvenile jurisdiction of the district court authorize a judge to appoint a guardian of the person for a child in a neglect case when the child comes into court without a parent or when the court finds the appointment of such a guardian to be in the best interest of the child, but the authority is permissive rather than mandatory. Further, state law makes no provision for paying a person to serve as guardian of the person. This deficiency of the state system of court services for neglected or abused children means that the state does not receive federal funds that would otherwise have been allocated to it. The following amounts would have been available to North Carolina had the state been eligible for federal funds for child abuse:

Period	Amount
7/1/74-6/30/75	$ 5,170
7/1/75-6/30/76	$63,800
7/1/76-6/30/77	$86,987

Since available federal funding may increase, it seems wise for the North Carolina General Assembly to consider the appropriate statutory changes to qualify in 1977.

A COMMUNITY APPROACH TO CHILD ABUSE AND NEGLECT

Darst Murphy McNairy, Martha Sharpless, Cynthia Doyle and Locke T. Clifford

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Authors' Note: We should like to point out that no program, especially a new one, can fully answer the complex problems involved in combating child abuse and neglect in the community.

Although this article will tell about cases that were handled successfully, Guilford County still has cases of abuse and neglect that go undetected or unresolved.

Children in North Carolina and throughout the United States are sometimes killed or irreparably damaged—psychologically or physically—by the growing problems of abuse and neglect. This situation will no doubt continue until adequate resources are brought to bear and communities become dedicated to making their children safe.

IN MAY OF 1973, twenty people met at Moses Cone Memorial Hospital in Greensboro to talk about child abuse and neglect. They did not meet by chance. Three infants had died of abuse in the Greensboro area in recent months, dramatically underscoring what a handful of professionals had been noting—a rapid rise in locally reported and observed cases of child abuse and neglect and a county protective services division that could not keep up with the problem. Clearly, a way to combat child abuse and neglect had to be found.

The eventual result of that meeting is the present Child Abuse Prevention Services (CAPS), a multi-faceted approach to helping abusive parents and their children that involves doctors, social workers, public health and mental health staffers, lawyers, and the courts. CAPS has received a mix of private and public funding and is already being used as a model for similar programs in communities of varying sizes across North Carolina.

From the start the program has operated with the sanction and cooperation of the Guilford County Department of Social Services (DSS), which was given jurisdiction in cases of abuse and neglect by North Carolina's 1971 child-abuse reporting law. DSS personnel were among the 20 professionals who attended that first meeting, along with several physicians, a police captain, social workers, public health nurses, and a consultant from the Institute of Government.

THE MEETING had little structure. Primarily, it gave those people who had seen the rise in abuse a chance to share their concerns and to spell out the nature and scope of Greensboro's problem. Participants shared reading lists and brainstormed on the best ways to set up a comprehensive system in which no abused child or abusive parent could get "lost." (Later the small, informal nature of this first meeting was credited with being a highly desirable way to begin the endeavor.)

Those who attended that first meeting had three main concerns. These professionals were:

—Worried that neither professionals nor the general public were aware of the child abuse that was going on, because of an almost total lack of education about identification, prevention, and treatment of child abuse and neglect.

—Frustrated by working within an identification and reporting system that was not adequate to address all aspects of the problem.

—Disturbed by the realization that follow-up in child abuse and neglect cases was often fragmented and inadequate, rendering the initial efforts by the physician or other professional useless. (At least one of the three infants who had recently died of abuse had been seen before and diagnosed as an abused child.)

These first participants were eager to have an immediate plan formulated to correct deficiencies in the existing system. They urged that a body of professionals representing all child-related services in the Greensboro area be convened to present them with the severity of the problem and to gather their ideas on what type of program could best answer the need.

MANY MORE MEETINGS were held, with up to 50 or 60 people attending, and the group took on a more formal name—the Child Abuse Task Force.

In organizing, the Task Force undertook a number of activities. It charged itself with gathering data and background information that would give it a clear picture of

local child-rearing practices as they related to the maltreatment of young children. It adopted a position statement that emphasized the responsibility of the entire community in preventing and treating child abuse and neglect. It distributed to its members copies of the very useful book *Helping the Battered Child and His Family*, by C. Henry Kempe and Ray E. Helfer. Two Task Force members visited the Institute on Child Abuse in Denver, Colorado, and presented more detailed suggestions on methods and procedures.

As it studied what had been effective elseshere, the Task Force learned that Greensboro already had most of the resources available to provide many of the recommended services. Its chief concern, therefore, became whether these resources could be pulled together in a cooperative, nonduplicating effort to meet the needs of neglected and abused children effectively and efficiently.

One of the organizers of the first meeting, a laywoman who had been active in community affairs, took on the task of keeping in touch with the many agencies, discussing how they might alter their programs to fit into an over-all plan while still maintaining their autonomy.

The large community representation on the Task Force throughout this phase accounted for much of the program's later success. Everyone could speak up on whatever he found objectionable in the program as well as contribute to it.

Participants in the meetings included physicians, lawyers, the Guilford County Department of Social Services, the Guilford County Health Department, the Greensboro Police Department, United Way, Family Service/Travelers Aid, United Day Care Services, the Legal Aid Society, the Greensboro Public Schools, the Greensboro Junior League, the University of North Carolina at Greensboro Nursery, the Greensboro Academy of Medicine, the Voluntary Action Council, the Family Life Council, R.S.V.P. (Retired Senior Volunteer Program), juvenile court counselors and the juvenile court judge, the Child Development Department of the University of North Carolina at Greensboro, the Guilford County Developmental Evaluation Clinic, WFMY-TV, and the *Greensboro Record*. Many laymen also attended.

In early meetings of the Child Abuse Task Force, a questionnaire was sent out that gave participants a chance to offer guidance, direction, or background information outside the mass meetings concerning their experiences with child abuse and neglect. The questionnaire also asked each agency spokesman to say what his agency could provide in services, particularly in the areas of education, crisis intervention, organizing treatment, and/or counseling.

As needs were identified, committees were set up to study them in depth and recommend what actions might be appropriate.

—The diagnostic and evaluation committee began to look at the development of a consortium that would permit mutual trust and dependence upon fellow professionals, with shared decision-making and service to families in need. The committee recommended a diagnostic and evaluation team to plan the best course of action for abused children and their families, to prescribe treatment, and to assure that a follow-up was done on each case.

—A treatment and development committee was formed to examine other ways of serving these families. The committee gave particular attention to services that were not extant in the community—such as parent aides, Parents Anonymous, crisis nurseries, and a 24-hour "hot line" geared to meet the needs of potentially abusive parents.

—An education and training committee was formed to establish specialized training programs for community professionals and more general programs to educate the public on the nature of child abuse and neglect.

—A proposal committee was formed to draft a request for funding from the federal government, to work for approval of that request, and to help in public education. The proposal committee's request for funding amounted to the first written statement of what a child-abuse program in Greensboro would be.

THE PRIMARY GOAL, as outlined in the proposal, would be to insure that each child is reared in an environment that secures his fundamental rights, allows the development of his fullest potential, strengthens the family by bringing together the community's helping services, public and private, in a unified effort to combat child abuse.

The primary responsibilities of the program would be diagnosis and evaluation, education and training, treatment, and research and development.

The program would be structured along three basic components (already identified as committees of the Child Abuse Task Force)—a diagnosis and evaluation team, a treatment and development team, and an education and training team.

The funding request provided for a program coordinator, who would offer direction, guidance, and coordination for every case of suspected child abuse and neglect handled by the program. The proposal committee saw such a person as especially important in light of the complexities of coordinating the medical, social, legal, and psychiatric aspects present in a typical abuse situation. It considered a smooth, organized pattern of intake, diagnosis, treatment, and follow-up to be essential in implementing the program's primary goal. Feeling that no one agency could accept full responsibility for a case from start to finish and that many agencies would need to be involved, it emphasized the need for effective coordination.

The coordinator's functions were outlined as follows: staffing the three teams, organizing the disposition conferences on individual cases, maintaining communications with families involved, keeping records, and carrying

out professional and community education. The coordinator would also oversee a parent aide program (to be a new community service under the auspices of the Child Abuse Task Force) and encourage implementation of extended services—such as Parents Anonymous and crisis intervention.

Although the proposal committee recognized that the cooperation and assistance of the Department of Social Services was essential to a successful child-abuse treatment and prevention program, it decided that a private, community-based program could serve a coordinating function better than a public agency could. Also, North Carolina law provides that the Department of Social Services can designate another agency to carry out certain aspects of services to abusive parents and their children, so that the new child-abuse program, by remaining private, could serve the DSS and still offer other, nonmandated programs.

In the initial funding request, however, the child-abuse program had to designate an established "sponsor." The United Day Care Services agreed to fill this role, with the understanding that policy and program decisions of the child-abuse group would remain separate.

Unfortunately, the funding request to the federal government was turned down. But the program that evolved in writing that request proved to be a solid base on which to build.

The program needed $15,000 to get under way as more than a volunteer effort. In the fall of 1974, a year and a half after a new program was first discussed, private foundations in the Greensboro area provided that amount. The Child Abuse Task Force viewed the private fundings and a later grant from the county mental health department as evidence that publicity and educational programs already begun were paying off in community awareness and willingness to help.

THESE EDUCATIONAL EFFORTS began long before the first funding request was even submitted. Immediately after the Child Abuse Task Force was formed, the Greater Greensboro Family Life Council, a United Way agency, began an effort to increase public awareness of the problem of abuse and neglect. Numerous newspaper articles, three major local television programs, and several radio programs focused attention on abuse and neglect as a growing community problem.

The Family Life Council, in cooperation with a local women's group, set up a speakers' bureau, which offered well-trained lay people to talk to clubs or other groups and organized panels of professionals on special request.

When the Child Abuse Task Force suggested a large-scale community-wide meeting that would draw attention to the subject of abuse and neglect as well as offer educational opportunities for participants, the Family Life Council arranged a day-long forum, with nationally recognized abuse authority Dr. Ray Helfer, co-author of *Helping the Battered Child and His Family,* as a guest participant. Seven hundred people attended this forum, including both professionals and laymen of all ages. No charge was made for participation.

The Family Life Council also began developing a child-abuse and neglect library and now has one of the most extensive collections on the subject in the state.

WHILE THE CHILD ABUSE TASK FORCE was developing, another effort was being made to involve lawyers as court-appointed "friends of the court" to represent abused or neglected children in legal proceedings when necessary. The Task Force recognized early that abused and neglected children were not represented by lawyers in court proceedings, and sometimes their interests might not be those of any of the other parties who did have lawyers—i.e., their parents, the Department of Social Services, or the district attorney. It therefore asked a well-known Greensboro lawyer and former assistant district attorney to investigate how this situation might be remedied. In cooperation with the district court judge who deals with juvenile matters, changes were made that allowed attorneys for the first time to sit in on proceedings and present evidence, make objections, and argue—solely on behalf of a child.

The Young Lawyers Section of the Greensboro Bar Association took the program as a project, and thirty-five attorneys volunteered their services, with endorsement and financial backing from the Bar Association. In the first year of their service, they represented children in more than fifteen cases.

The lawyers expanded their activity beyond serving as "friends of the court" on behalf of allegedly abused or neglected children. They also agreed to study existing statutes and procedures to determine the need for additional abuse or neglect legislation; to provide speakers to further public awareness of the intricate problems presented by child abuse; and to provide leadership, guidance, and information at the community level to any group or individual that asked for help.

WITH FUNDING AVAILABLE from private sources and community education and legal assistance programs well under way, the Child Abuse Task Force stage was left behind and the Child Abuse Advisory Council was formed to take on the task of running the program.

A program coordinator was hired by the Advisory Council in November 1974 and housed in the United Day Care Services offices. A special 24-hour "hot line" was acquired and listed in the new city telephone directory (the original listing, "Child Abuse Anonymous," was later changed to the less-threatening "Child Abuse Prevention Services").

The program coordinator immediately began calling meetings of the diagnostic and evaluation team as cases of suspected child abuse and neglect were called to the pro-

LOOKING AT CASE HISTORIES

The following case histories demonstrate the services that the Greensboro's Child Abuse Prevention Program has rendered thus far.

Case A. When the girl first saw her baby in the delivery room, she said, "That child is ugly." An alert resident pediatrician, noting that the mother was very young and single, made mental note that this baby could be at high risk for child abuse. The mother had to be encouraged to see the child but later was seen to hold him at arm's length during feeding times—another symptom of trouble. Doctors and nurses learned through informal chats that the mother was a newcomer to Greensboro, alone, unemployed, living without furniture in one room. With the mother's permission, the case was referred to Child Abuse Prevention Services, allowing the hospital to turn over confidential information to CAPS. The CAPS office set into motion the network of social services in the community that could address the mother's many problems. A parent aide helped her apply for public and private assistance money, find an apartment, and obtain a bed, a crib, and clothing for the baby (of which she had none.) A private physician, a public health nurse, and the parent aide undertook the patient and long-term job of helping the mother to "love" and "nurture" her child as well as provide for his physical needs.

With her increased trust and self confidence, the mother has found a job, made friends, and settled herself and the baby into a satisfactory relationship. In this potentially abusive situation, no abuse or neglect has occurred. The child was one year old in January.

Case B. Baby Y was admitted to the hospital at four months of age with the "failure to thrive" syndrome. Though the mother said that the baby had adequate feedings, he had gained virtually no weight since birth. After a week in the hospital—with attention from and contact with pediatric nurses—he showed a marked weight gain. During the several weeks that the baby was in the hospital, the mother visited rarely, hardly handling him on those occasions. Because this was felt to constitute an instance of neglect, the case was reported to the Department of Social Services. The DSS, acting in concert with the attending physicians and the fledgling Child Abuse Prevention Services, decided to seek custody of the child for placement in foster care until the mother was better prepared to nurture him.

The DSS went to juvenile court with its attorney, and the parents, who were fighting to retain custody and claiming there was no neglect, had theirs. Another attorney, who volunteered his services through a facet of the private abuse-prevention program, represented the child's interests.

On condition that the situation be reviewed in six months, the judge allowed the DSS to place the child in foster care, with the understanding that the parents, particularly the mother, undergo therapy. The mother thereafter was supported by several people—a pediatrician, a parent aide, and DSS social workers (who used a helpful and supportive, rather than punitive, approach). The endeavor proved to be an excellent exercise in cooperation among the local public and private resources. After six months, the child was returned to the mother, upon recommendation of the professionals involved. Workers from public health and social services have maintained contact with the mother during the last six months.

The baby, about a year and a half old, is growing normally. Although the mother and father still have parenting problems, the neglectful (and potentially abusive) situation appears to be well under control.

Case C. In Case A, a potentially abusive mother was reached in time to prevent mistreatment of a child. In Case B, a situation of neglect was remedied.

In this case, Mr. and Mrs. Z brought their toddler to the hospital for an illness. Bruises made physicians suspicious that abuse had taken place; a report was made to the Department of Social Services.

A social worker joined in investigating the case, and the Child Abuse Prevention Services' diagnostic and evaluation team met to discuss what should be done.

The parents admitted that they had a problem. Thus, when a final dispositional conference was held, their attorney sat in, along with the attending physician, a lawyer for the DSS, a volunteer lawyer for the child, and representatives of other community services who had had contact with the family.

Because the parents wanted to remedy the situation, it was decided to return the child to his home—with extremely stringent guidelines to assure ongoing treatment of the parents and protection of the child.

A very satisfactory adjustment has been made. The parents are receiving counseling, they have a parent aide to talk over day-to-day problems with, the mother has been attending Parents Anonymous, and no further abuse has occurred.

gram's attention (mostly by the Department of Social Services).

The voluntary team was and is composed of representatives from public health, mental health, social services, the child-abuse coordinator, and at least one physician. Other professionals—such as police, psychiatrists, neurologists, and lawyers—have been asked to participate in certain cases.

The program coordinator was instrumental in establishing a Parents Anonymous chapter in Guilford County. The group has met regularly each Monday night.

Parent aides have been hired and trained and assigned families to work with. The main thing they provide is friendship, helping out with advice on running a household if asked, being "on call" to the family in times of stress. The parent aides are not expected to be psychologists; their roles are more as "grandparent surrogates."

The program coordinator has also become thoroughly familiar with child-related agencies in the Greensboro area, keeping in touch with them, so they can be brought into use when needed.

A crisis day-care nursery is now available.

Also, the Children's Home Society has agreed to provide counseling, crisis day care, and family care to families with an abuse problem. The aim is to offer service, primarily to middle-income families, in a setting with which they can identify.

In the fall of 1974, the Child Abuse Prevention Services, faced with diminished funding from the original private grants, arranged to provide some of its services under a contractual agreement with the county and state Departments of Social Services. Matching funds in the amount of $5,000 were obtained from the county commissioners and the United Way so that the child-abuse program could receive $20,000 in federal funds. The contractual arrangement is expected to relieve much of the program's day-to-day financial burden—the biggest obstacle the program has had to overcome.

Hoping that public funds will be available in the future, the Child Abuse Prevention Services—as the program is now permanently named—expects to continue its basic operations, while still seeking private grants and community help in expanding into other areas of service to the abused or neglected child and his family.

CHILD ABUSE AND NEGLECT has been called an epidemic in the United States. The Greensboro community has been coming to grips with the problem and hopes to turn more attention to prevention as well as treatment in cases of abuse and neglect. Professionals active in setting up the child-abuse program in Greensboro also hope that more communities across North Carolina will become aware of new ways of protecting and serving abused and neglected children and their families.

CAUSES OF CHILD ABUSE AND NEGLECT [*Continued from page 4*]

is becoming unbearable, but they do not know where to turn or leave the child during acute stress. One valuable community asset would be a child-care facility in which parents could leave their children for brief periods until they regain their composure.

Sheltered environments for parents to live with their child are also needed. For instance, Chapel Hill has a program called CRIB, in which unmarried mothers can live with their infant during the six months after delivery in a sheltered environment. This enables them to resume their education or find a job while learning good parenting techniques in a supportive situation.

Occasionally a child must be separated from his family for a period of time in foster care. Foster parents need to be educated about the nature of abuse and neglect, and the state needs to improve the quality and quantity of foster home care. Foster parents particularly need to respect natural parents and work with them toward the goal of returning the child to his own home.

THIS ARTICLE HAS ATTEMPTED to relate appropriate community programs in child abuse and neglect to the current knowledge about how this problem arises. The great need is to improve the environment in our society for families so that they can handle the stresses of life better. Certain parents can be identified who are likely to handle stress less well and will need particular services. Above all, however, we need to remember that most of the services, as well as societal stresses, apply to all families, not just to a minority of families who abuse and neglect their children. The development of services for abused and neglected children is only one aspect of the need for better services for all children and their families.

EARLY AID TO MENTALLY DISTURBED CHILDREN

Lenore Behar

The author, who was program director for Project Early Aid, is now Chief of Child Mental Health in the Division of Mental Health of the North Carolina Department of Human Resources.

ADULTS ARE NOT THE ONLY PEOPLE who have problems that may need help from mental health professionals. Even very young children may have emotional difficulties that interfere with learning, getting along with others, and behaving in a constructive, socially acceptable way. These children are not rare. They are present in many backyard playgrounds, in many nursery school and day-care centers, and later in many public school classrooms. Identifying these children and finding help for them is a major challenge to the fields of education and mental health.

Traditional psychiatric approaches that involve a one-to-one relationship with a psychotherapist on a once-a-week basis have seemed minimally productive with very young children because the time lapse from one visit to the next is so long—children seem not to be able to carry over enough from one session to another. Also, many emotionally disturbed children have trouble getting along with their peers, and the traditional approach gives little opportunity to work on this problem except symbolically or indirectly.

Against this background, nine years ago members of the Psychiatry Department at the University of North Carolina School of Medicine believed that the best way to help these children was in a group treatment program that met every day—as a substitute for a nursery school or kindergarten experience. The planners drew heavily from the field of special education, which had moved toward making the remedial process an integral part of the nursery school experience. Visits to other child psychiatric programs for preschool children indicated that the proposed therapeutic preschool differed from existing preschool activities in that it would be itself a treatment environment rather than simply a child-care place with individual psychotherapy hours available to the very young emotionally disturbed child in attendance.

This new approach was named Project Early Aid, and from it has come a prevention/early intervention program for disturbed preschoolers that has had good success itself and also has opened a broad area of possibility – in establishing similar therapeutic preschools in other parts of the state, in helping child-care facilities all over the state to identify and work with children with special needs, and in helping parents deal with their children's special problems. This article will describe Project Early Aid and the significance that it may have for North Carolina's emotionally disturbed children.

PROJECT EARLY AID began in 1967 with a few shaky plans for its first component, the Therapeutic Preschool. A program would be developed that met every morning and approximated a normal nursery school environment. The therapeutic teacher and her aide would work with five or six children at a time in the classroom, helping each child learn to get along with other children and adults and to feel better about himself in dealing with learning, with physical play, and with his emotions. In addition, a psychiatric social worker would help the parents work out their own interpersonal difficulties and their problems in child-rearing.

In determining the types of children to be served by this program, the staff decided to work only with children who were primarily emotionally disturbed, that is, those who showed signs and symptoms of behavioral disburbance because of emotional problems. In other words, children with a physical handicap or a neurological impairment – certain learning disabilities or mental retardation—did not at first seem appropriate for the program. It soon became apparent, however, that many disturbed preschoolers have multiple difficulties, and even a very competent diagnostic team had trouble sorting out the problems. A child labeled emotionally disturbed often proved, over a period of time, to have other types of impairments—motor difficulties, poor hearing, or other perceptual problems. Therefore, an individualized treatment plan was developed for working with each child, and the plan was reviewed frequently by the teacher, the social worker, and his parents.

The types of children served by the program varied. They included children who were overly aggressive with their peers and or siblings, children with serious eating problems, children with serious problems relating to toilet training, children with delayed speech develop-

ment, and children who were electively mute. They ranged in age from three to six, but most were 4½ to five years old. All children considered for the Therapeutic Preschool received a comprehensive diagnostic evaluation, including psychological, psychiatric, pediatric, speech and hearing, psychoeducational, and neurological evaluations. If necessary, an exhaustive interdisciplinary evaluation was done. Parents took part in providing the social history and in both planning the treatment goals and implementing them. During the first stage of the project's development, parents were seen once a week by a social worker for traditional case work; their willingness to participate was one criterion for the child's acceptance into the program.

As the goals were set for each child and strategies to meet them delineated, the strategies were explained to the parents so that they could begin using them at home. For example, a stated goal of helping the child control temper tantrums might use the strategies of isolation and "time-out periods" (usually for five minutes or less); during this time the child could gain control of himself and then deal verbally with the anger-provoking situation. These strategies were explained to parents (as well as the physical and verbal reassurances that would be needed) so that when a tantrum occurred at home, they could carry the Preschool's therapeutic work over into the home. To help them further in carrying out "the home program," the parents were permitted to watch their child in the Preschool from an observation post with a social worker accompanying them to help them understand the child further.

The first year of the project, using this approach, showed success with both children and parents. Changes in the children's behavior were documented periodically and at the end of the project year. Later follow-up studies revealed that the improvements were sustained over a several-year period.

THOUGH PLEASED with the project's success, the staff felt uncomfortable about the number of children referred to the Preschool who could not be accepted because their parents either could not or would not participate. Many parents had problems related to employment that prevented them from participating in the program. Also, many families seemed "psychologically unready" for the parent counseling that was offered. It seemed unfair to deny service to children who needed it because of the difficulties their parents had, so some changes were made in the program the next year.

The second and third years represented a *second stage* of the project's development. In this time, staff tried to evaluate the effectiveness of several approaches in working with parents: Some children were accepted into the project even though their parents would not participate at all. Others were accepted with the expectation that their parents would participate in the traditional personal counseling part of the program, with supplemental home programs for the children. A third group of children were accepted with the expectation that their parents would observe them in the classroom and try to carry the Preschool program over into the home, but with no personal counseling.

By this time, the Preschool had expanded to accommodate two classes of children per day, so that in the following two-year period, twenty-six families were served. Although the number of families participating in the study does not represent a large enough sample for "conclusive" research findings, the outcomes were strikingly different for each group and heavily supported by the staff's impressions. The behavior changes among children in the three types of parent programs indicated that much greater change occurred in children whose families participated in the observation program; less change occurred in children whose parents participated in the traditional counseling; and the least change occurred in those children whose parents did not participate at all. As the staff planned for the fourth year of the program, it placed emphasis on the observational approach for parents. Although this approach may not be the only effective way of dealing with parents, the project's over-all success with it has been quite high, and the approach is clearly effective.

As the observational approach was strengthened, the staff began to view parents with a somewhat new attitude. Rather than reacting to parents as clinical cases to be cured or to be taught how to manage their children, it began to view them as allies in the treatment process. Parents increasingly began to help develop the goals for their child. Often parents helped the staff understand what approaches might be effective in dealing with their child, as well as define the approaches with which they personally felt most comfortable. As the parents became more a part of the program, they also became more supportive of it. Many parents became advocates for the program, while others took on such responsibilities as transporting children other than their own to the project site—children who might otherwise not have been able to participate because of transportation problems. As the style of the project changed from a parent treatment model to a parent participation program, the types of families who participated in the project changed as well. Originally, most of the project participants were upper-middle-class professional families who agreed to participate in personal counseling; the staff's new attitudes toward parents and new ways of working with them made the project more acceptable to families who were less well educated, less introspective, and less prosperous.

AS PROJECT EARLY AID became better able to serve many types of families and as its popularity grew, more referrals came from day-care centers. It then entered

the *third stage* of development during which the second component, the Consultation Service, was established. Firm working relationships with local day-care facilities were developed. During the early stages of the project, local day-care centers, nursery schools, and kindergartens had been contacted to find children who needed the services of the Therapeutic Preschool. Relationships with these facilities were good, and their staffs often consulted the project's staff about children who seemed to need special help. Many of the child-care centers, and particularly the full-day centers, were also asking for and needed a range of supportive services. Many needed help in program planning, or in understanding, in general, the emotional needs of young children, or in understanding how to relate to parents, or in dealing with specific problems of specific children. As requests continued and as the need for support services became more evident, more time of the Therapeutic Preschool staff was made available to day-care centers for consultation. Also, several students in the University of North Carolina's child psychology, child psychiatry, and child psychiatric social work training programs agreed to serve as day-care consultants in exchange for the opportunity to observe normally developing children, which they had little chance to do in other parts of their training program.

No funds were available to pay the additional staff that the Consultation Service required. Yet the project needed to collaborate with these centers because many children in the Therapeutic Preschool spent the other half of their day in a day-care center. It was important that the child-care workers understand the special needs of the children and to carry over the therapeutic strategies developed in the Preschool for the children. In the fall of 1970, a small federal grant was obtained and one full-time consultant and one half-time consultant were hired to provide liaison services and training for day-care workers. (But clearly not enough consultative help was available for the more than thirty day-care centers in the area surrounding Chapel Hill; many centers operated with untrained staff in relatively poor working conditions with many children in their care.)

Though finding funds for a new program is always difficult, an additional consultant was hired through funding arrangements made with the nearby technical institute (which recognized the day-care workers' interaction with the consultants as on-the-job training and gave them credit toward certification). Later the project received a special eight-year staffing grant under the federal Community Mental Health Center Act. The new funding provided for six more staff members and operating costs.

The consultation services themselves became more structured. Each consultant made a weekly visit to each normal day-care center for which he or she was responsible. The visit lasted four to six hours, depending on the center's needs and the number of children it served. During each scheduled visit, the consultant assigned to that center provided course work in child development (during the children's nap time), observed the children in the classroom to help identify those with special needs, worked with the staff on their problems of staff relations and interactions with parents, and helped parents of children with special needs obtain and follow through on diagnostic studies. Also, many children identified as having special needs underwent a formal diagnostic study by one of several local resources. Some of these children could be helped in the normal day-care classroom with specially designed programs to be implemented by the day-care worker; the consultant helped work out these programs and served as a liaison between the diagnostic service, the center, and the parents. Some of the children needed the special services of the Therapeutic Preschool; when they were placed in the Preschool, the consultant served as liaison between the Preschool staff and the day-care center where they spent the rest of the day.

Through their weekly visits, the consultants could observe the progress of each target child at his normal day-care center in getting along with his peers and his teachers and in his reactions to the total day-care situation. The day-care workers also visited the Therapeutic Preschool once or twice a month so that they could observe their child in the therapeutic program. Another benefit of this interaction between the project staff and the day-care workers was that the latter group, in coming to understand the target child and how to help him, could use this knowledge in dealing with other "special children" in their centers.

As these day-care workers grew more knowledgeable, more troubled children could be kept in their normal settings by the project staff's developing special guidelines for the teachers to follow. Thus, therapeutic work could be offered to more children—some in the Therapeutic Preschool and some in their normal day-care environment.

The project staff conducted workshops every couple of months for day-care workers and nursery school and kindergarten teachers in the area. These workshops focused on a variety of skills—from behavioral management techniques, to use of dance and creative movements with preschool children, to nutrition and meal planning.

THE PROGRESS OF CHILDREN in the Therapeutic Preschool was checked by watching them individually during designated time periods for several days of each month to see whether they showed increased constructive behavior. Each child was also given standardized psychological and educational tests at the beginning and end of his stay at the Preschool and whenever specific questions about his progress and/or ability were raised. Parents' reports on how the child behaved at home and day-care workers' comments about how he behaved at

their center were also important in considering the child's progress.

Follow-up contacts have been made with the children's parents and teachers to understand the long-range effectiveness of the program. The Therapeutic Preschool had not been totally effective with all children, but most of the children (78%) have progressed while there, and follow-up interviews indicate that they continue to do well. Most of them have gone into the normal public or private school environment, although some have needed special education classes or continued treatment. One child needed institutional care for a time.

The Consultation Services, which were provided to normal day-care centers to help them improve their programs, were also documented as effective. Using rating scales, the day-care workers evaluated the services as having a positive influence on them. Behavioral rating scales that were administered to the children in the centers that received consultation services indicated positive behavioral change in the children; similar tests on children in normal day-care centers that did not receive these services showed no significant changes. Also, the number of children referred for evaluation increased from the day-care centers that received services, which suggested that children with special needs were being identified.

A SPIN-OFF OF PROJECT EARLY AID is that students in health and mental health fields have had practical experience in helping child-care facilities work with special children. As they graduate and move to other jobs, they can take these skills throughout the state.

Also, after being designated in 1973 as one of five outstanding mental health programs in the country by the American Psychiatric Association, Project Early Aid has become a model for new programs throughout the country. The project director is now Chief of Child Mental Health in the State Division of Mental Health Services, which is currently developing early intervention/prevention programs for preschool children to be modeled after Project Early Aid and Project Enlightenment, a similar program in Raleigh. The Raleigh project is to be a model for services to be delivered to an urban population and Project Early Aid the model for rural areas.

To support this effort, the 1974 General Assembly appropriated $400,000 for the first year and another $600,000 per year for later years to fund eight new projects throughout the state. State funds were then used as a match for federal funds (Title XX) of $1,000,000 per year. By June of this year, twenty early intervention/prevention projects will be in operation across the state; they will provide service to approximately 500 children per year in the therapeutic preschools. It is anticipated that 250 normal day-care centers will receive consultation services, which should provide training to approximately 1,200 day-care workers and improve the care of some 6,000-7,000 children per year. The goal in North Carolina is eventually to have forty-two programs serving the state, one for each mental health catchment area.

ALTHOUGH THE IMMEDIATE FUTURE for increased state and federal financial support is not very promising, the focus of funding bodies on young and/or handicapped children and on the need to improve both mental health and education services is encouraging indeed. Decision-makers now clearly recognize the importance of prevention and early intervention for humane as well as economic reasons. The old adage "An ounce of prevention is worth a pound of cure" speaks well to the issues of the increased costs of human suffering (in the child and the parents) and rising costs of programs as the child grows older and his problems increase in seriousness and duration.

A PILOT PROJECT IN EDUCATING HANDICAPPED CHILDREN

Ann Sanford

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THE PAST SEVEN YEARS have brought about important changes in public attitudes toward educational opportunities for handicapped children. Until seven years ago, handicapped children had virtually no access to education. Families of the handicapped relied primarily on each other for support and guidance. Some pooled their resources to provide limited day-care facilities, but these "day-care centers for the retarded" were often manned by paraprofessionals and were generally custodial. Those who worked with the handicapped had few tools for assessing what a child could and could not do and little guidance about what and how to teach a handicapped child.

In response to this growing need for educational services for handicapped children, the Handicapped Children's Early Assistance Act was passed in 1968. Through the Bureau of Education for the Handicapped (BEH), twenty pilot projects were initially funded to develop and implement teaching methods for teachers of handicapped children and their families. (There are now 150 of them.)

One of these first projects is located in North Carolina. The Chapel Hill Training-Outreach Project has developed teaching methods that have proved successful with a diversity of handicapped children: emotionally disturbed, mentally deficient, brain damaged, deaf, autistic, crippled, cerebral palsied, epileptic, and learning disabled as well as normal children. These methods have been so successful that they have been widely adopted throughout the United States. The Outreach Project collaborates with such agencies as Head Start, various state-supported special schools, and the North Carolina Department of Public Instruction. It also distributes multi-media training materials for teachers and parents of the handicapped across the nation.

THE DESIGN OF THE PROGRAM REFLECTS ITS planners' conviction that each child is different. Each one has his own abilities and problems, and each must be treated as an individual. That being so, the place to begin is with what the child can do. The first phase of the project, then, was the development of the Learning Accomplishment Profile (LAP)—a means of highlighting a handicapped child's strengths and weaknesses and defining learning goals—and a teaching approach geared to each child's individual needs. The program involved not only the children and their teachers but also their families.

By using the LAP, a teacher can judge exactly what a child has learned in six basic steps of development:

1. Gross motor control such as walking, jumping, and throwing a ball;
2. Fine motor control such as tying shoes, buttoning clothes, and writing;
3. Self-help skills such as dressing, toileting, and eating;
4. Social-emotional skills such as getting along with others;
5. Language skills;
6. Cognitive skills such as understanding numbers and remembering objects.

Each of these areas of development is arranged in a hierarchy of skills that a child normally learns by age six. For example, fine motor skills range from holding a ring, which corresponds to a developmental age of one month, to printing the numbers 1 through 5, a developmental age of about six years. By observing a child's behavior, a teacher can find where each child falls along this continuum in each of the six areas of development. Families can also help in this process by giving the teacher information about what they know the child can do. Since the LAP shows the usual steps and sequences in acquiring skills, it gives both parents and teachers a more realistic and useful picture of the child than a single label such as "handicapped." It serves as a positive, concrete basis for progress reports and evaluations of the child's skills.

Once the teacher has determined what a child can do in each skill area, a profile of the child is prepared that highlights his strengths and weaknesses. From this profile, specific objectives are prescribed for him. Again, parents help in determining the educational goals for their child. Involving parents in this way gives the teacher a good idea of how realistic the parents' expectations for their child

may be and permits her to interpret the program's assets and limitations to the parents. Perhaps equally important, this participation gives the parents a sense that they are making a valuable contribution and have some control in their child's training.

After long-range objectives have been prescribed for a child, these long-range objectives are broken down into sub-objectives or skills that must be achieved in the process of meeting long-term goals. These sub-objectives are then arranged in a sequence in order of difficulty. Beginning where the child is, the teacher moves toward long-term goals by teaching one step at a time. Since each step builds upon the previous one, this approach ensures that the child will succeed. Each success is then rewarded and reinforced in a way appropriate to the child's individual likes and dislikes. In work with handicapped children, substantial attention and systematic rewards for his efforts are even more important than with the self-motivated, "normal" child.

Parent and family involvement has proven to be vitally important in helping with this process. In conjunction with teachers, parents can implement individual home programs in which they take responsibility for training the child in specific skill areas or for modifying certain of the child's behaviors.

Parents can also observe in the classroom. In addition to learning about classroom methods that can be used in follow-up at home, they can alleviate their natural apprehensions and answer their own questions about their child's training program. This type of interaction gives family members a concrete basis on which to make suggestions for changes or improvements in the teaching program. In fact, many family members participate directly in the training program as volunteers in the classrooms. This volunteer experience gives families increased confidence in training their own child. These parents, provided with training in individualized learning, are then a valuable resource not only in the classroom but also as knowledgeable advocates in the community.

Some parents need help in accepting their feelings about having a handicapped child and in developing realistic expectations for their child's progress. Meetings of families of handicapped children provide a time for exchanging information, training, planning policy, interacting socially, and solving problems in a supportive environment. Family coordinators also make home visits and maintain close contact with families. As parents need the resources of the other community agencies, the coordinator serves as a liaison. Throughout the Outreach Project, the importance of the family's role in the child's total development is a consistent message. Families are provided comprehensive services based on their needs.

DEMONSTRATING MODEL SERVICES has from the beginning been an important function of the Outreach Project:

1. *A Model of Resource Service to Young Handicapped Children and Their Families,* funded under Title IV, provides daily tutoring individually tailored to kindergarten and first-grade youngsters with special needs in public schools. This program provides an alternative to self-contained, special-education classes and their concomitant problems—stigmatism, lack of peer models who challenge the handicapped to develop new behaviors, and inopportunity for "normal" children to know those who are "different."

The Project also works directly with public school teachers, providing training and consultation in helping the teachers deal individually with their handicapped students.

2. *A Model of Comprehensive Preschool Service to the Severely Handicapped Child and His Family* serves as a pre-service and in-service demonstration/training site for those in special education, psychology, social work, and administration who work with the handicapped. A 1976 summer institute for public school special-education teachers will provide training for North Carolina's non-certified teachers.

3. *A Model Demonstration Project to Serve Young Gifted Handicapped Children and Their Families* is one of two national pilot projects for children who are gifted and handicapped. The stereotype of a handicapped child is that he is deficient in all areas of development. Yet, a physically handicapped child may be very bright, and a mentally deficient child also may have areas of exceptional ability. The family of the child who is both gifted and handicapped is faced with several concerns: (1) treating the child's handicap; (2) nurturing his unusual abilities; (3) locating services; and (4) accepting the paradox of a handicapped, *gifted* child. An economically deprived minority family faces even more complex problems in meeting an exceptional child's needs in a climate of poverty, and a major component of the Outreach Project focuses on services to the families of these children.

Special educators have become increasingly aware of the many handicapped and gifted children whose unusual abilities have been submerged in programs that focus on a child's deficiency. The Outreach Project is developing and demonstrating ways to identify and serve children with unusual abilities—in spite of emotional, physiological, or experiential handicaps. It collaborates extensively with the Governor Morehead School for the Blind, Central North Carolina School for the Deaf, the Greensboro Cerebral Palsy Preschool, and the Lenox Baker Cerebral Hospital.

THE PRIMARY OUTREACH TRAINING PROGRAM of the project is *The Education of the Young Handicapped Child,* a sixty-hour methods course. More than 1,000 North Carolina teachers and child-care workers have completed this comprehensive program of training, which has been conducted in: Cullowhee, Charlotte, Lenoir, Statesville, Greensboro, Henderson, Goldsboro, Fayetteville, Elizabeth City, Butner, Morganton, Boone,

Sanford, Winston-Salem, Smithfield, Greenville, Wilmington, Yadkin, Hillsborough, Asheville, Durham, Raleigh, and Wilkesboro.

This course is also used in other states. The Outreach group collaborates with the Vermont State Department of Public Instruction to finance the training of 40 Head Start teachers who travel from rural programs in Vermont to Burlington, Vermont, where Outreach staff train them according to the Outreach model. A similar venture in Cheraw, South Carolina, trains teachers and others who work with children in South Carolina, and next year the course will be taught in Colorado. Those who take the course can earn college, technical institute, or certificate-renewal credit for completing course requirements.

A current North Carolina Mental Health grant finances on-site training of those who work in state mental retardation centers and developmental day-care centers.

TO HELP PROVIDE PRESCHOOL SERVICES to handicapped children, a 1972 congressional mandate required that at least 10 per cent of the Head Start enrollment include severely handicapped children. A stated objective of the Office of Child Development (OCD) and the Bureau of Education for the Handicapped (BEH) is to collaborate on training handicapped children and bringing them into the mainstream of Head Start, and the Outreach Project was selected as one of six national OCD-BEH experimental programs to train Head Start staff in services to the handicapped.

Few educational issues have stimulated as much controversy as the movement to integrate the handicapped into programs designed for nonhandicapped youngsters. Head Start personnel at all levels were concerned about the potential impact of this integration. In the second year of providing services to the handicapped in Head Start, the effort was examined intensively to find out whether the early fears were justified. Had recruiting the handicapped affected the total Head Start program? What were the reactions of teachers and parents? *A Study of the Impact of Mainstreaming Handicapped Children in Head Start*, done in Chapel Hill in 1975, assessed the accomplishments, problems, needs, and attitudes reported by teachers in the nation's largest Head Start region. It rebuts initial concerns that integrating handicapped children would negatively affect services to nonhandicapped Head Start youngsters. Quite to the contrary, the data reveal that Head Start staff believed that the presence of handicapped children increased the quality of individual services to all children. They felt that the integration movement influenced the total parent program positively and that the training for services to the handicapped has increased teacher skills in general.

THE CHAPEL HILL PROJECT COLLABORATES with other agencies. The North Carolina Council on Developmental Disabilities coordinates enrollment of participants in the state course. The Division for Exceptional Children of the North Carolina Department of Public Instruction finances two Chapel Hill demonstration classes, provides stipends for those who want college credit, and extends credit for those who want to renew their North Carolina teaching certificates. The University of North Carolina Developmental Disabilities Training Institute utilizes project staff and materials in its training program. North Carolina community colleges, technical institutes, and universities provide course credit and accommodations for Chapel Hill Project training. The University of North Carolina Division for Disorders of Development and Learning serves as a resource for diagnostic and therapeutic services, staff development, and consultation. The Chapel Hill Project provides practicum sites for University of North Carolina graduate students in psychology, special education, early childhood education, and social work. In cooperation with the UNC Technical Assistance Development System of the Frank Porter Graham Child Development Institute, the Chapel Hill project has extended consultation and training to other projects. And finally, the Chapel Hill-Carrboro City School system serves as a channel for training grants serving a national audience. The mutual benefits of interagency collaboration have facilitated and strengthened services to children with special needs.

Our nation's growing awareness of a forgotten population—the handicapped and their families—is evident in increased legislative support and services. As one of the original model programs, the Chapel Hill Training-Outreach Project has pioneered in convincing the public of the need for comprehensive services to the handicapped and their families.

VOLUNTARY ADMISSION OF MENTALLY IMPAIRED MINORS: Constitutional Considerations

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ONE OF THE FASTEST CHANGING and most involved areas of current law affects mentally impaired persons. The speed with which courts have been deciding issues about their rights and the complex legal and social interests underlying the cases[1] defy description by any "overview," and I shall give none here.

Among the many new developments of mental health/retardation law is the recognition that procedural due process (guaranteed by the Fifth and Fourteenth amendments to the federal Constitution) is a prerequisite for guarding against the potential abuse of minors' rights by parents and others who purport to act in the best interests of the minor. Another development is the realization that substantive due process (guaranteed under the same amendments) requires that the power of state agents over mentally impaired persons in their custody be circumscribed.

This article discusses North Carolina law concerning voluntary admission and discharge of mentally ill and mentally retarded persons from centers and hospitals for the mentally handicapped. It also raises constitutional questions that are only partially answered to date. One question focuses on the power of a superintendent of a center or hospital to declare a person incompetent. The other question addresses the right of parents to admit their handicapped child to such a center. As will be demonstrated, the right of parents to institutionalize their children is no longer as legally free from challenge as it was when the "voluntary admission statutes" were first written, particularly in regard to the commitment of mentally retarded minors.

1. For discussions of the right-to-treatment and right-to-education cases, which give only a surface dimension of these recent developments, see Turnbull, "Effects of Litigation on Mental Retardation Centers," 41 POPULAR GOVERNMENT 44 (Winter, 1975), and Turnbull, *Educating Children with Special Needs*, NORTH CAROLINA LEGISLATION 1975 (Chapel Hill, N.C., Institute of Government, 1975), p. 92.

MENTALLY ILL PERSONS

The state's policy with respect to mentally ill persons[2] and inebriates[3] is that (1) if they are not demonstrably mentally ill or inebriate and are not dangerous to themselves or others, they should be encouraged to receive appropriate treatment by voluntarily admitting themselves to the state's treatment facilities and mental health hospitals; and (2) their admission is to be carried out under conditions that protect their dignity and rights.[4] Accordingly, people have a right not to be committed against their will ("involuntary commitment," as the practice is known among mental health professionals) unless they are demonstrably mentally ill or inebriate and are dangerous to themselves or others.[5]

A treatment facility[6] is a hospital or institution operated by the state for those who need care and treatment for mental illness, mental retardation, or addiction to alcohol or drugs. A treatment facility includes any community mental health clinic or center operated in conjunction with the state, the Psychiatric Training and Research Center at North Carolina Memorial Hospital (Chapel Hill), and private hospitals that consent to treat a mentally ill or addicted person.[7] Dorothea Dix Hospital (Raleigh), Broughton Hospital (Morganton), Cherry Hospital (Goldsboro), or John Umstead Hospital (Butner) are all "regional treatment centers." Local or district mental health centers are also treatment centers if operated in conjunction with the state.

Anyone who believes he needs treatment for mental ill-

2. Mental illness is defined as an illness that so lessens the person's capacity to use his customary self-control, judgment, and discretion in conducting his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. N.C. GEN. STAT. § 122-36(d).

3. An "inebriate" is any person habitually so addicted to alcoholic drinks or narcotic drugs or other habit-forming drugs as to have lost the power of self-control and who, for his own welfare or that of others, is a proper subject for restraint, care, and treatment. N.C. GEN. STAT. § 122-36(c).

4. N.C. GEN. STAT. § 122-56.1.

5. N.C. GEN. STAT. § 122-58.1.

6. N.C. GEN. STAT. § 122-56.2(d).

7. *Id.*

ness or inebriety may present himself to a treatment facility for evaluation.[8] He is required to complete a written application for his admission or evaluation.[9] No doctor's statement is necessary for admission or evaluation. The application contains the person's acknowledgment that he may be held by the facility for up to 72 hours after seeking his release by filling out the appropriate discharge form. When admitted, he must be given the appropriate discharge form.

The applicant must be examined and evaluated by a qualified physician of the facility within 24 hours after his admission.[10] The purpose of the examination is to determine whether he needs treatment or further psychiatric examination by the facility. If the examining doctor determines that the applicant does not need treatment for mental illness or inebriety or further evaluation or that he will not benefit from the treatment available, the applicant may not be accepted as a patient.

But a person who voluntarily admits himself to a treatment facility for treatment of his mental illness runs a great risk that he will be declared legally incompetent and thereby become the ward of a guardian. The risk arises from the fact that the superintendent of the treatment facility is empowered to issue a certificate of incompetency with respect to the person.[11] The certificate is issued without a required hearing on whether the person is incompetent. If issued, the certificate results, by operation of law, in the person's being declared incompetent and automatically treated as a ward; the certificate is filed with the clerk of superior court, who appoints a guardian for him. Since the nature of guardianship is to transfer the ward's legal rights and powers to the guardian, the person who voluntarily admits himself and with respect to whom a certificate is issued loses his rights without benefit of a hearing at which he can protest the issuance of the certificate. In short, he loses the protection of procedural due process. The constitutionality of the certification-by-superintendent provisions of the voluntary admissions act is open to grave doubt in light of *Hagins v. Redevelopment Comm'n.*,[12] in which the State Supreme Court held that due process requires that the person who is undergoing incompetency proceedings be notified of the proceedings and given an opportunity for a hearing. The certification-by-superintendent procedure also seems directly counter to the act's policy of encouraging voluntary admissions on a basis that protects the person's rights.

In applying for admission to a treatment facility, in consenting to medical treatment when consent is required for treatment, in giving or receiving any legal notice, and in any other legal procedure involved in voluntary admission, the parent, person acting in loco parentis, or guardian is entitled and required to act for a person who has been adjudicated incompetent.[13] This provision of the voluntary admissions act confirmed earlier opinions of the Attorney General that a minor may be admitted to a treatment facility by his parents or legal guardians, even over the child's objection.[14]

In *In re Long*, however, the North Carolina Court of Appeals recently held that minors admitted by their parents or others competent to consent to their admission are entitled to procedural due process safeguards if their liberty is at stake when they are admitted.[15] The General Assembly has since passed legislation that provides the needed safeguards for minors and persons adjudicated incompetent. Under that "safeguard" statute,[16] within ten days after a minor or person adjudicated incompetent is admitted to a treatment facility, a hearing must be held in district court in the county where the treatment facility is located to determine whether the person is mentally ill or inebriate *and* needs further treatment at the facility. The initial hearing and all later proceedings are to be governed by the involuntary commitment procedures.[17] Indigents are entitled to be represented at the initial hearing by special counsel employed by the Administrative Office of the Courts and assigned to represent patients at the regional treatment centers. All others may be represented by counsel of their own choice, at their expense, at all hearings. The Attorney General has ruled[18] that a *minor* need not be found to be dangerous to himself or others to be committed against his will under the safeguard statute. The opinion notes that there are several reasons for applying different standards with respect to the admission of minors to treatment facilities. They include the need to provide hospitalization and treatment for the mentally ill who are too young to seek or obtain help for themselves, the parental interest in obtaining help for a mentally ill child regardless of his recognition of such need, and the therapeutic desirability of affording mental health care at an early age so as to enhance the possibility of its success.

The Attorney General also has ruled that a person (adult or minor) who is admitted through the action of his parent(s), person(s) standing in loco parentis, or guardian and who thereafter becomes subject to the hearing safeguard of the involuntary commitment statute is entitled to periodic rehearings in order to permit the treatment facility to retain him in the facility for more than ninety days.[19]

Thus, a minor who is "voluntarily admitted" to a facility for the treatment of the mentally ill is entitled to certain procedural safeguards—namely, a hearing at district court to determine whether he is mentally ill or inebriate

8. N.C. Gen. Stat. § 122-56.3
9. *Id*
10. *Id.*
11. N.C. Gen. Stat. § 35-3; 44 N.C.A.G. 190 (1974).
12. 275 N.C. 90 (1969).
13. N.C. Gen. Stat. § 122-56.5.
14. 43 N.C.A.G. 161 (1973).
15. *In re* Long, 25 N.C. App. 702. (1975).
16. N.C. Gen. Stat. § 122-56.7.
17. N.C. Gen. Stat. Ch. 122, Art. 5A.
18. Opinion of the Attorney General, July 15 (name of recipient obscure on xerox copy).
19. Opinion of the Attorney General, July 22, 1975, to John L. Pinnix.

and in need of further treatment at the facility (not whether he is imminently dangerous to himself or others, which is the test applied to an adult or minor who is committed against his will) and periodic rehearings as provided for in the involuntary commitment statute. It seems fair to conclude that limited procedural due process safeguards are available to minors whose parents institutionalize them under the voluntary admissions act. (This article will not address the belief, widely held among many advocates for the mentally impaired, that there is no such thing as a mentally handicapped minor's voluntarily admitting himself when the agent of his admission is his parent or guardian. Under this view, all "voluntary" admissions are, in fact, involuntary on the part of the affected person and should be subjected to independent review under procedural due process safeguards.)

MENTALLY RETARDED PERSONS

The voluntary admissions and involuntary commitment procedures described above apply only to the mentally ill or inebriate, *not* to the mentally retarded.[20] Separate provisions apply to them.

Application for admission of a person (adult or minor) to a regional center for the mentally retarded (Western Carolina Center at Morganton, Murdoch Center at Butner, O'Berry Center at Goldsboro, and Caswell Center at Kinston) must be made by both parents, if they are living together, and, if they are not, by the parent who has custody of the person. If the retarded person has no parents, a person standing in loco parentis or the duly appointed guardian may apply for admission.[21] The Attorney General has ruled that the Division of Youth Services does *not*, by virtue of the fact that a retarded child has been committed to its custody, qualify as a person standing in loco parentis to him or as his duly appointed guardian. The Division therefore has no authority to commit children in its custody to a center for the mentally retarded.[22] Also, in a juvenile proceeding, admission can be made over the objections of parents or the guardian of or the person standing in loco parentis to a mentally retarded minor if the child otherwise would be placed in a juvenile correction facility.[23] The Commission for Mental Health Services is authorized to establish rules and regulations regarding the admission of children and adults to the centers.

Although the admission of minors to a treatment center for the mentally ill upon application of their parents involves an independent determination of the appropriateness of the admission and thereby safeguards of the minor's rights, no similar procedural guarantees apply for adults or minors who are admitted upon application of their parents to centers for the mentally retarded. This is so partly because *In re Long* and the laws that resulted from it addressed only the circumstances of mentally ill minors. Another reason that goes more to the heart of the matter, however, is that the law has treated mentally retarded persons as having few rights and mentally retarded adults as though they are minors under the professional and lawmakers' longstanding view of them as "eternal children."

All minors have a legal disability in not being able to give or withhold their consent to many actions taken with respect to them by others because they are presumed to lack the maturity, judgment, experience, and understanding necessary to give or withhold consent. The consent of a substitute or third party on behalf of the minor or of the mentally retarded person (whether adult or minor) is legally sufficient. Normally, the third party is a parent or a natural or legal guardian to the minor or the adult retarded person.

Although substitute consent is an indispensable legal doctrine whereby the legal requirement of consent is transformed so that essential or desirable consequences may follow, it rests on the questionable premise that the substitute or third party will act in the best interests of the minor. For retarded children and adults, the doctrine and its premise are especially questionable since the party with power to give or refuse consent for the handicapped person almost always has an interest in the grant or refusal of consent and thus, it may be argued, is in a situation so ripe for a conflict of interest that the substituted consent is rarely granted or withheld in the interests of the retarded person alone.

Third-party consent undergirds the "voluntary admission" of retarded persons to the state's four treatment facilities for the mentally retarded: a mentally retarded minor or adult may be admitted upon the application of his parents or guardian and the approval of the institution. The tragedy of mental illness or mental retardation often makes it impossible and always makes it difficult for parents or family of the retarded minor to cope with him at home; one outlet for the family is institutionalization. In many cases, institutionalization is both necessary and desirable for the minor as well as for his family; in other cases, it is of questionable or no value to him although it benefits the family. In the latter cases, the minor's consent is subsumed in his parents', to his detriment, thereby raising the question whether the substitute-consent doctrine is a fiction worth preserving in its present form. What makes the legal disability of incapacity to consent crucial in the admission of retarded persons to centers for the retarded is the combination of the high

20. A person is mentally retarded if his mental development is so retarded that he has not acquired enough self control, judgment and discretion to manage himself and his affairs, and for whose own welfare and that of others supervision, guidance, care, or control is necessary or advisable.

21. N.C. GEN. STAT. § 122-70.

22. Opinion of the Attorney General, dated January 8, 1975, to James P. Smith.

23. N.C. GEN. STAT. § 7A-286. See also Opinion of the Attorney General dated October 3, 1975, to Dr. Ann F. Wolfe, that a district court judge exercising juvenile jurisdiction may not commit juveniles to mental retardation centers under G.S. 7A-286.

likelihood of consent from an interested and overwrought parent/guardian to a liberty-depriving and potentially injurious action (admission to an institution) when no independent review of the consent or of the proposed action is available and no disinterested advocate for the minor is furnished. In brief, the theory, to which lawmakers and lawyers tend to subscribe, that a fair procedure will produce an acceptable result is inapplicable to these situations because lawmakers have not chosen to require any procedure, much less a fair one, by which the substitute-consent doctrine can be circumscribed so that it will not be abused.

Such efforts as the state or its agencies now are making to provide a rein on the unrestricted use (and potential abuse) of the third-party consent doctrine are necessary but insufficient. The proposed creation of a human rights committee at each of the state's mental health and mental retardation centers is a necessary step toward establishing center-wide review of generalized practices in the institutions and, it is to be hoped, of particularly noteworthy individual cases of some residents. Yet, to expect a human rights committee to carefully hear each case in which the use of third-party consent may jeopardize the rights of a handicapped minor not to be institutionalized is to expect it to perform more than its members humanly can do. Nor does the proposed use of paralegal and legal advocates at each institution necessarily ensure a systematic procedure for review of third-party consent in each case in which such consent may jeopardize the minor's rights.

A necessary and sufficient guarantee against abuse of a retarded minor's rights under the substitute-consent doctrine is a policy that addresses the substance as well as the process of surrogate consent. Such a process is suggested by *In re Long,* the statute that resulted from the decision (described above in the section on "voluntary" admissions of minors to mental health facilities), and the recent case of *Bartley v. Kremens,*[24] decided by a three-judge federal district court in Pennsylvania.

The plaintiffs in *Bartley* alleged that they were committed against their wills to state mental health and mental retardation facilities pursuant to state law applicable to persons 18 years old or younger. They challenged the constitutionality of statutes that permitted the commitment of minors to institutions for the mentally ill and mentally retarded upon the application of parents or guardians (third-party consentors) irrespective of the wishes of the minors and without a hearing or counsel for them.

Sustaining the plaintiff's allegations that the statutes were unconstitutional on their face and as applied, the three-judge court held that due process is required in all civil commitment proceedings involving minors. Specifically, the court ruled that the plaintiffs were entitled to:

1. A probable cause hearing within seventy-two hours from the date of their initial detention;
2. A post-commitment hearing within two weeks from the date of their initial detention;
3. Written notice, including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment;
4. Counsel at all significant stages of the commitment process and free counsel if they are indigent;
5. The right to be present at all hearings concerning their proposed commitment;
6. A finding by clear and convincing proof that they need institutionalization; and
7. The rights to confront and to cross-examine witnesses against them, to offer evidence in their own behalf, and to offer testimony of witnesses.

Recognizing that "parents, as well as guardians *ad litem* or persons standing *in loco parentis,* may at times be acting against the interests of their children," the court also held:

> In the absence of evidence that the child's interests have been fully considered, parents may not effectively waive personal constitutional rights of their children.

If *In re Long,* its statutory progeny, and *Bartley* are considered in light of the present North Carolina statutes permitting mentally retarded persons, whether adult or minor, to be admitted upon the application of their parents or other guardians, if the assumption that surrogate decision-makers for retarded persons hardly ever are free of potential conflicts of interest with their retarded dependents is taken into account, and if the fair procedure/acceptable result theory is found wanting in the case of the admission of retarded persons to the state's centers for the retarded, then the state's present admission-of-the-retarded statute seems doomed to fail constitutional muster. The time for legislative reform or court action, similar to *In re Long* or *Bartley v. Kremens,* may not be distant.

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24. F. Supp. (E.D. Pa., decided July 24, 1975), *rev. granted sub nom.* Kremens v. Bartley 75-1064, March 23, 1976. A result similar to *Bartley* was reached in J. L. v. Parnham__F. Supp.__, 44 L.W. 2421 (M.D. Ga. Feb. 26, 1976).

CHANGES IN NORTH CAROLINA'S JUVENILE CORRECTION SYSTEM

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DURING THE LAST FIVE YEARS, North Carolina's juvenile justice system has undergone a re-evaluation that has produced significant changes in organization, program design, legislation, and policy. The primary impetus for change and reform came from the North Carolina Bar Association's Penal System Study Committee report entitled *As the Twig Is Bent,* which was issued in May 1972. The Governor had asked the Bar Association to investigate and study the state's juvenile corrections system in February of 1971.

This report included some startling information. Per capita, no other state in the Union committed more children to state training schools than North Carolina. Further, these training schools were located in isolated rural areas, so that children placed there tended to be out of sight and out of mind. The programs of these institutions were found to be inadequate. The report found that half of the 2,400 children in North Carolina training schools should never have been sent there. It called the state's training schools "dumping grounds" for "the mentally retarded, the uneducable, the runaways, pregnant girls, the neglected, and, in many instances, simply the unwanted child. The only offense that many of the students have committed is that they do not like or cannot adjust to school."

The report's basic recommendation was that greater use be made of community-based facilities and programs to deal with the delinquent youth wherever possible in lieu of commitment to training schools. The report endorsed the concept of smaller, community-oriented home-type facilities like Boys' Home at Lake Waccamaw. The report read: "The committee has been impressed with the significant decrease in the recidivist rate apparent in such home-type settings which deal with smaller numbers of students. We recommend that this concept be expanded on a statewide basis, through the continued aid of private contributions and with the addition of state grants. We do not feel that the state should take over full control of these facilities other than to impose minimal licensing requirements so that the operation of these homes will remain in the hands of private boards of trustees."

This report and its recommendations have resulted in a number of changes in the state's juvenile justice system. Some have been administratively implemented, such as reducing the average length of time that children spend in state training schools from twelve to five months and the new student management program (which uses positive pressure from the peer group and group counseling to teach the child how to solve the problems he faces and to bring about attitude changes). Other changes have resulted from recent legislation. For example, four criteria have been established that district judges who hear juvenile cases must consider in committing a child to training school; those criteria are designed to reduce commitments unless community-based alternatives have been exhausted and to discourage commitment of children younger than ten. The 1975 General Assembly expressed its legislative intent in the following words:

> The General Assembly hereby declares its intent to reduce the number of children committed by the courts for delinquency to institutions operated by the Division of Youth Development (now renamed Youth Services), Department of Human Resources or other State agencies. The primary intent of this article is to provide a comprehensive plan for the development of community-based alternatives to training school commitment so that "status offenders" (defined by this article to include "those juveniles guilty of offenses which would not be violations of the law if committed by an adult") may be eliminated from the youth development institutions of this State. Additionally it is the intent of this legislation to provide noninstitutional disposition options in any case before the juvenile court where such disposition is deemed to be in the best interest of the child and the community.

Thus, this legislation established a fourteen-member Technical Advisory Committee on Delinquency Prevention and Youth Services within the Department of Human Resources.

Other recent legislation has made significant organizational changes at a state level in assigning responsibility for programs in the juvenile justice system—by giving the Administrative Office of the Courts statewide responsibility for juvenile probation and after-care in 1974, and by transferring the training school program from the Department of Correction to the Department of Human Resources in 1975. The thrust of recent organizational

legislation is to consolidate state-level responsibility for juvenile correction programs—including delinquency prevention, juvenile detention, development of community-based programs, and operation of state training schools but excepting juvenile probation and after-care—within the Department of Human Resources. Since juvenile probation and after-care services are the responsibility of the Administrative Office of the Courts, no single state agency is responsible for planning, coordination, and information in relation to the juvenile justice system.

THE CAPACITY TO IMPLEMENT IN RELATION TO LEGISLATIVE PURPOSE

The General Assembly has now responded to most of the significant recommendations of the Bar Association's report. The state is now in the process of implementing this legislation. Inevitably, a gap may occur between legislative purpose and the ability of state government to implement effectively. One recent example of this gap is the speed with which the 1974 juvenile detention legislation that provided a structure for statewide juvenile services, including state-operated detention homes to serve rural areas, has been implemented. One year was allowed for accomplishing this task. No state-operated juvenile detention facilities yet exist, and the state continues to use jails for juveniles, in violation of state law and policy.

Another area that has affected juvenile corrections within the state is recent federal legislation—the Juvenile Justice and Delinquency Prevention Act of 1974 (which will provide some $750,000 in federal funds in the 1976-77 fiscal year) and the availability (through the Law Enforcement Assistance Administration) of other federal funds for programs in juvenile justice. At the state level, these federal funds are administered through the Law and Order Commission in the Department of Natural and Economic Resources. Control of federal funding for juvenile justice programs represents power and opportunity to effect change. In short, whether federal funding is available for a program means the very existence of the program—when federal funding runs out, the program often ceases.

ISSUES AND PROBLEMS FOR THE FUTURE

The problem of fragmentation in the juvenile justice system has been identified during the last five years but not yet solved. No single unit of state government is responsible for planning or coordination in relation to juvenile justice problems within the state. The several state agencies that have a role in juvenile justice need improvement in these areas.

One pressing problem is availability of information. While several state agencies keep records and compile statistics for their own purposes, little information is available about the system as a whole. Frequently, the reports available in state government are not compiled in such a way that one can get accurate information about children in the system.

Since good information is lacking, it is hard to get an accurate picture of the directions of change in juvenile corrections in North Carolina, but certain areas where better information, understanding, and planning are needed can be identified. A few of them are:

1. *Delinquency Prevention.* Legislation adopted in 1975 establishes the Technical Advisory Committee on Delinquency Prevention and Youth Services within the Department of Human Resources. This fourteen-member committee has been appointed, is functioning, and has started work on plans for community-based programs. It seems to be the only unit of state government with a clear legal mandate to develop delinquency prevention programs on a statewide basis. Its authority includes setting standards that local programs must meet to qualify for state and federal funding. The Secretary of Human Resources has designated the Division of Youth Services within the Department of Human Resources as the departmental unit responsible for staff services.

The state has appropriated little or nothing for delinquency prevention and community-based programs. Thus, such programs must continue to seek federal and local funding. Unless the state provides secure funding for such programs, some existing local programs will collapse. The state was assigned the role of facilitator in the 1975 legislation—it should help local leaders develop delinquency prevention and community-based programs in relation to local needs. This role is new to state government, and once more a gap may develop between legislative intent and implementation.

2. *Law Enforcement Services.* In recent years, a growing number of juvenile units have been established in local law enforcement agencies with federal funding. An awareness has come that police work with children is a specialized field requiring certain special skills. Thus, a North Carolina Juvenile Officers Association has been formed and has developed its own programs to give its members professional training. This increased specialization has raised certain questions about the law enforcement officer's appropriate role with children. Is it the traditional role of enforcement? Is it a social role? Should juvenile officers follow the national trend toward diversion (evaluate the needs of the juvenile offender and refer him to the appropriate community resource)? What about the legal authority of police to divert?

Law enforcement professionals disagree about some of these issues. Legislation to clarify legal authority may be needed.

3. *Intake.* Legislation enacted in 1974 authorized an intake process in each of the state's thirty judicial districts under the supervision of the district's chief court counselor. Intake is a process that controls whether a juvenile petition is issued and the juvenile is subjected to court proceedings. The decision is based on the severity of the

offense and a social assessment of the child offender's needs by the court staff. Intake is not new in the juvenile court field, but raises some problems in relation to current trends toward protecting the rights of children and the need for limits on discretion of court personnel.

Through federal funds, the Administrative Office of the Courts has secured more staff to implement the intake idea more effectively. The balance between the social desirability of intake and the need to protect the rights of children is delicate. The intake process needs to be evaluated to determine whether it achieves both goals.

4. *Community-Based Programs.* Under 1975 legislation, the Department of Human Resources is responsible for helping local communities develop community-based programs that provide alternatives to training school. This is a difficult assignment in view of the need for statewide coverage because of the difficulties of the facilitator role in relation to local leadership, because of the need for secure funding, and because of the need for considerable professional skills to develop appropriate programs.

There are two points of view in regard to this assignment – the state's and the locality's. From the state's point of view a unit of state government is responsible for working through the four regional offices with local communities. While no state funds are available to support local programs, state government is responsible for helping counties assess local youth needs, for developing standards that must be met to secure funding in the future, for working with leadership that may have some local autonomy and responsibility, and for developing a statewide approach.

From the local point of view, several good local programs, both residential and nonresidential, have been established. Local leaders have assessed need and developed programs, usually with little or no help from the state. Funding has been secured from federal and local governments and private sources with little help from state funds. But some of these local programs will now be able to secure permanent funding from federal sources and are therefore beginning to look to the state for technical help, access to funding, and leadership. Some local leaders are unhappy and discouraged over what the state is offering.

The availability of federal money represents a paradox in view of the funding problem. The Department of Human Resources has a federal grant of some $300,000 for community-based programs for committed delinquents. The Department plans to use these funds to work out alternative community placements for children inappropriately committed by the courts and for status offenders in training school. Apparently the money may not be used for diverting juvenile offenders from the system or for delinquency prevention services. Thus other sources of funding are required. Since no state funds are available at present, professionals are looking hopefully at the possibility of federal funding, under Title XX of the Social Security Act, that may be used for delinquency prevention. Counties are free to seek Title XX funds for diversion programs, prevention programs, and community-based services.

5. *Training.* Three state agencies (Administrative Office of the Courts, Department of Human Resources, Department of Justice) have a $900,000 federal grant for training of juvenile justice personnel, including law enforcement officers, court counselors, and institutional personnel in the training schools of the Department of Human Resources. According to the terms of the grant, this training must be planned and delivered on an interagency basis. The $900,000 is for the first year, but continued federal funding is unlikely.

The availability of so much money in one year for training provides an excellent opportunity to upgrade juvenile justice personnel. Again, a gap may occur between intent and capacity to implement.

Legislation adopted in 1975 declares that the state's policy is to encourage specialization in juvenile cases by district judges who are qualified by training and temperament to be effective in relating to youth and in using appropriate community resources to meet their needs. The law authorizes the Administrative Office of the Courts to encourage the judges who hear juvenile cases to secure appropriate training and provides for reimbursement for travel and subsistence while participating in such training. It further authorizes the Administrative Office of the Courts to develop a plan whereby a district judge may be certified as qualified to hear juvenile cases by reason of training, experience, and demonstrated ability. Any judge who meets such certification requirements is to receive a certificate to this effect from the Administrative Office of the Courts. In districts where a district judge has been certified as qualified to hear juvenile cases, the chief district judge is required to assign these cases to him when practical and feasible.

The legislative intent is to upgrade the quality of juvenile hearings through training of judges and to establish a certification process by which a judge can be recognized as qualified through training, experience, and demonstrated ability. This law is permissive, not mandatory. Thus its implementation will depend on the leadership and interest of the Administrative Office of the Courts.

6. *Getting Children Out of Jails—Development of Juvenile Detention Programs.* The state continues to have a serious problem in the number of children that are confined in local jails, primarily because appropriate juvenile detention facilities are not available except in eight urban counties. Recent legislation authorizes jail detention of children for up to five days in a separate cell labeled a "hold-over facility," pending transportation to an approved juvenile detention home. Local police, court personnel, and judges will continue to be forced to violate state policy and law relating to jail detention of children until the state develops a statewide detention program. The basic problem is funding. The 1975 General Assembly appropriated $200,000 for the biennium to fund the

state subsidy to county detention homes that provide regional services and $150,000 for the 1975-76 fiscal year to construct a model juvenile detention home, presumably to be located in Cumberland County. This level of state funding is probably inadequate to encourage counties to participate in planning a statewide approach to juvenile detention services.

7. *Closing Training Schools and Diverting State Funds to Community Programs.* While existing law mandates that the Department of Human Resources close training schools as populations decline and that state funds for operation of training schools be diverted to community programs, there are practical, political, and personnel problems in achieving this legislative policy. Implementing this legislative policy is dependent on the Commission of Youth Services, which shares responsibility for developing community-based programs with the Technical Advisory Committee on Delinquency Prevention and Youth Services. Closing a training school will mean loss of jobs to some personnel, relocation to some, and conversion of existing training school facilities to other state uses. Because of the many problems involved, it may never be done.

The Division of Youth Services in the Department of Human Resources reports that the Department is funded to provide care to 1,260 children; the design capacity of the existing institutions is 1,749 children; the bed capacity of the system is 2,500 plus; the juvenile population in training schools ranged from 775 to 1,210 children in 1974 and from 650 to 1,000 in 1975. It reports that the average length of stay is shorter today than a year ago, with fewer recidivists. In fact, the Fountain School has recently been closed.

CONCLUSION

It seems clear that the North Carolina juvenile justice system will continue to be fragmented and to operate as a nonsystem in the near future, with a gap between legislative intent and capacity to implement. One important issue is how to convert state funds from support of institutions to support of community-based programs. Related to this is the need for appropriate planning to dovetail available federal funding with state and local funding and to use available private funding sources.

Achieving positive change in juvenile corrections may involve several keys. One key would be to increase the visibility of children on probation, in community programs, and in training schools; these children are now tucked away out of the public consciousness. If the public were made more aware of them and their problem, public concern for children would demand better programs, more accountability, and secure funding for those program models that are found effective in helping children.

Another critical key is the identification of local leadership and initiative. State government needs to recognize local leadership in this field so that state staff can "facilitate" their efforts through technical assistance, help in assessing need, program information, and access to funding.

CONSENT REQUIRED FOR THE MEDICAL TREATMENT OF MINORS

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AT EARLY COMMON LAW, a father had a duty to support his minor child.[1] Along with this duty he had the right to control his child's services and earnings during minority. If a father did not perform his obligations or exercise his rights, the mother was required to provide support and could control the services and earnings. It was the parents who had a right of action against a person who negligently injured their child. This parental interest, coupled with the general feeling that minors did not have enough wisdom and experience to act for themselves, produced the rule that minors could not alone consent to medical treatment. Parental consent was required. When a minor's parents were dead or otherwise unavailable, the consent of a legal guardian or some other person standing in loco parentis (in place of a parent) to the minor was required. (Hereafter the term "parental consent" will also mean consent by a guardian or person who stands in loco parentis.)

Recognition of dangers to the public health through spread of communicable diseases or to the minor patient himself if treatment were delayed until parental consent could be obtained led many states, including North Carolina, to enact statutes protecting physicians from liability for treating minors in certain circumstances without parental consent. These statutes and some recent constitutional developments have caused considerable confusion about when a minor may obtain medical treatment without the consent of his parents. This article will examine the present status of North Carolina's law concerning the consent required for treatment of minors generally as well as some specific statutes and cases that apply to specific procedures.

North Carolina law defines a minor as "any person who has not reached the age of 18 years."[2] The words "child" and "infant" are synonyms for "minor" and therefore carry the same definition. Treatment is defined[3] as "any medical procedure or treatment, including X rays, the administration of drugs, blood transfusions, use of anesthetics, and laboratory or other diagnostic procedures employed by or ordered by a physician licensed to practice medicine in the State of North Carolina that is used, employed, or ordered to be used or employed commensurate with the exercise of reasonable care and equal to the standards of medical practice normally employed in the community where said physician administers treatment to said minor." This very broad definition is intended to include any medically related procedure.

IN GENERAL, no person can be physically touched for the purpose of medical treatment without his consent.[4] If the person to be treated is a minor, either of his parents, his guardian, or a person standing in loco parentis to him must consent to the treatment. Treatment without a patient's consent when the patient is an adult or without parental consent when the patient is a minor is an unauthorized touching, or in legal terms a battery. An action for damages could result. Thus, as a general proposition, a physician should never treat an adult patient without his consent or a minor patient without parental consent.

North Carolina's basic law on the treatment of minors is set out in Article 1A of Chapter 90 of the General Statutes. It requires prior parental consent in all but three circumstances. A physician who treats a minor without parental consent in any of these three situations has immunity from legal action based on treatment without consent.[5] This immunity does not, however, relieve him of liability for negligence in treating the minor.

First, a physician may treat the minor when any of three emergency situations exist:

(1) Where the parent or parents, the guardian, or a person standing in loco parentis to said child cannot be located or contacted with reasonable diligence during the time within which said minor needs to receive the treatment, or

1. *See, e.g.*, White v. Commissioners of Johnston County, 217 N.C. 329, 7 S.E.2d 825 (1940).

2. N.C. GEN. STAT. § 48A-2.

3. N.C. GEN. STAT. § 90-21.2.

4. The consent that is required must be informed. That is, the patient must be informed of the material risks involved in and the consequences of the procedure. The consent must also be voluntary. The patient must act not under duress but with full freedom.

5. N.C. GEN. STAT. § 90-21.4

(2) where the identity of the child is unknown, or where the necessity for immediate treatment is so apparent that any effort to secure approval would delay the treatment so long as to endanger the life of the minor, or

(3) where an effort to contact a parent, guardian, or a person standing in loco parentis would result in a delay that would seriously worsen the physical condition of said minor.[6]

In any emergency case, if the treatment to be administered includes a surgical operation, the physician is required to obtain the opinion of a second physician licensed to practice medicine in North Carolina.[7] This requirement is relaxed when the emergency situation arises in a rural community or in a community where it is impossible for the surgeon to contact any other physician.

Second, a minor's consent is itself effective and no other consent is necessary when he is emancipated.[8] Emancipation occurs either when a minor marries or when the parent "surrenders all right to the services and earnings of the child as well as the right of custody and control of his person."[9] Physicians generally cannot determine when emancipation by act of the parent has occurred and thus do not normally rely on the claim of emancipation to justify treating a minor without parental consent. Emancipation by marriage is more easily documented and therefore a more likely basis for treatment.

Finally, a minor may be treated without parental consent when the medical procedures to be rendered are "to determine the presence of or to treat venereal diseases and other diseases reportable under G.S. § 130-81."[10] Examples of other reportable diseases under this statute are diphtheria, hepatitis, malaria, mumps, polio, rubeola, and smallpox.

OTHER STATUTES AND CASES also speak to the ability of minors to undergo specific medical procedures and the consent required for them.

Blood Donation. The statute[11] providing for the donation of blood expressly allows any person eighteen or over to donate blood without parental consent. This authorization implies that parental consent is necessary before a minor may give his blood. In addition, the general rules of Article 1A of Chapter 90 would require parental consent before a minor may donate blood.

Anatomical Gifts. The law[12] that authorizes anatomical gifts by persons eighteen or over nowhere gives minors the power to execute such gifts. This power appears denied minors even if parental consent is obtained. But a parent or guardian is not prohibited from executing an anatomical gift of a deceased minor child.

Sterilization Operations. Under North Carolina law (G.S. 90-271) voluntary sterilization operations may be performed on one who is 18 years old or older or on one who is under 18 if that person is married. The operation is allowed only if the physician consults with another licensed physician and only if the patient requests the procedure in writing. The physician must also give the patient a full and reasonable medical explanation of the consequences of the operation.

A voluntary sterilization operation may be performed on an unmarried minor only if all the requirements of G.S. 90-271 have been complied with, if the minor himself has requested the procedure in writing,[13] and if the parents or guardian has petitioned the juvenile court of the county where the minor resides for an order permitting the operation. The court will issue such an order only if it finds the sterilization operation to be in the minor's best interest. This further procedure is required before sterilization of an unmarried minor in order to protect him from a sterilization operation that is sought and consented to by his parents for selfish or punitive reasons.

Abortion. Before 1973 an abortion could not be performed on a minor without written parental consent. In 1973 the General Assembly rewrote the statute regulating abortion to comply with recent United States Supreme Court opinion[14] concerning the point during a pregnancy at which a state, by regulations, might intrude upon a woman's right to decide whether to have a child. In doing so, it left out any reference to a requirement for parental consent before an abortion may be performed on a minor.[15] This omission has been interpreted by the Attorney General as a conscious decision by the Gen. Assembly not to limit a minor's ability to get an abortion.[16] It could be argued, however, that the legislature intended instead to have abortion fall within the general rule for treatment of minors set out in Article 1A of Chapter 90. These rules would require parental consent before an unemancipated minor could receive an abortion.

Several federal and state courts have dealt with whether a minor has a right to an abortion without prior parental consent.[17] Nearly all of their decisions have found unconstitutional any state attempt to require parental consent. Only one federal court has upheld a state parental

6. N.C. Gen. Stat. § 90-21.1.
7. N.C. Gen. Stat. § 90-21.3.
8. N.C. Gen. Stat. § 90-21.5(a).
9. Gilliken v. Burgage, 263 N.C. 317, 322, 139 S.E.2d 753, 757 (1965).
10. N.C. Gen. Stat. § 90-21.5 (b).
11. N.C. Gen. Stat. § 90-220.11.
12. N.C. Gen. Stat. § 90-220.2.
13. N.C. Gen. Stat. § 90-272.
14. The decisions behind the rewrite of the abortion statute are Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973).
15. *See* present N.C. Gen. Stat. § 14-45.1.
16. 44 N.C.A.G. 213 (Jan. 28, 1975).
17. *See* Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); Planned Parenthood Ass'n. v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975); Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1974); Planned Parenthood of Central Missouri v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1974); Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1974); Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); State v. Koome, 84 Wash.2d 901, 530 P.2d 260 (1974).

consent statute.[18] The operation of this statute has been stayed by the United States Supreme Court[19] until it hears the case. The Attorney General's opinion noted earlier and the trend of recent federal court decisions argue strongly for the right of a minor in North Carolina to obtain an abortion without parental consent. However, the right will remain unsettled until the Supreme Court decides the issue finally.

Pregnancy Test and Family Planning Services. No statute or case in North Carolina directly deals with whether minors may obtain contraceptives or pregnancy tests without prior parental consent. Thus it would appear that the ability to receive contraceptives or pregnancy tests would fall under the general rules of Article 1A of Chapter 90. Since the distribution of contraceptives and pregnancy tests are neither emergency situations nor reportable diseases, it seems clear that prior parental consent is required before such services are made available to unemancipated minors. This interpretation is supported by the fact that the 1975 General Assembly defeated a bill that would have given minors the right to obtain pregnancy tests without parental consent.[20]

One recent federal case holds that a state may not constitutionally require parental consent before providing minors with contraceptive information and services.[21] The court's rationale was that since the Fourteenth Amendment gives a woman the right to decide whether to terminate her pregnancy, she must also have the right to take measures to guard against her pregnancy. This logic is easily extended to give the right to get a test to determine pregnancy. In reaching this decision, the court had to assume that minors have the right to terminate a pregnancy. If the United States Supreme Court gives minors this right when it decides the case now before it,[22] the next step seems to be giving minors the right to obtain contraceptives and pregnancy tests without prior parental consent.

Drug and Alcohol Abuse. The treatment of minors for drug or alcohol abuse is also governed by the general rules of Article 1A of Chapter 90. Parental consent is necessary.

Unsuccessful legislation introduced in the 1975 General Assembly would have given minors the ability to consent alone to treatment for drug or alcohol problems.[23] Future attempts to change the present requirement of parental consent should be expected, since many people feel that more minors would seek help if they were not required to expose their problem to their parents.

UNDER PRESENT LAW most medical procedures are available to minors only when their parents consent. This provision fosters parental control and, when the interest of the minor and his parents coincide, the requirement of parental consent lends experience and knowledge in deciding what is best for the child.

The problems with requiring parental consent arise when the parent and the minor have substantially different interests. Parents might refuse consent on religious grounds or for punitive or nonsensical reasons that bear no relation to the minor's best interest. The trend in the federal courts at least seems to be to give more rights to the minor, with the counseling necessary to insure what is best for the child coming from the physician instead of the parents.

18. Planned Parenthood of Central Missouri v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1974).
19. 420 U.S. 918 (1975).
20. H.B. 652.
21. T_____H_____ v. Jones, Civ. No. C74-276 (D. Utah, July 23, 1975).
22. *See* text accompanying note 19 *supra*.
23. H.B. 652.

STUDENT RIGHTS—AN OPENING DOOR

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THE PROTECTION OF CERTAIN LEGAL RIGHTS of public school students is not new. The United States Supreme Court has long recognized some limitations on the power of schools. In 1943 Mr. Justice Jackson put it this way:

> The Fourteenth Amendment, as now applied to the states, protects the citizen against the state itself and all of its creatures—boards of education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[1]

Still, while student rights have existed in principle for some time, courts have only recently begun to enforce them to any substantial degree.

Where does the American public school student[2] stand today? To what extent does he control his relationship with the school? At the most basic level, he is not free to choose whether to be a student. Compulsory school attendance is the law of every state but one (Mississippi), and there is no present likelihood of a serious challenge to its legality. Furthermore, it is only now being asked whether compulsory attendance may carry with it a right to benefit from the education.

Within the school setting, a child has few affirmative rights—that is, rights to pursue a course of conduct contrary to the wishes of school authorities. Such as they are, his affirmative rights largely proceed from the guarantees of the First Amendment. He has, however, a sizable and growing number of negative rights. This term refers to the whole group of actions contrary to his interests that a student may legally prevent school officials from taking. The category includes the rights to be free from discrimination on the basis of race, sex, or marital or parental status; the right to certain standards of due process before the school imposes penalties for violating its rules; the right to have his school records kept private; and the right to certain protections of the Fourth Amendment when a search is to be made of a student or his belongings. Although some of these rights arise from federal legislation and federal agency regulations, most of them have been established by federal judicial decisions. Of the rights established by the courts, only those confirmed by the Supreme Court can be viewed as final (and those too are subject to redefinition). Many of the rights claimed by students have been recognized by only one or more federal district court decisions or a circuit court decision, and recent ones at that, so that students and school officials share a feeling of uncertainty about them. At this period of 1976, students' rights is an extremely fluid area of law. Though the pendulum appears to be swinging toward protection of the rights of individual students, it is not yet clear how far courts and Congress will go in limiting the authority of the school.

THE RIGHT TO BENEFIT FROM SCHOOLING

Earlier generations were not as convinced as we that every child should attend school. The first compulsory attendance law was not enacted until 1852 (Massachusetts). Two decades later nearly all states had such laws, but they were often tacitly ignored, especially in the South. Even today, North Carolina law allows the State Board of Education to excuse pupils "due to the immediate demands of the farm or the home in certain seasons of the year."[3] Now, however, the principle of compulsory attendance is probably more firmly entrenched than any other element in the school law. Only the Amish, who oppose high school education on religious grounds, have successfully challenged it in recent years. In its decision excepting the Amish from Wisconsin's compulsory education law, the United States Supreme Court specified that the state's interest in universal education ranks higher than all but

1. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

2. Private school students have fewer rights, obviously, since unjust action by their schools is not "state action." Federal legislation such as Title IX and the Family Educational Rights and Privacy Act applies only to those institutions that accept federal financial assistance.

3. N.C. GEN. STAT. § 115-167 (1975).

the most fundamental constitutional rights like freedom of religion. The Amish might not have prevailed even then, except for certain other favorable circumstances.[4]

If the legality of compulsory education is assumed, an interesting question follows. What responsibility does the state have toward child and parent when it compels the child to attend school? Presumably, the state coerces individuals in order to confer the benefit of education; can it be said, then, that the state commits an actionable wrong against one who is coerced without being given a fair opportunity to benefit?

The general premise that the state must afford benefit when it drastically curtails freedom was accepted by the United States Supreme Court recently when it held that harmless mentally ill persons may not be confined without treatment.[5] An analogous case in the school context was filed in 1972 but has not yet been adjudicated. In that complaint a public school student and his mother asked damages from the school district for its negligence in assuring the boy's mother of his satisfactory progress and awarding him a high school diploma while he remained illiterate.[6]

In North Carolina the principle has already been accepted as part of the state's educational policy. The Equal Educational Opportunity Act, N.C.G.S. 115-1.1, enacted in 1973 and still only partially realized, says that ". . .the State must develop a full range of service and educational programs, and . . . *a program must actually benefit a child or be designed to benefit a particular child* in order to provide such child with appropriate educational and service opportunities [emphasis added]." Taken literally, such a statutory requirement establishes a new and important student right, the right of each individual to benefit from compulsory[7] public education.

FREE SPEECH

The First Amendment to the United States Constitution guarantees the people freedom of religion, freedom of speech, freedom of press, freedom of association, and the right to assemble peaceably and petition the government. The constitutional limits placed on the federal, state, and local governments by this amendment are the cornerstones of our democracy. Thus, it is not surprising that it was in the area of First Amendment rights that the courts first began to declare that public school students have constitutionally protected rights.

In 1943, the United States Supreme Court declared that the First Amendment protects the right of public school students who are Jehovah's Witnesses not to participate in a legislatively mandated daily salute and pledge of allegiance to the American flag.[8] The students and their parents argued successfully that the required patriotic ceremony violated their First Amendment rights to freedom of religion. Twenty years later, after much litigation, the Supreme Court ruled that the First Amendment prohibited school-sponsored prayer, Bible-reading, and devotional services in the public schools.[9] But these cases did not clearly establish that the students themselves could assert the First Amendment against school policies. Here, as in other school cases, the Supreme Court based its decisions on the parents' rights as well as the students' rights.

Not until 1967 did the Supreme Court state unambiguously that students have constitutional rights. In *Tinker v. Des Moines Independent Community School District,*[10] the Court declared:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[11] . . . First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[12]

The *Tinker* decision specifically declared that the First Amendment protected the right of students to wear black armbands to school as a symbolic expression of protest against the Vietnam War even though such action violated a school board rule forbidding the wearing of armbands. Beyond the particular facts of the *Tinker* case, however, the Supreme Court's decision has been the foundation for a great many other federal and state court decisions on students' First Amendment rights. Students may verbally express their opinions on campus on any issue, including criticism of school policies and school administrators. *Tinker's* protection of symbolic speech has been extended to freedom buttons, white armbands, and expressive patches and symbols sewn on student's clothes. Students' rights to freedom of the press have been one of the most frequently litigated First Amendment areas. After *Tinker*, the courts have clearly recognized that the First Amendment protects students' rights to publish nonschool-sponsored materials off-campus and to

4 Wisconsin v. Yoder, 406 U.S. 205 (1972). Among those circumstances cited by the Court are the facts that the Amish are model citizens in all other respects, that their children do attend school through the eighth grade, and that parents thoroughly train their high school-age children in vocational skills.

5 The Court held only that the plaintiff, a harmless mentally ill person who could have cared for himself outside an institution, should not have been involuntarily confined for custodial care. It left undecided the question of whether the state may confine such persons if it does treat them. O'Connor v. Donaldson, 95 S.Ct. 2486 (1975).

6 Doe v. San Francisco Unified School District, Civil # 653-312 (Superior Court, San Francisco, filed November 20, 1972).

7. A number of actions have been filed by dissatisfied students in public or private institutions of higher education alleging negligence, fraud, or breach of contract. Perhaps one reason none have succeeded is that the element of state compulsion is lacking. See CHRONICLE OF HIGHER EDUCATION 12, 11 (November 24, 1975), 1.

8. *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

9. *See* Abington School District v. Schempp, 374 U.S. 203 (1963).

10. 393 U.S. 503 (1969).

11. *Id.* at 511.

12. *Id.* at 506.

distribute these "underground newspapers" on campus. The courts have also held that the First Amendment greatly limits the power of school officials to censor school-sponsored publications that are produced and published by students.

Still, the First Amendment is not absolute, even as it applies to adults in the community at large. In *Tinker* the Supreme Court recognized that students' First Amendment rights must be "applied in the light of the special characteristics of the school environment."

> But conduct by the student, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[13]

Thus, school officials, to insure orderly education of students, may impose reasonable regulations on the time, place, and manner of student expression, such as rules limiting distribution of student newspapers to periods when students are not in class or prohibiting loud and boisterous speech in hallways during classes. Rules governing time, place, and manner are not reasonable, however, if their primary purpose and effect are to eliminate free expression. *Tinker* makes it clear that freedom of expression may not be "so circumscribed that it exists only in principle."

Nor does the First Amendment protect expressive conduct of students that results in or may reasonably be forecast to result in "substantial and material disruption of school activities." However, before school officials may limit or restrain students' exercise of their First Amendment rights, actual disruption must exist or the school must have objective and substantial evidence to support a forecast of substantial and material disruption. Bare allegations that student expression "could" cause disruption are not enough. As the Supreme Court indicated, ". . . In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[14] Schools have not often been successful in proving that student speech or press caused or was likely to cause substantial and material disruption of school activities. In cases involving student demonstrations, however, schools have frequently been able to uphold their disciplinary actions against participating students. Passive student demonstrations on campus during student free time are within the scope of First Amendment protection outlined in *Tinker*. In contrast, when students walk out of classes, refuse to attend classes, sit-in during class, or demonstrate by moving though the hallways disturbing students in class, lower federal courst have relied on *Tinker* in ruling that the First Amendment does not protect them from disciplinary action. This is because these actions, though often "passive," bring the normal operations of a school to a halt and are therefore considered a substantial disruption.

In addition to these restraints on student First Amendment rights required by "the special characteristics of the school environment," certain types of expression have never been considered protected speech for adults or children. Obscenity is not within the scope of the First Amendment's protection. School officials may prohibit obscene speech and distribution of obscene publications on campus, but the burden is on the school to demonstrate before censorship that the materials are in fact legally obscene. Although a legal standard for obscenity in the school setting has not been defined by the Supreme Court, in most cases the lower courts have applied standards that closely reflect the Supreme Court's definition of obscenity for the adult community.[15] Even if a broader definition of obscenity is developed for school children, no legal definition of obscenity will include all things that are vulgar, indecent, or even shocking to the sensibilities of school officials, other students, and parents. If student expression is not legally obscene, it may not be prohibited merely because it is vulgar or offends the tastes of school officials.

Libel and slander, like obscenity, are not protected free speech. School regulations prohibiting libelous publications or slanderous speech are permissible. The difficulty with such regulations is that libel and slander also are legal terms with very precise legal definitions. In addition, the Supreme Court has declared that the legal standard for proving libel of a public official is higher than for proving libel of another person, so that it would be very difficult for school officials to limit or censor even the most strident student criticism by labeling it slander or libel.

Insulting or "fighting" words, "the very utterance of which inflict injury or tend to incite an immediate breach of the peace," are also not protected by the First Amendment. Thus, for example, when an explosive situation exists at a school because of racial tensions, school officials or a court might be justified in prohibiting the use of racial epithets, the distribution of "hate literature," or the wearing of certain symbols, such as the Confederate flag, until tensions ease. Here again, the burden is on the school to show that the facts of the particular situation justify a reasonable forecast that certain student expression will result in substantial and material disruption of school operations.

Students' First Amendment rights must be balanced against the state's interests in orderly operation of the public schools. However, since the Supreme Court's decision in *Tinker,* the burden has shifted to the schools to justify restraint of students' rights to free speech and press. Still, it is important to recognize that school authorities have not been hamstrung by *Tinker* and its progeny. The

13. *Id* at 503.
14. *Id.* at 508.
15. *See* Miller v. California, 413 U.S. 15, 23 (1973), in which the Supreme Court stated the basic guidelines for determining whether literature is obscene.

cases clearly recognize the power of school officials to deal with substantially disruptive conduct even when it is expressive conduct that is otherwise protected by the First Amendment. School officials need only be aware that the power to preserve order in the educational process must be exercised within constitutional limits. The fundamental freedoms that *Tinker* declared students carry with them into the schools must be protected by school officials and not restrained or extinguished unless the officials can show circumstances that leave them no practical alternative.

PERSONAL APPEARANCE

Historically, schools have exercised strict control in matters of student dress and grooming. In recent years, however, as long hair, beards, and mustaches became fashionable for men and unconventional clothes became the standard for young people of both sexes, school systems frequently have found themselves in court defending the validity of student dress codes against challenges by students and their parents. The Supreme Court has consistently and frequently refused to hear cases dealing with student appearance and thus has left standing lower court opinions that conflict. Consequently, in answering questions about schools' authority to control student appearance, one must first ask: Where do you live?

Hair Codes. The most frequently litigated issue in student appearance cases concerns the regulation of hair length on male students. Five of the ten circuits of the United States Court of Appeals (First, Third, Fourth, Seventh, and Eighth) have ruled that students have a constitutionally protected right to choose their own hair style,[16] and this right extends to all school activities including athletics.[17] (North Carolina is in the jurisdiction of the Fourth Circuit.) But these five circuits have not agreed on the constitutional basis of this right. The First Amendment's guarantee of free expression, the Ninth Amendment's guarantee of the right to privacy, and the Fourteenth Amendment's guarantee of due process and equal protection have all been used to provide the constitutional underpinning for the right of male students to wear long hair. While this right is not absolute, it has sufficient constitutional magnitude for these courts to require school systems to meet a substantial burden of justification in order to regulate student hair styles. Unless the school system shows that long hair creates "substantial and material disruption," or presents health or safety hazards, or subverts the basic purposes of the school program, a hair-length regulation is constitutionally impermissible in the areas served by these courts. Even in the limited circumstances when a school does meet its burden of proof, the school official must try to prevent disruptions in other ways before he may order a student to shear his locks.[18]

In four other circuits (Fifth, Sixth, Ninth, and Tenth), federal courts of appeal have ruled that students have no constitutionally protected fundamental interest in their personal appearance, and any interest they do have is so insubstantial that it is not cognizable in federal courts and is therefore subject to state and school regulation.[19] These courts have rejected not only the constitutional bases for the right to determine one's personal appearance outlined above but also claims that hair codes violate freedom of religion and parents' constitutional right to raise their children according to their own values. Within the geographical boundaries of these jurisdictions, school systems need only demonstrate that regulation of hair length is rationally related to educational purposes—a burden of justification not difficult to satisfy. In the federal circuits that strike the balance in favor of nonarbitrary school regulations, however, students may be able to attack school hair codes successfully in state courts on the basis that either state constitutional or statutory law limits the power of schools to regulate student appearance.[20]

Dress Codes. Even those courts that have recognized a significant constitutionally protected interest in one's personal appearance have held that school officials have broader discretion in regulating the clothing that may be worn at school than in regulating hair styles. Less justification for regulating dress is required because the infringement of personal liberty is temporary, since it is limited to the time a student spends at school. In contrast,

16. *See e.g.,* First Circuit (Maine, Mass., N.H., R.I., P.R.), Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Third Circuit (Del., N.J., Pa., Vir. Is.), Stuff v. School Bd., 459 F.2d 339 (3d Cir. 1972); Fourth Circuit (Md., N.C., S.C., Va., W. Va.), Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Seventh Circuit (Ind., Ill., Wis.), Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); and Eighth Circuit (Ark., Iowa, Minn., Mo., Neb., N.D., S.D.), Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971). No opinion concerning long hair on male students was found for either the Second Circuit (Conn., N.Y., Vt.) or the circuit for the District of Columbia.

17. *See* Long v. Zopp, 476 F.2d 180 (4th Cir. 1973) (per curiam).

18. *See e.g.,* Massie v. Henry, 455 F.2d 799, 783 (4th Cir. 1972), in which the court rejected the school official's arguments that a hair code was justified because of the disruptive reactions of others to long hair on males and to insure safety in shop and laboratory courses. The Fourth Circuit panel noted that hairnets would prevent the safety hazards in shop and lab and that school officials should work for tolerance of freedom of choice in order to defuse the adverse reactions of others.

19. *See, e.g.,* Fifth Circuit (Ala., Canal Zone, Fla., Ga., La., Miss., Texas), Karr v. Schmidt, 460 F.2d 609 (5th Cir.) (en banc), *cert. denied,* 409 U.S. 989 (1972); Sixth Circuit (Ky., Mich., Ohio, Tenn.), Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert denied,* 400 U.S. 850 (1970); Ninth Circuit; (Ariz., Alaska, Cal., Hawaii, Guam, Idaho, Nev., Ore., Wash.), King v. Saddleback Jr. College Sch Dist., 445 F.2d 932 (9th Cir. 1971); Tenth Circuit (Colo., Kan., N. Mex., Okla., Utah, Wy.), Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 405 U.S. 71 (1972).

20. *See, e g.,* Breese v. Smith, 501 P.2d 159 (Alaska 1972) (school hair-length regulation impermissibly infringed student's right under Alaska constitution to exercise his personal choice as to appearance); Murphy v. Pocatello Sch. Dist., 94 Idaho 32, 480 P.2d 878 (1971) (under the Idaho constitution, the right to wear one's hair in manner of his choice is a protected right of personal taste); Neuhaus v. Federico, 505 P.2d 939 (Ore. App. 1973) (school board not authorized by state statute to govern student hair styles).

the effect of a hair code remains with the student "24 hours a day, seven days a week, nine months a year."[21] Despite this broader discretion, a school system may not regulate a student's manner of dress unless it can show that the regulation is necessary to the performance of the school's educational mission. In general, school dress policies that prohibit the wearing of pants by girls, dungarees or jeans, or any other general style of clothing have been found to be impermissibly overbroad and unnecessary to prevent disruption and promote academic achievement. In addition, Title IX of the Education Amendments of 1972, discussed below, would also prohibit student dress codes that impermissibly discriminate on the basis of sex. Still, bikinis on girls and loincloths on boys are inappropriate school-house attire. Schools may prohibit unsanitary, obscene, or scanty and suggestive clothing. In addition, health and safety considerations may empower schools to require that students wear certain clothing when participating in specific activites—for example, helmets for football players or hair nets for students who are serving food or taking shop courses.

As in the cases involving hair styles, federal courts in those circuits that have found no substantial federal question raised in challenges to grooming codes are very likely to sustain a school's dress code unless it is shown to be clearly unreasonable, arbitrary, or enforced in a discriminatory manner. Dress codes may still be struck down in these states, however, when state and federal courts find that in enacting the regulations, the school officials exceeded their authority under the state's constitution or statutes.[22]

SEX DISCRIMINATION

A student has a right not to be discriminated against because of his sex. It derives from Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), which forbids sex discrimination in any education program or activity that receives federal funds. Sex discrimination in education has also been held to violate the equal protection clause of the Fourteenth Amendment, but Title IX may represent firmer ground for most litigants. After three years of often bitter debate, the Department of Health, Education, and Welfare, the President, and Congress approved final regulations for Title IX in July 1975. The sections dealing with treatment of students cover admissions, curriculum, counseling, extracurricular activities, and discipline.

While discrimination in admissions is primarily a concern of higher education, two parts of the admissions regulations affect elementary and secondary school students. First, no one may be excluded from a vocational school because of sex; second, if sex is used as the basis of exclusion from a school, comparable courses and facilities must be made available to the excluded sex at another school with the same admissions criteria and program offerings. Thus, districts that maintain single-sex schools (North Carolina does not) now are obliged under Title IX to offer equal opportunity. The same result was reached by a Massachusetts federal district court and by the Ninth Circuit Court of Appeals in cases challenging the higher admission standards required of girls for academically elite high schools in Boston and San Francisco.[23] The most recent federal court decision, *Vorchheimer v. School District of Philadelphia*,[24] goes even further than Title IX on the admissions issue. In that case the court found a denial of equal protection in the exclusion of qualified persons from the boys' high school on the basis of sex, even though the plaintiffs could have enrolled in a girls' high school of equal quality.

The curriculum requirement of Title IX is quite specific: no student is to be excluded from a course or required to take a course because of his sex. The regulations note that a disproportionate number of one sex in a class should lead school administrators to examine the situation to insure that discrimination is not the cause. In response to criticism of its proposed regulations, HEW made exceptions to the general premise for chorus groups and physical education and sex education classes. Chorus groups may continue to be selected by vocal range, and classes dealing with human sexuality may have separate sessions for girls and boys. Students may be separated by sex within gym classes for the teaching or playing of contact sports, defined as "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."

In spite of protest from women's groups, the Department did not change its decision to exclude textbooks and teaching materials from Title IX's coverage. HEW claimed that coverage of books would raise serious First Amendment problems, to which feminist leaders replied that such a regulation requires no greater degree of censorship than is now imposed by state textbook commissions.

Discriminatory counseling is prohibited by the act, as well as the use of sex-biased tests to determine a student's interests or abilities. As with class enrollment, when a disproportionate number of one sex appears in counseling categories, the school is responsible for seeing that the

21. Richards v. Thurston, 424 F.2d 1281, 1285-86 (1st Cir. 1970).

22. *See, e g*, Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970) (California statute authorizing school boards to prescribe rules for discipline did not also authorize them to regulate dress and personal appearance of public school students); Johnson v. Joint Sch. Dist. No. 60, 95 Idaho 317, 508 P.2d 547 (1973) (school board exceeded its jurisdiction and authority by prohibiting female students from wearing slacks); Scott v. Board of Educ., 60 Misc. 333, 305 N.Y.S.2d 601 (1969) (school board had no power to regulate student dress for reasons other than safety, order, and discipline).

23. Bray v. Lee, 337 F. Supp. 934 (D.C. Mass. 1972) Berkelman v. San Francisco Unified School District, 501 F.2d 1264 (9th Cir. 1974).

24. Vorchheimer v. School District of Philadelphia, 400 F.Supp. 326 (E.D. Pa. 1975).

imbalance is not caused by its discrimination. For example, a school that discovers that 87 per cent of the students it advises to enter pre-medical programs are boys but only 5 per cent of those advised to enter nursing are boys needs to examine its counseling program for possible sex discrimination.

Title IX regulations also cover extracurricular activities. In fact, the athletics section has aroused more controversy than any other, though primarily in higher education circles. The regulations require equal athletic opportunities for both sexes, a goal that elementary schools have one year (until July 1976) to meet and secondary schools three years (July 1978). Ten criteria for judging equality of opportunity are specified. Although nearly all these factors involve expenditures, the regulations explicitly state that unequal expenditure is not by itself a violation, merely one consideration among others. An explanation of the apparent ambiguity here may have to await the result of complaints and enforcement proceedings under the act in the next few years. Schools are free to maintain separate teams for contact sports or any activity in which selection is based on competitive skill. However, if there is no girls' team in a noncontact sport, a girl must be allowed to try out for the boys' team (though not vice versa).

Because schools have often applied different behavior and dress standards to male and female students, Title IX can be expected to have a noticeable effect in the area of discipline. Presumably, such common restrictions as "no slacks for girls" and "no hats for boys" are no longer enforceable in public schools,[25] but the more important effect will be on the schools' treatment of pregnancy. Pregnant students, married or unmarried, may not be excluded from school entirely as was commonly done in the recent past. Nor may they be placed in a separate program or excluded from any class or school activity unless they request the separation. Title IX also requires that the student be granted leave for as long as medically necessary and then be reinstated to her original position.

MARITAL OR PARENTAL STATUS

Title IX prohibits school rules limiting admission to school or participation in the educational program because of marital or parental status when those rules discriminate on the basis of sex. It does not, however, protect students from school regulations that treat students differently because of their marital or parental status regardless of their sex. While no Supreme Court decision has set out the rights of students in school to be free from discrimination based on their marital or parental status, the presence of students who are married or pregnant or are parents has caused chaos and confusion in the schools for years. Many students who have had their education terminated or limited because of their marital or parental status have gone into state and federal courts to determine their rights. These cases make it clear that public school students do have a right to be free from discrimination based on their marital or parental status.

Marital Status. Although states may enact compulsory attendance laws, the consensus of the reported cases is that married students are emancipated and no longer amenable to compulsory attendance laws.[26] The courts have required a clear legislative mandate before they will require married students to attend school against their will. State legislatures that have acted in this area have usually done so specifically to exempt these students from compulsory attendance laws.[27]

This has not meant, however, that schools may at their option exclude or restrict the participation of married students in the school's total educational program. School systems have tried to exclude permanently or limit the school activities of married students to discourage teenage marriages, to reduce dropout rates, and to prevent the more precocious married students from corrupting other students. The almost unanimous response of the courts has been that the right to marry is a fundamental one guaranteed by the United States Constitution and schools may not without compelling reasons deny a student his state-granted right to an education because he exercised this constitutional right. The law in this area was well summarized by one federal district court:

> [A] student may not be expelled from public school simply because of his marital status, without a factual showing of some misconduct or immorality, and without a clear demonstration that the welfare or discipline of the other pupils or the school is injuriously affected by the presence of married students.[28]

This same reasoning has been used by other courts to strike school regulations prohibiting married students from participating in athletic programs,[29] honor societies,[30] and other extracurricular activities.[31]

Parental Status. The great furor in this area arises when pregnant girls or unwed parents try to continue their education. As noted earlier, Title IX absolutely forbids penalizing pregnancy, but it does not apply to even-handed

25 The same result on the slacks issue was reached in Scott v. Board of Education, 305 N.Y.S.2d 601 (Sup. Ct. 1969), and Johnson v. Joint School District, 95 Idaho 317, 508 P.2d 547 (1973).

26. *See, e.g.*, *In re* Goodwin, 214 La. 1062, 39 So.2d 731 (1949); *In re* Rogers, 36 Misc. 2d 680, 234 N.Y.S.2d 172 (1962); State v. Gans, 168 Ohio St. 174, 151 N.E.2d 709 (1958), *cert. denied*, 359 U.S. 945 (1949).

27. *See, e.g.*, Fla. Stat. § 232.01 (Supp. 1974).

28. O'Neil v. Dent, 364 F. Supp. 565, 569 (E.D. N.Y. 1973).

29. *See, e.g.*, Holton v. Mathis Indep. Sch. Dist., 358 F. Supp. 1269 (S.D. Tex. 1973), *vacated as moot*, 491 F.2d 92 (5th Cir. 1974); Moran v. School Dist. #7, 350 F. Supp. 1180 (D. Mont. 1972); Indiana High School Athletic Ass'n. v. Raike, 329 N.E.2d 66 (Ind. App. 1975).

30. Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1972).

31. Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972).

school rules penalizing parents of both sexes. Schools have argued that students who are unwed parents lack moral character and their presence in school will contaminate other students. The courts have generally answered that while "lack of moral character" may be a legitimate reason for excluding a child from public schools, the status of being an unwed parent is insufficient as a sole basis for exclusion.[32] A further infirmity of regulations governing unwed parents is that they usually cover only unwed mothers or are enforced only against unwed mothers because of the difficulty of proving paternity. Thus, discrimination on the basis of sex occurs in violation of the equal protection clause of the Fourteenth Amendment and the federal sex discrimination statute, Title IX.

Today, except in unusual circumstances, students who are married or pregnant or are parents have the same state-granted rights as other students to an education. Neither marital status nor parental status is a justification per se for excluding a public school student from school or restricting that student's participation in the school curriculum or extracurricular activities.

RACIAL DISCRIMINATION

A student's right to insist that decisions concerning his education be made without regard to his race is more firmly established than any other student right in principle, although in reality it often seems that the national goals announced twenty-two years ago in *Brown v. Board of Education*[33] are only slightly nearer. The history of noncompliance and enforcement difficulties stretches from Little Rock in 1958 to South Boston in 1976; but, putting that complex matter aside as beyond the scope of this article, the basic rights themselves can be easily stated. Students have a right based on the equal protection clause of the Fourteenth Amendment and on Title VI of the Civil Rights Act of 1964 to expect their school district, their school, and their classroom to be racially integrated, though not necessarily to reflect the exact ratio of racial populations within the district. It seems clear that they have a right to be taught by a racially integrated faculty[34] and, at least if their numbers are large, to be taught in a language they understand.[35] Even though the goals are far from fully realized, few dispute the legal entitlements in these areas, and the cases on the subject, many of which involve the scope of the remedy, will not be dealt with here.

Today new problems of racial discrimination, often referred to as "second-generation" problems, are being identified in the areas of testing, tracking, and school discipline. Since testing results frequently determine tracking, a school's practices in these spheres are often challenged together. Not surprisingly, a number of cases have held that standardized tests may not be used to assign pupils to tracks in recently desegregated school districts.[36] A more difficult question arises when the testing results place racial minorities in the lower tracks while the school's intentions are benign or at least neutral. In *Hobson v. Hansen*[37] a federal circuit court ordered the District of Columbia to suspend the operation of a four-track system, citing cultural (racial) bias in the tests by which students were tracked, lack of movement between tracks, particularly into higher tracks, and lack of educational opportunity in the lower tracks as denials of equal protection. A federal district court in California granted an injunction forbidding the San Francisco school system to place black children in classes for the educable mentally retarded on the basis of I.Q. test scores.[38] Although these decisions rest on the premise that achievement and I.Q. tests do not equitably test the abilities of minority racial groups, both cases and especially *Hobson* contain language that indicates a certain skepticism about the fairness of using tests to categorize and assign children at all. Certainly, *Hobson* expresses as great a concern for the economically disadvantaged student as for the black student. These cases, along with *Griggs v. Duke Power Co.*,[39] the employment testing decision, may be the opening wedge in a future attack on educational criteria of many kinds.

Most recently, schools have been charged with racial discrimination in applying discipline. In Dallas a federal court labeled the higher corporal punishment and suspension rates of black students the result of institutional racism.[40] Similar accusations are made on a national level by the report of a group called the Children's Defense Fund[41] and by the Office of Civil Rights of the Department of Health, Education, and Welfare. In August 1975

32. *See* Shull v. Columbus Municipal Separate Sch. Dist., 338 F. Supp. 1376 (N.D. Miss. 1972). In the *Schull* case the court required that before any exclusion for "lack of moral character," the unwed parent must receive written notification of the immoral characterization and a due process hearing to determine whether the student is "so lacking in moral character that her presence in the public school would taint the education of other students." *Id.* at 1377.

33. Brown v. Board of Education, 347 U.S. 483 (1954).

34. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

35. Lau v. Nichols, 414 U.S. 563 (1974).

36. Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Circuit, 1969); Lemon v. Bossier Parish School Board, 444 F.2d 1400 (5th Circuit, 1971); Moses v. Washington Parish School Board, 456 F.2d 1285 (5th Circuit, 1972).

37. 269 F. Supp. 401 (D.D.C. 1967), *aff'd. sub. nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Circuit, 1969).

38. Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

39. 401 U.S. 424 (1971) (prohibiting use of a test not demonstrably related to job performance that tends to eliminate a disproportionate number of black applicants). *Griggs* was, for instance, the grounds for the recent decision invalidating North Carolina's use of the National Teachers' Examination. United States v. State of North Carolina, 400 F. Supp. 343 (E.D.N.C., 1975).

40. Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1974). In July 1975 an action was filed charging the Wake County school administration with racial discrimination in assignments and discipline. *News and Observer* (Raleigh, N.C.), July 23, 1975, page 1.

41. *School Suspensions—Are They Helping Children?* (Children's Defense Fund, 1946 Cambridge Street, Cambridge, Mass., September, 1975.

the Office of Civil Rights informed all public school systems that in future investigations of racial discrimination, the Department will expect school districts to produce detailed records of every important disciplinary action by race and sex of the students.[42] The memo has recently been revised to require the record-keeping only in some 3,000 school districts with large minority populations. Records are to be kept for each expulsion, suspension, corporal punishment, referral to special school or class for behavior modification, transfer to a different school or class, or dropout. HEW recommends that the records be a brief history of each event, including a description of the offense, any hearings conducted, alternatives considered, and final disposition of the case. Perhaps the mere fact of keeping such records will benefit students by making administrators aware of actual or potential discrimination in their schools. At any rate, the information will be valuable to HEW investigators and individual plaintiffs.

DUE PROCESS IN DISCIPLINE

Far from being a concern of minorities alone, school discipline regulations concern all students. School administrators, in turn, should probably be more careful about the fairness of school rules and their procedures for enforcing the rules than about any other of their legal responsibilities toward students. There are several reasons why this should be so. First, disciplinary actions are the means by which a school is most likely to infringe on an individual student's constitutional prerogatives. The rights involved are usually important ones. Second, the school's basic legal duties in imposing discipline are well established, at least as compared with its duties in certain other areas. Third, the United States Supreme Court has held that school administrators are personally liable in damages under 42 U.S.C. § 1983 when they willfully or ignorantly violate a student's basic constitutional rights.[43]

The Fourteenth Amendment to the United States Constitution states "nor shall any State deprive any person of life, liberty, or property without due process of law." Public schools are agents of the states, and major decisions on the subjects of short-term suspensions,[44] long-term suspensions and expulsions,[45] and corporal punishment[46] define the minimum standards of due process that students may expect as a matter of constitutional right. For short-term suspensions—that is, those of ten days or less—the requirements established by the Supreme Court in *Goss v. Lopez*[47] are indeed minimal. As a result of *Goss*, students suspended for any length of time must be told what they are accused of (oral notice will do); told what the evidence against them is, if they deny the charge; and then given a chance to explain. This "hearing" may be immediate and wholly informal. (In fact, it would undoubtedly take longer to describe the requirements of *Goss* than to comply with them.) Moreover, if the official fears that the student's "presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," he may suspend the student summarily and exchange explanations later. Although the Court recognized a student's "property" interest in public school education and his "liberty" interest in a good reputation, it was unwilling to protect students further against the possibility of brief suspensions.

When more is at stake, as in a second suspension,[48] a long-term suspension, or an expulsion, federal courts have afforded students greater protection. There is no Supreme Court opinion on point, but the Fifth Circuit opinion in *Dixon v. Alabama State Board of Education*[49] appears to be authoritative, particularly since the Supreme Court cited it respectfully and at length in *Goss* as a "landmark decision." *Dixon*, which held that students are entitled to notice and a hearing before being expelled from a public school, has been expanded by later decisions. It now seems likely that a pupil involved in a serious disciplinary action is entitled to at least these elements of due process: (1) general notice or forewarning of the kind of behavior that merits expulsion, (2) specific written notice of charges against him and the supporting evidence, (3) a hearing, and (4) a hearing decision supported by the evidence.[50] Other rights are less clearly established. In the interests of a fair hearing, for example, a person other than the principal or school official involved in the misconduct might better serve as the trier of facts, but courts are evenly divided on whether combining the prosecutor-judge roles invalidates the hearing. Legal opinion is similarly divided on a student's right to legal counsel at the hearing and whether the student defendant may cross-examine the witness against him. It is clear, however, that judicial rules of evidence, such as no hearsay, need not be followed in the hearing. While the school's procedures even in so

42. Memorandum for Chief State School Officers on Student Discipline Record Keeping, from Martin H. Gerry (U.S. Dept. Health, Education, and Welfare, August 1975).

43. Wood v. Strickland, 400 U.S. 308 (1975). For a full discussion of the implications of *Wood*, see L. Lynn Hogue, *Personal Liability of Governmental Board Members: New Developments in the Law*, in this issue.

44. Goss v. Lopez, 419 U.S. 565 (1975).

45. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961).

46. Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd*, 96 S. Ct. (1975).

47. Goss v. Lopez, 419 U.S. 565 (1975).

While it may not always be true that the consequences of a second or subsequent suspension are more serious, in North Carolina a second suspension gives the principal the discretionary authority to expel [N.C. G.S. 115-147 (1975)] and hence should be treated like an expulsion.

49. 294 F.2d 150 (5th Cir. 1961).

50. This and the following statements of requirements for long-term suspension and expulsion are taken from an article by Robert E. Phay soon to be published: *Student Discipline: Procedural Issues, Law and the School Principal* (in press).

serious a matter as expulsion are not expected to conform fully to judicial standards, students may ask and cautious administrators will grant very considerable due process for those threatened with severe discipline.

Short of expulsion or suspension, corporal punishment is the most severe form of discipline inflicted on a student; here too students' rights are beginning to expand. In 1974 two circuits held that the corporal punishment practices at a particular institution reached the level of "cruel and unusual punishment" forbidden by the Eighth Amendment,[51] a possibility that had previously been accepted only in theory.[52] (In January 1976, however, the Fifth Circuit Court reversed itself in an en banc review of the *Ingraham* case, 525 F.2d 909.) Two other recent decisions saw the parents' right to forbid corporal punishment as being stronger than the schools' disciplinary responsibility.[53] Both of these arguments were made in the latest case, *Baker v. Owen*[54] from North Carolina, but failed. Instead, the three-judge federal district court identified a student's "liberty" interest in avoiding corporal punishment and set out criteria for insuring due process when it is to be imposed. After construing the state's corporal punishment statute (N.C.G.S. 115-146) narrowly and finding it constitutional as interpreted, the court recommended the following procedures. First, corporal punishment should never be used unless other, lesser punishments have been tried and unless the child has been warned that corporal punishment may be the result of further misbehavior. The exception to this rule, the court said, is for "those acts of misconduct which are so antisocial or disruptive in nature as to shock the conscience." Second, the teacher or principal should administer corporal punishment only when another person (teacher or principal) is present and that person has been told beforehand and in the student's presence of the reason for the punishment. Finally, the teacher or principal should furnish a parent who asks for information a written statement of his reasons for punishing the child and the name of the second official present. These suggestions for due process, which are similar to those contained in the Fifth Circuit's original decision in *Ingraham v. Wright*,[55] are of course dicta. The district court held that the particular student and his mother were not entitled to damages; by summarily affirming, the Supreme Court merely sustained the result without expressing any view on the reasoning of the opinion or the rules it set forth. Nevertheless, until the Supreme Court does consider the corporal punishment issue, the half-dozen liberal opinions cited here may influence schools in the direction of less reliance on corporal punishment.

51. Nelson v. Heyne, 491 F.2d 352 (7th Circuit 1974); Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974).

52. Bramlet v. Wilson, 495 F.2d 714 (8th Circuit 1974).

53. Glaser v. Marietta, 351 F. Supp. 555 (S.D. Pa. 1972); Mahanes v. Hall, C.A. No. 304-73-R (E.D. Va. 1974).

54. 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd.* 96 S. Ct. (1975).

55. 498 F.2d 248 (5th Cir. 1974).

ACCESS TO INFORMATION AND PRIVACY OF RECORDS

Some important new rights derive from federal legislation rather than judicial decisions, a fact that has obvious advantages for the protected groups. The Family Educational Rights and Privacy Act of 1974,[56] for instance, is uniformly applicable to all American public schools, and its provisions are far more comprehensive and detailed than even a Supreme Court decision on school record privacy would be. The act, which interestingly enough was introduced by Senator Buckley of New York with the support of the American Civil Liberties Union, establishes clear and immediate rights in a field that courts had not entered. The law's effect is twofold: it allows parents (and adult students) to see the student's records while preventing most others from seeing the records without permission.

Under the access provisions, a parent (and the student when he is 18) has the right to inspect his child's education records, a term broadly defined as "written documents directly relating to the student kept by the school or a person acting for the school." This would include, for instance, all the items in a North Carolina pupil's cumulative record folder, though not his teacher's personal notes and perhaps not the confidential records of guidance counselors and school psychologists. (The key distinction between records covered by the act and others is whether the person who makes the observation shares it with anyone else; if so, it is an education record.) The act regulates time, place, and manner of inspection. Thus, the school is to allow inspection of records as soon as conveniently possible after a request and in no event more than 45 days later. Parents may be required to look at the records at the school in the presence of a school official,[57] but they have a right to take copies (provided at cost) of any document they examine. They also have a right to a reasonable explanation of the records.

The right to inspect the record is accompanied by a right to challenge misleading or inaccurate information. The school may decide on the type of hearing to be held for this purpose. Then, after the hearing even if the school's decision is not to change the record, the parent may insert an explanatory statement in the file.

Privacy is the other aspect of the law. As a general rule, a school may release only "directory information" (name, address, attendance dates, degrees, etc.) without parental consent unless the information seeker falls under one of the categories entitled to see the records: school officials or research bodies with a legitimate educational interest, government officials under a statutory duty (not including police), and those who need information in an emergency

56. P.L. 93-380 (enacted Aug. 21, 1974), as amended by Sen. J. Res. 40 (1974), 20 U.S.C. § 238g.

57. The act does not say so, but these precautions seem reasonable considering that the records belong to the school and that a school official should be present to interpret them.

to protect the health or safety of the student or others. Even directory information must be withheld if a parent specifically requests it. Finally, the school must notify parents and students of their rights under the act and must maintain a list in the student's file of each person other than school officials who asks to see the file and his reason for seeking access.

SEARCH AND SEIZURE

Very few court cases have delineated the Fourth Amendment rights of public school pupils, and most of those that have been decided come from state courts. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This prohibition against "unreasonable searches and seizures" has generally been construed to permit a search only when (1) the person whose interests are involved consents, or (2) there is probable cause to search and a warrant has been issued authorizing the search, or (3) there is probable cause and exigent circumstances are such that taking the time to obtain a warrant would frustrate the purpose of the search, or (4) a valid arrest has been made and the search is incident to the arrest. These constitutional restraints apply only to governmental officials, and until recently courts have concluded that for Fourth Amendment purposes school officials are private rather than governmental persons.[58] Thus, the Fourth Amendment was found not to apply to school searches, and students were left with virtually no Fourth Amendment rights.

Now, however, most courts recognize that student interests in privacy are protected by Fourth Amendment rights that do not end at the schoolhouse gates.[59] School authorities are obviously governmental officials, and their power to search students is limited by the Fourth Amendment. The difficult question for the courts has been in defining a reasonable search in the school setting. As the United States Supreme Court has recognized in a non-school context, "unfortunately, there can be no ready test for determining reasonableness other than balancing the need to search against the invasion which the search entails."[60] In balancing students' Fourth Amendment rights with the state's interest in maintaining order and discipline in the public school, the courts usually have struck the balance in favor of the latter.

Students have argued that unless one of the well-defined exceptions applies, the stringent probable cause and warrant requirements of the Fourth Amendment apply with full force to school searches. School officials answer that the school environment itself is a special circumstance justifying less stringent search limitations. When searches have been conducted primarily by school officials to further school purposes, such as enforcement of disciplinary rules, courts have found that a less stringent standard is required to justify school searches of students and their property. School officials have not been required to obtain a search warrant or even show probable cause that an infraction has been committed to justify a search initiated for school purposes when it is conducted by school personnel. When school searches have been challenged, courts have required only that school officials show that when the search took place a "reasonable suspicion" existed that school regulations or state laws were being violated by students to justify the search.

In developing the "reasonable suspicion" standard, courts have placed great weight on the in loco parentis doctrine (that is, the school stands in the place of the parent) and the statutory responsibilities of school officials for the safety and welfare of their pupils. The courts have found that school officials have a duty to investigate any suspicion that conduct or materials dangerous or harmful to the health or welfare of students is occurring or being harbored in the school. The courts' conclusion has been that school officials need greater flexibility in meeting the goals and duties as public educators than is allowed by the probable cause standard for reasonable searches by governmental officials in other situations.[61] If school officials have a reasonable suspicion that a student has contraband materials or evidence of school infractions, the vast majority of courts have held that they can search the student or his personal effects without his consent and without first obtaining a search warrant.

The facts that justify a reasonable suspicion have varied from case to case. The reasonable-suspicion standard does not require a determination that from the facts it is more probable than not that the person suspected has contraband material. On the other hand, a mere hunch that a student is violating a school rule will not justify a search. School officials must have at least "reasonable grounds for suspecting that something unlawful is being committed . . . before justifying a search of a student . . . ." If the search is based on facts justifying reasonable suspicion, any contraband seized is admissible against the student in school disciplinary hearings and, in most cases, in any later criminal or juvenile proceeding.[62] If a school search

58. *See, e g., In re* Donaldson, 269 Cal. App. 509, 75 Cal. Rptr. 220 (1969); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (1970); and Mercer v. State, 450 S.W.2d 715 (Tex. Ct. App. 1970).

59. *See, e.g.*, State v. Young, 216 S.E.2d 586 (Ga. 1975); and People v. D., 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974).

60. Camara v. Municipal Court, 387 U.S. 523, 536 (1967).

61. *See* People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S.2d 731 (1971), *aff'd*. 30 N.Y.2d 734, 333 N.Y.S.2d 167, 285 N.E.2d 153 (1972).

62. *But see*, State v. Mora, 307 So.2d 317 (La. 1975), *vacated and remanded*, 44 U.S.L.W. 3199 (S.Ct. Oct. 7, 1975). In this case the Louisiana Supreme Court ruled that

> a search on school grounds of a student's personal effects by a school official who suspects the presence or possession of some unlawful substance is not a "specifically established and well-delineated" exception to the warrant requirement and that the fruits of such a search may not be used by the State prosecutorial agency as the basis for criminal proceedings. [*Id* at 320.]

On appeal, the Supreme Court vacated the judgment and remanded the case to the state supreme court for consideration of whether its decision was based on federal or state constitutional grounds or both.

is based on less than a reasonable suspicion, it seems clear that the materials seized by school officials would be inadmissible in any juvenile hearings or criminal prosecution. But it is not clear that the evidence could be excluded from a school disciplinary proceeding. A student also has potential civil and criminal remedies against school officials if he can show that a school search of his person or effects was unreasonable under the applicable standards.

Searches of student lockers by school officials have been an entirely different matter. The courts have generally concluded that students have no reasonable expectation of privacy in their school lockers because they know that school officials have a master key or list of combinations to all the lockers and reserve the right to inspect the lockers at any time.[63] Thus, school lockers have been considered property controlled jointly by the school and the student, and school officials may search lockers without the student's consent. In a few cases, the extent of the school control over student lockers has been found to include the right to consent to a warrantless search of the locker by the police.[64]

Except for locker searches, when the police come on campus to conduct a search for the primary purpose of discovering evidence of a crime, they must satisfy the search and seizure standards applicable in criminal cases.[65] School officials may not consent to a police search of a student, nor may the police assume the less stringent reasonable-suspicion standard for searches by school officials. Unless the student consents or circumstances are such that a search warrant is not needed, police searches on campus must be based on probable cause with a search warrant. This is true even if the search is conducted jointly by the police and school officials or only by school officials at the instigation of the police. When the primary purpose of the search is to discover evidence for the criminal prosecution of the student, then the Fourth Amendment applies with full force to searches on the school grounds.

63. *See, e.g.*, Overton v. New York, 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596, *vacated and remanded,* 393 U.S. 85 (1968), *original judgment aff'd,* 24 N.Y.2d 522, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).

64. *See* State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied,* 397 U.S. 947 (1970).

65. *See* Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

The law of search and seizure of students is in a state of flux. Neither the Supreme Court nor the federal courts of appeal have decided any cases directly governing the Fourth Amendment rights of public school students. However, litigation in this area is increasing. It seems likely the federal courts will in time define the public school student's Fourth Amendment rights more clearly and then require that schools develop procedural safeguards to protect those rights.

CONCLUSION

Students have acquired major new entitlements in the past decade. Whether the number of their legal rights will continue to increase, however, is hard to predict. On the other hand, when one considers that in *Goss v. Lopez* the Supreme Court was divided 5 to 4, despite the compelling nature of the facts presented,[66] that case seems a less substantial victory for student rights than might at first appear. Then, too, the newest appointee to that divided court, Justice John Paul Stevens, has been labeled by lawyers and education authorities as a "traditionalist" who would probably vote with the *Goss* minority in future litigation of students' rights.[67] On the other hand, the tendency to extend student privileges that one perceives in Congress and in the lower federal courts may have its own impetus by now that will eventually influence the direction of the Supreme Court itself and lead to recognition of a broad panoply of students' rights.

66. Footnote 9 of the majority opinion in *Goss v. Lopez* notes that one defendant, Betty Crome, was suspended for an event that did not occur on school grounds and for which mass arrests were made. Although she was released without being charged and claimed total innocence, she was suspended by telephone before school began the following day "without even being told what she was accused of doing or being given an opportunity to explain her presence among those arrested." Dwight Lopez's story excites even greater sympathy. He was one of seventy-five students summarily suspended as a result of a lunchroom disturbance. Although Lopez claims he was not involved in any way, he was never told why the principal thought he was a participant or allowed to explain what he was doing in the lunchroom. Lopez remained out of school entirely for four weeks, during which he and his family made repeated, unsuccessful efforts to contact school authorities for any kind of hearing. At the end of that period, he was notified of transfer to another school. Lopez attended the new school for a number of months and then dropped out.

67. *Higher Education Daily* (December 3, 1975), 5-6; *School Law News* 3, 25 (December 12, 1975), 2-4.

PERSONAL LIABILITY OF GOVERNING BOARD MEMBERS:

New Developments in the Law

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PERSONAL AWARDS of money damages against school board members are a relatively recent phenomenon. Since 1969, federal district courts in Massachusetts,[1] New Hampshire,[2] Kentucky,[3] and Louisiana[4] have awarded personal damages against school board members for violations of teachers' constitutional rights in cases challenging teacher dismissals and nonrenewals of teaching contracts. Before 1969, in cases affecting school board members, courts had awarded only equitable relief (forcing the defendant to take or refrain from taking action) as opposed to money damages. The recent holding by the United States Supreme Court in *Wood v. Strickland*[5] that school board members can be sued personally for damages for violating students' constitutional rights represents a further elaboration and formulation into a national rule of these prior developments with respect to a board member's liability.

The *Wood* case involved three high school students who were expelled for violating school regulations by "spiking" punch served at a school-sponsored event. When the students were confronted about the incident, their teacher at first assured them that she would handle the matter herself; but she later urged the students to confess their act to the principal, who then suspended them pending a decision by the school board. The principal told the students to tell their parents about the board meeting to be held that night but said that the parents should not contact the board members about the incident. Neither the students nor their parents attended the board meeting at which their case was considered.

During the board's deliberations the superintendent of schools received a telephone report that one of the students had been involved in a fight that same evening at a basketball game. He repeated the report to the meeting, and the board voted to expel the students.

Two weeks later another meeting was held that was attended by the students, their parents, and counsel, but neither the teacher nor the principal was present. The second meeting consisted of the reading of facts as they had been found at the first meeting. The board rejected a plea of leniency and voted to expel the students.

The students and their parents then brought suit against the school board members under a section of the Civil Rights Act of 1871, codified as 42 U.S.C. § 1983, alleging violation of their federal constitutional right to due process. Ultimately the case reached the United States Supreme Court, which considered whether, if they violated the students' constitutional rights, the board members could be held personally liable. The Court held that they could be so held. It then remanded the case to federal district court for a determination of (1) whether the second hearing given the students by the school board satisfied constitutional due process requirements, and (2) if due process had not been granted, what damages, if any, the students were entitled to.[6]

The federal statute (§ 1983) under which the suit was brought provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Despite its apparently broad scope, the language of § 1983 has never been given unlimited application by the courts. The Supreme Court has held that the immunity of state legislators[7] and judges[8] is not affected by § 1983. Governors and other state officials, however, have only a qualified, or good-faith, immunity under § 1983 and do

1. Lucia v. Duggan, 303 F.Supp. 112 (D. Mass. 1969) (dismissal of a teacher for wearing a beard).

2. Chase v. Fall Mountain Regional School Dist., 330 F.Supp. 388 (D.N.H. 1971) (violating a teacher's constitutional rights in not renewing the teacher's contract).

3. Dause v. Bates, 369 F.Supp. 139 (W.D. Ky. 1973).

4. Smith v. Concordia Parish School Bd., 387 F.Supp. 887 (W.D. La. 1975) (superintendent and school board members held liable for an award of back pay and attorney's fees).

5. 420 U.S. 308 (1975).

6. Decided *sub nom.* Strickland v. Inlaw, 519 F2d 744 (8th Cir. 1975).

7. Tenny v. Brandhove, 341 U.S. 367 (1951) (§ 1983 does not eliminate the traditional immunity of legislators from civil liability for acts done within their sphere of legislative action).

8. Pierson v. Ray, 386 U.S. 547 (1967) (common law doctrine of judicial immunity is unaffected by § 1983).

not share in the absolute immunity of legislators and judges.[9] The Supreme Court in the *Wood* decision places school board member liability in the context of earlier cases that had considered the extent of immunity accorded under the Civil Rights Act.

School board members are held to have the same qualified immunity that state executive officials have, as opposed to the greater immunity of legislators and judges. Qualified immunity is determined by this test:

> The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a [person's] . . . constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice.
>
> . . . .
>
> A compensatory award will be appropriate only if the. . . board member has acted with such an impermissible motivation or with such disregard of. . .clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[10]

Under this standard, immunity is conditioned on both good faith (sincere action based on the personal belief that one is doing the right thing) and avoidance of acts that violate the well-established constitutional rights of others.

By contrast, in actions brought under the common law of torts for harms done, board members and other officials enjoy a more protective immunity than that allowed in actions brought under § 1983. Traditionally, immunity to suit exempted an official from liability for harms that he caused others through governmental acts because of his need to be free "to exercise his discretion and to perform his official duties without fear that his conduct will be called into question at an evidentiary hearing or subject him to personal liability.[11] Professor Prosser, a leading academic authority on tort law, states the rule thus: "A public officer . . . cannot be held liable for doing in a proper manner an act which is commanded or authorized by a valid law."[12] Under this test an officer or board member is immune from suit if the act from which the harm resulted was within the scope of his duty (i.e., commanded or authorized by law) and was undertaken without malice, corruption, or ill will (i.e., in a proper manner or in good faith). Immunity bars an action or suit, and when it "is properly claimed, the action [against an officer or board member] is defeated at the outset."[13]

Board members have never been absolutely immune from liability in the sense that the federal and state governments and their agencies and municipal corporations have been. Governments may not be sued without their consent. Both the federal and state governments have consented to suit by adopting tort claims acts.[14] Municipal corporations may in some instances waive the defense of immunity by purchasing insurance.[15] Neither employees nor officers of government have absolute immunity from suit or from liability. Employees of governments are not immune at all and are liable for harm caused.[16] Board members do, however, enjoy a limited immunity. Board members are liable in damages for acts done in bad faith (misfeasance). But they are not liable under traditional tort law for negligence (malfeasance) or inaction (nonfeasance). Under the state law of torts, to maintain a suit against a board member or officer, a plaintiff must show malice, ill will, or corruption. This burden of proof has been so difficult that no reported North Carolina case of recovery against a board member can be found.

A number of North Carolina and federal court decisions decided under state law illustrate the rule of immunity of board members who exercise discretion in good faith within the scope of their authority. Several cases involving members of boards and commissions conclude that there can be no liability in tort or trespass for actions taken with respect to the members' official duties unless that action is based on malice or corruption.[17] The only case found in which the question of personal liability was submitted to a jury was *Betts v. Jones,*[18] a suit against members of a school committee brought by the parents of a child who was killed in a school bus accident. The parents contended that the driver of the bus was known to be reckless and incompetent and the members of the school committee that employed him should be held personally liable.

The case was tried in the March term, 1936, in Anson County. A judgment in the amount of $500 was returned

9. Scheuer v. Rhodes, 416 U.S. 232 (1974) (chief executive officer of a state, senior and subordinate officers of state's national guard, and president of state-controlled university held entitled only to qualified, good-faith immunity).

10. Wood v. Strickland, 420 U.S. 308, 321-22 (1975).

11. Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973).

12. W. Prosser, Law of Torts 127 (4th ed. 1971). (hereinafter cited as Prosser)

13. Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973).

14. The North Carolina tort claims act in N.C. Gen. Stat. § 143-291 *et seq* Its narrow construction is discussed in Prosser at 976, n. 54.

15. E.G., N.C. Gen. Stat. § 153A-435 ("Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function").

16. Miller v. Jones, 224 N.C. 783, 32 S.E.2d 594 (1945) (employees of State Highway and Public Works Commission are liable for the negligent operation of a street sweeper by the open doors of a store, resulting in damage to the merchant's stock).

17. Kinsey v. Magistrates of Jones County, 53 N.C. 186 (1860) (magistrates of a county are not personally liable for the defective condition of roads and bridges that arises out of the exercise of their duties as a governmental board). Moye v. McLawhorn, 208 N.C. 812, 182 S.E. 493 (1935) (absent malice or corruption, county board of commissioners are not personally liable for their failure to prevent the beating of a prisoner by inmates of county jail). Smith v. Hefner, 235 N.C. 1, 68 S.E.2d 783 (1952) (school trustees of a city administrative unit and park commissioners are not personally liable, absent malice or corruption, for negligence by a workman under their employ in piling concrete blocks that fell and killed a spectator at a baseball game).

18. 203 N.C. 590, 166S.E. 589 (1932) (members of a school committee could be held personally liable for malice and corruption in hiring a school bus driver known to be reckless and unfit); *see also,* Betts v. Jones, 208 N.C. 410, 181 S.E. 334 (1935) (hiring of a school bus driver known to be reckless and incompetent would permit a jury to presume malice—malice in law—upon a proper showing of facts at trial sufficient to hold school committee members personally liable).

only against the negligent driver. There is no indication that the members of the school committee were ever held personally liable.[19]

The immunity rule is as evident in contract and bond actions as it is in tort and trespass. While the doctrine of immunity that protects governmental board and commission members from liability is, strictly speaking, a tort doctrine rather than a contract doctrine and as such does not apply to contract law, North Carolina courts nevertheless apply it to actions based on losses that grow out of contractual relationships or failures to require a bond as required by statute. Although the cases in this area are not uniform, the clear pattern is to excuse board and commission members from personal liability for losses here as in matters of tort and trespass.[20] Two North Carolina decisions have held board members liable for failure to require a bond when it was expressly commanded by statute,[21] but they are only a very narrow exception to the many cases exempting board members from liability.

The change in the law brought about by the *Wood* decision and its standard of qualified (good faith) immunity is that, in suits brought under civil rights statutes like § 1983, a plaintiff need not allege malice. Once the plaintiff shows that his rights have been violated and brings himself within the statute, the board member must prove at trial that he acted in sincere belief in the rightness of his conduct and in compliance with the requirements of the Constitution. When a board member is sued under state tort law, he can answer that his acts are those of a governmental officer, and the plaintiff's action will be defeated unless the plaintiff can prove malice or the absence of good faith on the board member's part. Qualified immunity differs from the tort immunity of governmental officers, then, in that the defendant must raise and prove his good faith as a defense.

The *Wood* decision has given added publicity to the subject of board member liability and has set forth a standard of conduct for board members that may make suits harder to dispose of than under prior law. Whether these effects will result in increased litigation for board members or in added liability for the imposition of damages is still unknown. The cost of defending such suits will probably increase even with respect to actions that do not result in damages since the defense of good faith may have to be presented at trial rather than resolved at an earlier pleading stage of the litigation, as formerly happened. Law suits will thus become longer and perhaps more difficult to settle short of trial.

19 Judgment Docket "M," p. 193, Anson County Superior Court.

20. Spruill v. Davenport, 178 N C. 364, 100 S.E. 527 (1919) (absent malice or corruption, public school district committee members are not personally liable for breach of contract in discharging a teacher). Town of Old Fort v. Harmon, 219 N C. 245, 13 S.E.2d 426 (1941) (former mayor and members of board of aldermen are not personally liable for a salary paid to a chief of police who, as member of board of aldermen, was ineligible to hold the chief's position).

21. Moffitt v. Davis, 205 N C. 565, 172 S.E. 317 (1934). Moore v. Lambeth, 207 N C. 23, 175 S.E. 714 (1934).

The problem of board member liability essentially arises under federal law, since the results under North Carolina law are unchanged by the *Wood* case. The remainder of this article will examine in greater detail the federal law affecting board members and how the risk of liability can be managed through planning and insurance.

SOURCES OF FEDERAL JURISDICTION

Jurisdiction is the power of courts to decide cases. Federal courts may exercise jurisdiction over suits involving board members under provisions of both federal and state law. jurisdiction under federal law comes from the civil rights statutes and from the authority of federal courts to decide constitutional and other matters that affect the federal government or its laws. Jurisdiction over claims based on state law can arise from the power of federal courts to decide cases that raise a mixture of issues under both federal and state law. This is called pendent jurisdiction. Claims based on state law can also be raised under the jurisdiction of federal courts over suits between citizens of different states. This is called diversity jurisdiction.

The Civil Rights Laws

Federal jurisdiction over the acts of board members comes primarily from the civil rights laws that encompass several substantive areas. The two provisions of particular significance for board member liability are the action for deprivation of rights under color of state law § 1983 and the action for conspiracy to deprive persons of rights or privileges.[22] Since all state and local governmental board members exercise authority "under color of" statutes, ordinances, or other regulations, their actions are potentially within the ambit of the civil rights laws. One feature of the civil-rights-based action that is particularly important in assessing the extent of board member liability is the absence of a dollar amount limitation on jurisdiction. Under the civil rights laws, actions may be brought for an infringement of a right even when the amount of damages claimed is small.

Federal courts do not permit actions to be brought without any limit on the time between when the alleged harm occurred and when a suit is brought. Although the civil rights laws contain no statute of limitation, the principal is borrowed from state statutes, such as a three-year limitation.[23] The survival of a civil rights action for the benefit of the estate after the death of a party whose rights have been injured depends on the provisions of state law. A civil rights action will survive if the state law

22. 42 U.S.C. § 1985(3).

23. O'Sullivan v. Felix, 233 U.S. 318 (1914). Almond v. Kent, 459 F.2d 200 (4th Cir. 1972). Madison v. Wood, 410 F.2d 564 (6th Cir. 1969) (three-year statute of limitations borrowed from Michigan statute). Donovan v. Mobley, 291 F. Supp. 930 (C.D. Cal 1968) (three-year statute of limitations borrowed from California statute). North Carolina has a three-year statute of limitations, N C. GEN. STAT. § 1-52.

of the place where the alleged injury occurred provides for it.[24]

In some instances plaintiffs are required to pursue available means of correcting or redressing wrongs either through proper administrative channels or in state courts before they may bring an action in federal court. This requirement is intended to insure both that state courts have an opportunity to pass on matters affecting state law and that, when possible, controversies are resolved without the intervention of courts. Generally, however, plaintiffs are not required to exhaust state judicial or administrative remedies before bringing a suit for damages under the civil rights law.

Certain wrongful acts can create a cause of action under both state law and the civil rights laws. For example, a deprivation of a right defined by state law or a dereliction with respect to a duty imposed by state law may carry a state statutory or common law penalty. In such an instance the penalty under state law is an addition to the remedy.[25] Ordinarily, negligence creates no cause of action under the civil rights law, but negligence that results in depriving someone of his constitutional rights does create a federal cause of action.[26]

A final matter to be considered is vicarious liability, or the legal responsibility of board members for the actions of a subordinate or agent of the board. The law on the vicarious liability of board members is not settled, and federal courts have reached different conclusions in cases brought under the civil rights law.[27]

Federal Questions

Federal district courts also have the power to decide matters arising "under the Constitution, laws, or treaties of the United States" (federal-question jurisdiction) through 28 U.S.C. § 1331. In an action based on § 1331, the amount in controversy must exceed $10,000. Actions against board members that can be brought under the civil rights laws can also be based on federal-question jurisdiction if the damages meet the required level. In 1961, the United State Supreme Court held[28] that a municipal corporation was not a "person" within § 1983 and therefore could not be sued for damages under that statute. Some defendants, then, like units of government can be reached only under federal-question jurisdiction.[29] It is clear after the *Wood* decision that board members can be held liable under § 1983 whereas governmental units cannot. This distinction in potential liability may have less importance when the amount of damages sought is high and the amount-in-controversy requirement of § 1331 (a) has been met, since federal jurisdiction can be established over the governmental unit as well as over the individual board member. For these larger suits, a plaintiff who can gain jurisdiction, in an action under § 1331, over a governmental unit with adequate resources might forego a judgment against an individual board member under § 1983. When the jurisdictional amount requirement of § 1331 cannot be met, however, the plaintiff will have no choice but to seek his damages from the board member.

Claims Based on State Law

Pendent Jurisdiction. Federal courts have the power to decide cases based on state as well as federal law through both pendent and diversity jurisdiction. Pendent jurisdiction is the power to decide a case that arises out of one set of facts but involves claims or causes of action based on both state and federal law. Pendent jurisdiction permits a plaintiff to take to federal court a claim that is based on state or common law but arises out of the same factual circumstances as the federal claim. This has particular relevance to board member liability when the federal claim is based, for example, on § 1983, which has no jurisdictional amount limit (nor, of course, any requirement of diversity of state citizenship), since under pendent jurisdiction a board member may be forced to litigate a small state claim (i.e., one under $10,000) in a federal forum. Pendent jurisdiction is not a matter of right, but is rather within the discretion of the court, and courts may decline to apply it when injustice would result.

Pendent jurisdiction has been accepted in the Fourth Circuit Court of Appeals in a case[30] that joined a claim for assault and battery based on state law with a claim under § 1983. Courts in other federal circuits have also granted pendent jurisdiction in actions against board members. A Second Circuit case[31] permitted state claims

24. Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974) (survival provided for under Illinois law). Survival of actions is provided for under North Carolina law (G.S. 1-22), but it is subject to express limitations (G.S. 28-175).

25. McCray v. State of Maryland, 456 F.2d 1 (4th Cir. 1972) (failure of a court clerk to file papers as required by state law, impeding a prisoner's action for state postconviction relief). Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971) (failure of a deputy sheriff to deliver a habeas corpus petition to court).

26. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970).

27. Compare Courtney v. School Dist. No. 1, 371 F. Supp. 401 (D. Wyo. 1974) (a school board was held vicariously liable for the nonrenewal of a teacher's contract by a superintendent and principal), with Taliaferro v. State Council of Higher Educ., 372 F. Supp. 1378 (E.D. Va. 1974) (members of the state council of higher education would not be liable for the personal misconduct of administrators unless they had actual knowledge of the misconduct and acquiesced in it). Cases under § 1983 holding superiors liable where a state statute created liability should also be noted. Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973) (South Carolina common law made the sheriff liable for the misconduct of temporary law enforcement officers). Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971) (Washington state statute made the sheriff liable for the negligence and misconduct of jailers and deputies).

28. Monroe v. Pape, 365 U.S. 167 (1961).

29. City of Kenosha v. Bruno, 412 U.S. 507 (1973) (a municipality is not a person under § 1983 even for injunctive relief); Moor v. County of Alameda, 411 U.S. 693 (1973) (a county government is not a person under § 1983); *see also* Kelly v. West Baton Rouge Parish School Bd., 517 F.2d 194, 197 (5th Cir. 1975).

30. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); the § 1983 claim is discussed at 1231. *See also* Scott v. Vandiver, 476 F.2d 238, 242 (4th Cir. 1973).

31. Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969) (Veterans' Administration physician was transferred without a hearing from a position in the veterans' hospital in Syracuse, N.Y., after allegations of racism in his dealings with hospital personnel).

for slander and for tortious interference with an employment relationship to be joined with a claim under § 1983. Other federal courts have reached similar results.[32]

Diversity Jurisdiction. Federal courts also have the power to decide cases based on state law brought between citizens of different states (diversity jurisdiction) under 28 U.S.C. § 1332. Diversity jurisdiction, like federal-question jurisdiction, is subject to an amount-in-controversy limitation of over $10,000. A case from the Seventh Circuit[33] allowed claims based on diversity of citizenship to be brought in conjunction with a claim based on § 1983, although such actions appear to be infrequent. Unlike actions brought under pendent jurisdiction, diversity-based actions are less likely to surprise board members with litigation in a federal forum because of the narrower prerequisites (citizenship and amount) that must be satisfied before a suit can be brought.

Summary

Federal courts have jurisdiction over cases in which damages could be awarded against governmental board members in the following circumstances: (1) when a violation of civil rights is alleged; (2) when a federal question is raised and the damages claimed exceed $10,000; (3) when damages claimed under state law are combined with a federal claim arising out of the same facts; or (4) when a claim over $10,000 based on state law is raised between citizens of different states.

DAMAGES IN FEDERAL CASES: VERDICTS, JUDGMENTS, AND SETTLEMENTS

It is settled law that damages are available under § 1983. Nominal damages under the act are presumed, and actual as well as punitive damages can be awarded. At least one court has held that willful actions, even though "gentlemanly," will justify punitive damages when they reflect a gross disregard of basic rights and are done in bad faith.[34] The awarding of punitive damages is at the discretion of the judge, and punitive damages are allowable in civil rights cases even in the absence of actual damages.[35] Attorneys' fees are another item of damages that can be awarded in civil rights cases. They are not routinely awarded by American courts, but are within the equitable jurisdiction of federal courts and may be awarded when appropriate. They are usually justified by extreme conduct such as bad faith in bringing or defending a lawsuit.

Information on the actual amounts of judgments that are awarded plaintiffs and settlements reached between parties out of court is difficult to obtain. There is a substantial disparity between the large six- and seven-digit damages sought that appear in the newspapers and the much lower figures or even lack of final judgment amounts in the reported cases. This is so partly because reported cases, particularly in the civil rights area, deal with actions early in the litigation when procedural rather than substantive issues are resolved (for example, the judge's reasons for denying or sustaining a defendant's motion to dismiss an action for failure to state a claim upon which relief can be granted). A judge's final order or memorandum reciting the damages awarded may not appear in the published reports of decisions. The same situation exists for settlements reached out of court. A leading treatise on civil rights law cites very few cases dealing with damage amounts.[36]

The *Newsletter* of the Association of Trial Lawyers of America reports information on verdicts, judgments, and settlements gathered from newspaper reports, reported cases, and letters from association members (who many times served as counsel on the cases). Because of its specialized nature (there is a regular column on "Million Dollar Verdicts"), the *Newsletter* serves to pinpoint areas of risk and predictable damage and settlement amounts. The following are typical of recent reports in the civil rights area:

A $19,000 settlement was reached in a § 1983 action for violation of First Amendment rights brought by an employee working for the New York City Housing and Development Administration who was fired two weeks after testifying at a city planning commission hearing as a private citizen.[37] Twelve million dollars was awarded to 1,200 antiwar demonstrators in a suit against the District of Columbia for violation of the demonstrators' First Amendment rights (75 per cent of the award) and for false arrest, cruel and unusual punishment, and malicious prosecution (the remaining 25 per cent) that grew out of events in Washington on May 5, 1971.[38] A $225,000 settlement was reached in an action on behalf of a child beaten by his foster parents in a home where he was placed by a city's social service department.[39] A prison inmate was awarded $500,000 against a prison superintendent and others for injuries inflicted on him by other prisoners.[40]

Three North Carolina decisions (two quite recent) give

32. Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D. Mich. 1973); Dause v. Bates, 369 F. Supp. 139 (W.D. Ky. 1973); Jervey v. Martin, 336 F. Supp. 1350 (W.D. Va. 1972).

33. Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973).

34. Lykken v. Vavreck 366 F. Supp. 585 (D. Minn. 1973).

35. Stolberg v. Members of Bd. of Trustees for State Colleges for State of Connecticut, 474 F.2d 485 (2d Cir. 1973); Mansell v. Saunders, 372 F.2d 573, 576 (5th Cir. 1967); and Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1968).

36. C. Antieau, Federal Civil Rights Acts § 76 (1971).

37. Lichtensteiger v. City of New York, cited in 18 A.T.L.A. News Letter 7 (February 1975).

38. ACLU v. District of Columbia, cited in 18 A.T.L.A. News Letter 9 (February 1975).

39. Thompson v. City of Poughkeepsie, cited in 18 A.T.L.A. News Letter 62 (March 1975).

40. Cited in 18 A.T.L.A. News Letter 63 (March 1975). The name of the case is not given.

some guidance on the amount of verdicts, judgments, and settlements reached in suits against university officials and board members. The first case,[41] decided in 1974, was an action against the chancellor of East Carolina University and the chairman of the university's board of trustees in both their individual and official capacities. The case arose from the expulsion of two students who had written and published a letter that concerned parietal regulations in the April 1 issue of the campus newspaper. The letter used a vulgar expression with reference to the university's chancellor. The trial judge characterized the disciplining of the students by expulsion from the university as an "excuse" to discharge the student editor "for his editorial policy which conflicted with the views of [the president]. . . . Since the letter was rightfully published, the suit was unnecessary but for the actions of the defendants in disciplining plaintiffs."[42] The court awarded attorney's fees and expenses of $3,429.60 plus costs against the defendants:

> Since the complaint was filed three years ago the defendants have continually blocked all avenues of compromise and fully litigated every detail much to the delay and detriment of the plaintiffs. By insisting upon litigation . . ., by totally disregarding the constitutional rights of the plaintiffs . . ., and by interposing a variety of administrative obstacles to thwart plaintiffs . . ., defendants have been stubborn to the point of obdurate obstinacy.[43]

This award was upheld by the Fourth Circuit Court of Appeals, but the case was remanded for a determination of whether the $3,429.60 should be assessed against the defendants individually or officially.[44] An award against the defendants in their official capacities would be assessed against the State.

In addition to the judgment for attorney's fees and expenses, the trial court in this case awarded nominal damages of $100 against each defendant. The Court of Appeals also directed that when the case is remanded the court should make findings of fact on whether the defendants acted in good faith under the standard in the *Wood* decision. The court did not decide the issue of good faith in the original trial, and an award of damages would be justified only if the defendants did not act in good faith. (Although the issue of the defendants' good faith was not decided in the initial trial, they did assert it on appeal.) When the case was remanded, the district court dismissed the damages against the defendants in their individual capacities and awarded attorneys' fees against them in their official capacities.[45]

Two other recent North Carolina cases, one involving officials at Guilford Technical Institute and the other one involving members of the Board of Trustees of Western Carolina University, were both decided after the *Wood* decision. The cases, both tried before juries, reached different results. In the Guilford Technical Institute (GTI) case,[46] a nontenured community college teacher brought suit against the school's administrators for breach of his employment contract and violation of his constitutional rights of free speech and due process. The dispute arose when, contrary to the terms of his contract with GTI, the teacher was required to teach a remedial mathematics course in the guided studies division of GTI in place of a regular course in the math-science division. He protested the assignment and was discharged without compliance with the GTI discharge procedure. A federal jury of five (one juror was dismissed during the trial) returned a verdict of $86,655 for the teacher. The award was divided as follows: $15,000 personally against four GTI administrators; $60,000 against GTI as punitive or exemplary damages for violation of the teacher's constitutional rights to free speech and due process; and $11,655, also against GTI, for breach of the teacher's employment contract. After the trial judge indicated that he intended to set aside the verdict as excessive, the parties reached a settlement of $18,000—the teacher's annual salary of $15,540 and attorney's fees of $2,460.

Another recent case involved an action against the members of the board of trustees and administrators of Western Carolina University (WCU)[47] that was brought by an English teacher who was not recommended for tenure allegedly because of his involvement in organizing a teachers' union on the WCU campus. Nonrenewal for this reason would be a violation of his First Amendment rights. The teacher argued that an antiunion bias was present among the WCU administrators that should be imputed to the members of the board of trustees. The jury found the board members not liable for damages.

Two other federal cases similarly reflect the wide range in judgments awarded against members of boards of trustees. In a Pennsylvania case[48] brought by a professor who was discharged in the middle of his contract without notice and a hearing, the court awarded nominal damages of $1. The court refused to remand the case for a hearing since it was apparent that a hearing would not affect the decision to discharge the plaintiff. The court also refused to award back pay in view of the teacher's two-year delay in bringing his suit.

The Tenth Circuit Court of Appeals upheld an award of $9,100 against the president, the dean of academic affairs, and the dean of applied arts of a Utah junior col-

41. Thonen v. Jenkins, 374 F. Supp. 134 (E.D.N.C. 1974), *aff'd. in part,* 455 F.2d 977 (4th Cir. 1972) (no interlocutory appeal permitted from district court order for administrative appeal where both parties consent to an order), *aff'd. in part,* 491 F.2d 722 (4th Cir. 1973), *aff'd. in part, vacated and remanded in part,* 517 F.2d 3 (4th Cir. 1975). *Thonen* is cited in *Wood.*

42. Thonen v. Jenkins, 374 F. Supp. 134, 139 (E.D.N.C. 1974).

43. *Id.*

44. Thonen v. Jenkins, 517 F.2d 3,6 (4th Cir. 1975).

45. Thonen v. Jenkins, 733__Civ.__Washington Div. (E.D.N.C. July 1, 1975).

46. Jeffus v. Beerman, C-371-G-73 (M.D.N.C. 1975).

47. Grant v. Abbott, BA-74-120, -121, and -125 (W.D.N.C. 1975).

48. Skehan v. Board of Trustees of Bloomsburg State College, 358

49. Smith v. Losse, 485 F.2d 334 (10th Cir. 1973).

lege in an action arising out of the wrongful denial of tenure to a nontenured associate professor of history. The award was apportioned as follows: $4,100 actual damages against the three administrators and $2,500 punitive damages each against the president and the dean of academic affairs. The members of the Utah State Board of Education, who were also named in the suit, were not held liable.[49]

IMMUNITY AND THE DEFENSE OF GOOD FAITH UNDER FEDERAL LAW

We saw earlier that in a § 1983 action, the burden of establishing good faith has been shifted from the plaintiff to the defendant. This being so, it is important to review the meaning given the term "good faith" by federal courts considering the liability of board members and administrators. As the *Wood* decision defined good faith, it is a combination of both subjective and objective elements: a board member "must himself be acting sincerely and with a belief that he is doing right," and he must act in accordance with "settled indisputable law."[50] Lower federal courts have further identified at least four objective measures of good faith: (1) knowledge of prior law; (2) a reasonable factual basis for board action as judged from the perspective of the board member making a decision; (3) prior approval by a superior government agency of a given course of action; and (4) adherence to prior, established practices.

The degree of knowledge of prior law necessary to show good faith must be inferred from several court decisions; it is not precisely set forth in the *Wood* decision or elsewhere. Clearly, however, board members are not "charged with predicting the future course of constitutional law."[51] Lower federal courts have held that board members and other administrators are to be allowed some time in which to respond to new trends in constitutional law. For example, a federal district court in Virginia dismissed a complaint for damages against individual members of the board of visitors and the rector of the University of Virginia for discrimination in admissions on the basis of sex, in violation of the equal protection clause of the Fourteenth Amendment. The complaint was dismissed because the university had already instituted an adequate plan to eliminate the discrimination that had affected the plaintiff in the case. The court notes that time must be allowed to adjust to changes in legal requirements:

> Any change in the method of operation of an institution as large as the University of Virginia at Charlottesville is bound to take some time. It is not uncommon for courts, when declaring constitutional rights not previously recognized and declared, to delay for a reasonable time, in consideration of practical problems incident to the implementation of those rights, the actual exercise of the newly declared right.[52]

But court decisions also indicate that although some time will be allowed board members to adjust to changes in the law, that time is not limitless. Hence in the *Wood* opinion the Court apparently considered thirteen years long enough to become aware of the requirements of due process in student expulsions. Apparently, then, good faith includes reasonable diligence in following legal requirements. Of course, deliberate violation of established constitutional law defeats a claim of good faith.

Another objective element of good faith is that actions taken by the board and its members be reasonable. The courts examine the reasonableness of board action prospectively as the board member himself would have viewed his task and not retrospectively from the viewpoint of the injured plaintiff bringing a lawsuit.

Another measure of good faith is whether there was prior governmental approval of a particular course of action. For example, a federal district court in Maine held that eligibility regulations followed by welfare department administrators were unconstitutional. The regulations had been approved by both the United States Department of Health, Education, and Welfare and officials of the state. The welfare department administrators who had acted in reliance on the approved regulations were not held personally liable for damages.[53]

A fourth objective measure of good faith is whether established practices and standard procedures were being adhered to. Officials who have followed established or traditional ways have not been held liable when those practices have later been held invalid. For example, the Fourth Circuit Court of Appeals denied damages against the clerk of the South Carolina Senate for enforcing an unconstitutional resolution permitting boys but not girls to be senate pages. The court noted that

> [a]lthough the clerk may have acted with little sensitivity to a swelling tide of legal and social precedent rapidly eroding the bastion of male chauvinism, he acted in the light of a longstanding, albeit vaguely defined, "custom" of the South Carolina Senate barring female pages. He did no more, or less, than what had always been done.[54]

The cases just discussed indicate that board members can demonstrate good faith when their actions are taken with reasonable attention to legal requirements, are based on a reasonable view of the facts before them, are made in reliance on prior governmental approval, or are in keeping with established practices. These objective elements contrast with elements such as racial motiva-

50. Wood v. Strickland, 420 U.S. 308, 321 (1975).
51. *Id.* at 322, quoting Pierson v. Ray, 386 U.S. 547, 557 (1967).
52. Kirstein v. Rector and Visitors of the Univ. of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).
53. Westberry v. Fisher, 309 F. Supp. 12 (D. Me. 1970).
54. Eslinger v. Thomas, 476 F.2d 225, 229 (4th Cir. 1973).

tion,[55] intentional disregard of First Amendment rights,[56] and overt violation of the law,[57] which have been held to defeat a claim of good faith.

Board members and other officials should be aware of a recent case from the Ninth Circuit indicating that a board member who asserts the affirmative defense of good faith must waive his attorney-client privilege with respect to communications with his counsel regarding the plaintiff's constitutional rights.

In *Hearn v. Rhay*,[58] a prisoner brought suit against state prison officials under the civil rights laws for violation of his constitutional rights. The prison officials answered by asserting that their actions were taken in good faith, and thus they were entitled to qualified immunity under the standard set forth in the *Wood* case. The federal district judge in *Hearn* held that by invoking the defense of good faith, the defendants placed in issue their malice toward the prisoner and their knowledge of his constitutional rights. The prisoner was therefore entitled to discover documents concerning the legal advice provided the prison officials by the state attorney general, and the defendants waived the attorney-client privilege to the extent that the plaintiff needed this information to respond to the officials' defense of good faith. The court noted that by involving the attorney-client privilege, the defendant officials denied to the plaintiff information that was necessary to rebut the affirmative defense of good faith.

RISK MANAGEMENT

Risk management[59] in the context of governmental board operations means finding areas of exposure to liability, eliminating those areas or minimizing those that cannot be eliminated, and transferring the risks of those that remain through insurance or through budgeting funds for self-insurance.

One way to find areas of risk is to review current legal requirements with respect to the functions and duties of one's particular board. Where legal counsel is available, board members should request a periodic assessment of the impact that changes in statutes or recent litigation may have had on their tasks as board members. They should consult counsel whenever they are in doubt about possible legal requirements with respect to a specific factual situation. Once legal advice is obtained, it is still the board members who must make the decision, but relying on the advice of counsel in areas where the law is not clear will, if need be, help the board member objectively demonstrate his good faith and thus avoid the imposition of liability. But once clear legal requirements are identified, they can be disregarded only at some increased risk of being held liable.

Another important aspect of risk management is to minimize risks that cannot be eliminated. Board members should take care to see that their good-faith posture is preserved at all times, since the occasion may arise when they will need to establish good faith in order to avoid liability. This is essentially planning for litigation. It consists of such steps as avoiding statements that might show prejudice or animosity with respect to matters that will be decided by the board, following rules adopted by the board for conducting its own affairs (as well as those imposed by law), and retaining records and minutes that demonstrate the proper conduct of the board's business. The board and its counsel may want to consider other ways to minimize risk as well.

A third aspect of risk management is transferring the costs of unavoidable risks from the board member to an insurer or third party. An unavoidable risk of board membership is the possibility of being sued. Even when a board member has acted in good faith, a suit may be brought against him. A concomitant cost of litigation is the cost of counsel. Attorneys' fees are not usually awarded against an opposing party unless he has acted in bad faith in bringing or defending a lawsuit. The statutes, however, provide ways for local units to provide legal defense.

North Carolina statutes are not entirely clear with respect to the authority of local governments to purchase insurance to protect board members and officials from liability under § 1983. The clearest authority for such purchases appears in G.S. 115-78(f), which applies to county and city boards of education: "Funds for the purchase of insurance to protect school board members and school administrators may be included in the school budget. . . ." This provision was repealed during the last session of the General Assembly (Session Laws 1975, c. 437, s. 1) and is effective only until July 1, 1976. It will be replaced by the new School Budget and Fiscal Control Act, which has no express insurance purchase provision.

Other provisions for purchasing insurance are presented below. While it is possible for units of local government to consider the purchase of insurance as necessarily or fairly implied in the unit's express powers or essential the accomplishment of its objects and purposes, some additional authority may be necessary to make this purchase.

Under G.S. 160A-167, cities, counties, and county ABC boards "may provide for the defense of any civil or criminal action or proceeding brought against ["any employee or officer"] either in his official or individual capacity, or both, on account of any act done or omission made, or any act allegedly done or omission made in the scope and course of his employment or duty as an em-

55. Parine v. Levine, 274 F. Supp. 268 (E.D. Mich. 1967). Dupree v. City of Chattanooga, Tennessee, 362 F. Supp. 1136 (E.D. Tenn. 1973). Curry v. Gillette, 461 F.2d 1003 (6th Cir. 1972).

56. Jannetta v. Cole, 493 F.2d 1334, 1338 (4th Cir. 1974); ("No preview of an uncertain future was needed to determine that firing one for his participation 'in circulating a letter of complaint' was constitutionally impermissible.")

57. Gaffney v. Silk, 488 F.2d 1248 (1st Cir. 1973).

58. 44 U.S.L.W. (E.D. Wash. Nov. 11, 1975).

59. This discussion of risk management is based on McCahill, "Avoid Losses Through Risk Management," 49 HARV. BUS. REV. 57 (May-June 1971).

ployee or officer. . . ."[60] Defense may be supplied by the governmental entity's "own counsel, or by employing other counsel, or by purchasing insurance which requires that the insurer provide the defense." This statute provides authority for paying the costs of defense and insuring against the costs of defense, but it apparently grants no authority to pay judgments or settlements or to insure against any judgments or settlements.

G.S. 153A-435 gives counties authority to purchase liability insurance with much broader coverage. Such insurance may cover the county "itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment." This language, which is confined to insurance, permits the purchase of coverage for judgments and settlements as well as the costs of defense provided for under G.S. 160A-167. (It should be noted that G.S. 160A-485, which was rewritten in 1975, concerns only the waiver of municipal immunity through the purchase of insurance. Cities may indemnify themselves against their tort liability and waive immunity to the extent of the amount of insurance purchased. But the statute does not apparently confer on cities the authority to purchase insurance to pay individual judgments or settlements against aldermen or other municipal officials, although its wording may suggest that it is a city parallel to G.S. 153A-435.)

It should be noted that the county liability insurance provision (G.S. 153A-435) does not unequivocally authorize the purchase of insurance to cover judgments and settlements against county board members sued under a federal statute like § 1983. Units of local government might seek a clarification of statutory authority in this area from the General Assembly and should consult the attorney to their board before entering into an insurance contract covering more than the costs of defense authorized under G.S. 160A-167.

When a board member undertakes his duties conscientiously, the possibility that he will be held personally liable in a lawsuit is remote, but it is not completely avoidable. Where the statutes permit the purchase of insurance, this risk of liability can be transferred through insurance. Insurance policies written for board members usually provide "wrongful act" coverage. Two examples of definitions of "wrongful acts" are set out below:

[A]ny actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by the Insureds in their individual or collective capacities or any matter claimed against them solely by reason of their being the Insureds.

[A]ny actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty including misfeasance, malfeasance, and non-feasance by the Insureds in the discharge of their duties with the Public Entity, individually or collectively, or any matter claimed against them solely by reason of their being or having been Insureds.

Policies with similarly worded provisions are available through several insurers. Wrongful-act coverage appears broad enough to cover civil-rights-based actions and is represented by insurers as covering such actions. There are, however, no reported cases on the legal effectiveness of such coverage.

Insurance policies generally provide that the insurer will defend the insured in the event of lawsuits and pay the costs of litigation. Thus insurance to cover only litigation costs, which G.S. 160A-167 apparently contemplates, may have to be especially negotiated with insurers.

The market for insurance to cover board member liability is changing rapidly, and boards that are contemplating purchasing insurance may wish to check in advance with agents, insurance consultants, and such organizations such as the North Carolina County Commissioners Association and the League of Municipalities to determine what coverage is available and at what cost.

POSSIBLE APPROACHES IN AVOIDING LIABILITY

1. With the help of legal counsel, board members might find it useful periodically to review current legal requirements, changes in the law, and activities of their board that might affect the constitutional rights of others.

2. Board members might screen their agenda for decisions that may result in litigation. Care should be taken that the minutes record a reasonable basis for such decisions.

3. When appropriate, board members might seek the approval of other state or federal governmental agencies for a particular action when a decision may result in litigation.

4. To the extent permitted by law, board members might avoid making initial fact-finding decisions likely to result in litigation. Instead, they might exercise review authority over decisions made by subordinate administrators in such matters as hiring and discharging employees and denying salary raises.

5. Board members might consider purchasing insurance to cover possible costs of defense of suits against them and might investigate the legal basis for purchasing liability insurance to pay possible judgments and settlements.

60. N.C. Gen. Stat. § 153A-97 cross-references the authority of counties under N C. Gen. Stat. § 160A-167.

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