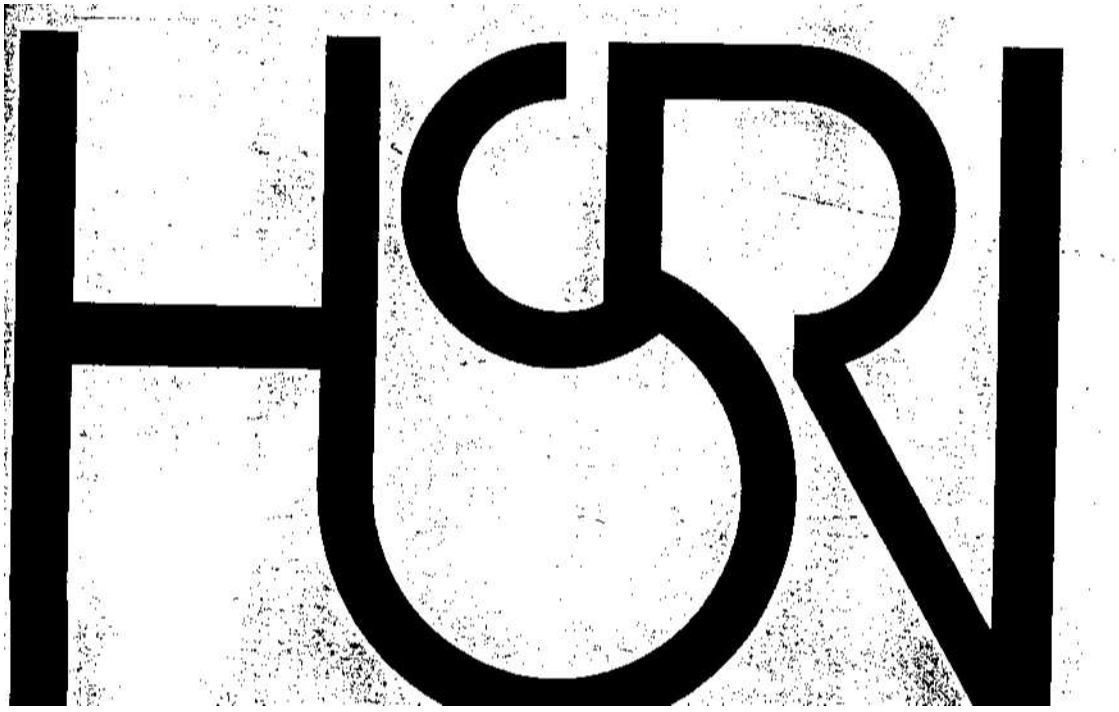
Human
Services
Research
Institute

Contract No. 130-81-0021
LONGITUDINAL STUDY OF THE
COURT-ORDERED DEINSTITU-
TIONALIZATION OF PENNHURST

IMPLEMENTATION ANALYSIS # 3: ISSUES AFFECTING COMPLEX LITIGATION



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A LONGITUDINAL STUDY OF THE COURT-ORDERED DEINSTITUTIONALIZATION OF PENNHURST

P R O J E C T S U M M A R Y

The Study

In July of 1979, the Office of Human Development Services (OHDS) within the U.S. Department of Health and Human Services (DHHS), Region III, began a 5 year Longitudinal Study of the Court-Ordered Deinstitutionalization of the Pennhurst State School and Hospital. To conduct the study, OHDS is using Temple University and Human Services Research Institute.

The goal of the study is to analyze the impact of Judge Raymond J. 3roderick's U.S. District Court Order of March 17, 1978, (and subsequent Court Orders) in which he declared that the residents of the Pennhurst center should be placed in less restrictive community facilities. The Longitudinal Study has a dual purpose: to examine the broad range of effects of this particular deinstitutionalization in Southeast Pennsylvania and to assemble data and provide analyses that will be useful to the other States and communities around the nation who are facing similar changes in their human service systems.

The Major Study Areas

To better organize the many research tasks in the study, the research team has organized itself into three study areas:

Study Area A - Impact on Clients and Communities
Study Area B - Impact on Costs
Study Area C - History and Implementation Analysis

Study Area A - monitors at both Pennhurst and, later, in community sites, the developmental progress of the study population, the services they receive, the quality of their living environments, and their satisfaction; the impact of de-institutionalization on families of clients, both in anticipation of the action to be taken under the Court Orders and following the actual relocation; and the attitudes of others in the clients' local communities, both before and after deinstitutionalization,

Study Area A also includes case studies of several Pennhurst residents, in which the research team will keep track of the particular histories of a group of clients. This activity will lend a more human perspective to the study as a whole.

Study Area B - will deduce the costs and configuration of costs to provide service, both for Pennhurst and, longitudinally, for community providers as they are affect-ed by deinstitutionalization. For as many service categories as possible, it will determine the average cost per unit of service delivered at Pennhurst and, over time, in the community. These service unit costs will be applied to the reported units of service received by individual clients. From this, the study will derive estimates of total costs for each relocated client, as a function of how much service the client actually receives.

Study Area C - maintains a detailed historical journal, in which are documented the status of compliance with the Court" Orders and the events in the Pennhurst case as they unfold during the period of this study. This study area examines the actions and intentions of the people who make public policy - how they influence the government and service system and how, in turn, they are influenced by the actions of Courts, legislators, and parent groups. It will record and analyze these influences and the interrelationships among the branches and levels of government as policy forms and evolves. In addition to this continuing chronicle, one particular issue or aspect of implementation of the Court Orders will he singled out each year for more extensive exploration and analysis.

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I. BACKGROUND

A. Issues in Litigation

Litigation in the field of mental disabilities is no longer a unique and isolated phenomenon. It has now been ten years since the Wyatt v. Stickney[1] case was decided, and in the intervening decade the art of the public law suit has been honed to a fine edge. Suits ranging from right to treatment, to right to care in the least restrictive setting, to right to community-based habilitation have been filed in at least half the states in the country. Given the pervasiveness of litigation, many states have also become accustomed to court supervision over certain aspects of state mental disabilities systems. In some cases, such as the Welsch v. Noot[2] case in Minnesota, the court's jurisdiction is now in its tenth year.

Because complex litigation aims deeply at the structure of state mental disabilities systems, it has also tended to bring system problems into strong relief. Like taking barium before an X-ray, the implementation of court mandated changes has illuminated all of the nooks and crannies in state systems and pointed out the major stresses and strains. In many instances, litigation has also been a catalyst for change and reform. Conversely, because of the controversial nature of many remedies in public law litigation, suits also have the potential for disrupting the political status quo and hastening the polarization of the multiple constituencies in the mental disabilities system.

The analysis of the implementation of the Halderman v.

Pennhurst decree[3], conducted as part of the Longitudinal Study of the Court-Ordered Deinstitutionalization of Pennhurst[4], has suggested several areas where the presence of the case has exacerbated and/or created tensions or schisms among the key actors in the state mental retardation system. One particular area of intensified tension has been in the state legislature. Whereas in the past the legislature had, within reason, relied on the Department of Public Welfare to set the tone and direction for the mental retardation program, insistent complaints from parents and others stimulated the legislature to conduct its own investigation of the management of the system. The investigation led to a series of recommendations, of which one is remove the grounds for any possible presumption that the state's mental retardation statute offers an entitlement to services. This action and the growing concern among some legislators regarding the pace of deinstitutionalization can to some extent be traced to the Pennhurst litigation.

Increased union opposition to deinstitutionalization can also be linked to the Pennhurst litigation. The specific union, the American Federation of State, County, and Municipal Employees (AFSCME), is a significant actor in the political environment surrounding the development of policy in the mental retardation system. Actions of the union have taken many forms including the use of litigation to attempt to block institutional closures and institutional phase-downs; financial support for the Parent/Staff Association, a defendant intervenor in the Pennhurst suit; and legislative lobbying, including successful opposition to zoning

legislation that would have opened up residential neighborhoods to small group living arrangements for mentally retarded persons.

The creation of the Office of the Special Master (OSM) by the federal district court also caused consternation in Pennsylvania both because of the extent of its responsibilities and the amount of resources devoted to its operations. Since its inception, OSM has been viewed by the state defendants in particular as an intruder into traditional state prerogatives. In part, OSM's problematic relationships with the defendants have stemmed from its multiple mandates and the individuated nature of much of its compliance mission.

Finally, the Pennhurst litigation appears to have aggravated if not created tensions among the parents of mentally retarded persons in Pennsylvania. Because of the frank deinstitutionalization character of the remedy, pro-institution parents were forced to take sides and they ultimately formed a separate organization and became opposing parties in the case. Given the community orientation of the Office of Mental Retardation in Pennsylvania, this polarization may have occurred in any event, but not as quickly nor as intensely.

B. Comparative Analysis

Though these tensions have become manifest in Pennsylvania since the inception of the Pennhurst case, it is not clear whether these findings can be generalized to other states where similar or related litigation is in progress. There are several reasons to suspect that the Pennsylvania context is not typical of the situation in other states. For one thing, the Pennhurst case has not been settled and it is once again on its way to the Supreme Court of the United States. Additionally, the Pennhurst suit is primarily a deinstitutionalization case whereas litigation in many other parts of the country is directed at institutional improvement or mixed institutional improvement and deinstitutionalization. Finally, the nature of the Pennsylvania mental retardation system is complex and relatively sophisticated compared to many other states.

Further, even in Pennsylvania, it is not always clear to what extent the issues that have surfaced are attributable to the litigation on the one hand, and concern regarding deinstitutionalization on the other. In order to determine whether the issues growing out of the investigation of the Pennhurst litigation are present or emergent in other states that have been subjects of related suits, project staff designed a comparative analysis to assess the following four potential effects of litigation within a state:

1. state legislative "backlash" against mental disabilities litigation and/or deinstitutionalization;

2. strong and vigorous opposition to continued deinstitutionalization on the part of unions representing institutional employees;

3. alienation between the compliance monitor or master and state mental retardation authorities;

4. schisms among parents of retarded citizens regarding the future of institutional care.

As comparison sites, project staff selected four states where complex litigation has been brought and where the decrees affected large numbers of retarded citizens. In order to maintain continuity with the Implementation Analysis for year two (Bradley, Allard, and Epstein, 1981), two of the states selected were Maine and Michigan. These sites had been used in year two to compare the reaction of the state defendants in Pennsylvania to the response of state defendants elsewhere. The second two sites were Minnesota and Massachusetts — two sites where litigation has been a factor in the mental retardation system since 1972 and 1978 respectively. The cases in the four states are:

Maine -- Wuori v. Zitnay[5]

Michigan — MARC v. Smith[6]

Massachusetts — Ricci v. Greenblatt, McEvoy v. Mitchell, Gauthier v. Benson, and MARC v. Dukakis (two suits)

Minnesota — Welsch v. Hoot

C. Objectives and Method

The third Implementation Analysis prepared for the Longitudinal Study has the following objectives:

- To highlight the political and legal forces that influence the administration of the mental retardation system in Pennsylvania;
- To analyze each of the four major issues and the relative impact that each has had on the system in the state to date, and in the foreseeable future;
- To compare and contrast the influence of the four major issues across other states where significant litigation is in progress;
- To assess the relative weight of each of the political and legal phenomena as catalysts in the system and the extent to which they stem from similar or dissimilar motivations and/or circumstances;
- To suggest possible policy directions for addressing concerns raised by each of the factors under analysis.

Following selection of the comparison sites, each state was contacted to secure pertinent court-related and program materials, and interviews were scheduled for the two days to be spent in each state. Project staff were specifically interested in talking to individuals who could shed light on the four issues including state legislators and their staffs, union representatives, parents of retarded individuals living both in institutions and in the community, and court-appointed compliance officials. Additionally, interviews were scheduled with state mental retardation officials, providers of mental retardation services, advocates, institutional staff, and attorneys.

In order to elicit information pertinent to the four issue areas, staff prepared a topic guide to govern all interviews. With respect to key actors in Pennsylvania, targeted questions

were added to the interview guide used during the one week site visit in the state in conjunction with the preparation of Historical Overview VI. As usual, all interviewees were informed that their responses would be kept confidential and that no remarks would be attributed to any particular individual. Interviewees were also told that they would be asked to review a copy of the analysis in draft in order to ensure the accuracy of the information presented.

Specific materials used to prepare the implementation analysis include previous Historical Overviews, court orders and consent decrees, state budgets and supplemental budget materials, state mental retardation plans, state statutes and regulations, court monitor and master reports, institutional census and staff data, and legal and implementation literature.

D. Time Period

The period covered by this analysis concludes roughly at the end of the Fall of 1982. Where it seemed appropriate, more recent events that have a direct bearing on the issues covered have been included in the footnotes or in the text.

E. Organization of the Report

The primary focus of this analysis is on the emergence of key issues affecting the implementation of the court decree in the Pennhurst case. Therefore, Chapter II focuses on the impact that the four factors described above have had on the state mental retardation system and on the litigation. This section discusses the antecedents of these issues and establishes the points of comparison explored in the other states. Chapter III focuses on the extent of legislative retrenchment -- both in Pennsylvania and in the comparison states. Chapter IV examines the relative power and prominence of employee unions in the comparison states contrasted to Pennsylvania. Chapter V concentrates on what has been learned from the experience of the Office of the Special Master in Pennsylvania contrasted with alternative compliance entities in other states. Chapter VI is devoted to an examination of the parents' movement in the four states and the extent to which there is evidence of the types of divisions seen in Pennsylvania.

Chapter VII assesses the interaction among the four areas of investigation and comments on their collective impact on current and future services for mentally retarded persons. The final section, Chapter VIII, suggests possible policy directions at the state and federal level that should be taken in response to the findings of the multi-state analysis.

II. EMERGENCE OF MAJOR ISSUES IN PENNSYLVANIA

A. Legislative "Backlash"

In recent years the Pennsylvania Legislature has intensified its scrutiny of the state's mental retardation system generally and the issues surrounding the Pennhurst court order specifically. Although it is difficult to relate this increased attention to mental retardation directly to Pennhurst, it does appear that certain issues emanating from the court orders (i.e., fiscal, programmatic and others) stimulated legislative involvement in the overall mental retardation system. For the most part, this involvement can be characterized as an attempt by some legislators to redirect the existing mental retardation system in the Commonwealth to a more conservative fiscal and programmatic orientation.

In this section of the Implementation Analysis, several key events are described in order to highlight what can be termed as a legislative "backlash" against both the litigation and the system's frank community thrust. For example, one action specifically targeted to the Pennhurst court order was the legislature's failure to fund the Office of the Special Master for fiscal year 1982-83. Other legislative actions, though not directed to the implementation of the Pennhurst decree in particular, were arguably given momentum because of the visibility of the Pennhurst case and related litigation in the state. Such actions included the initiation of House Bill 1824 to amend the Mental Health and Mental Retardation Act of 1966,

the passage of Resolution 63 that established a special investigating committee to review the Pennsylvania Office of Mental Retardation, and the disposition of the 1982-83 Governor's budget for mental retardation programs.

1. House Bill 1824

As a result of numerous factors, including the spate of individual litigation in courts of common pleas around the state, the Pennsylvania Supreme Court's decision in the In re Joseph Schmidt[8] case, and the Third Circuit's action in the Romeo v. Youngberg[9] case, House Bill 1824 was introduced in the General Assembly on September 22, 1981, The intent of the bill was to restrict and tighten the statutory provisions of the Mental Health and Mental Retardation Act of 1966. Such an extensive revision of the Act had never been successfully undertaken by the legislature. Some of the clarifications that the authors felt were necessary to address the judicial interpretations of the 1966 Act included:

- provision of services under the Act would be explicitly contingent on the availability of funding from the legislature;
- if funds were not appropriated in sufficient quantity to meet program needs, the state and the counties could not be compelled to expend such funds for eligible individuals;
- if there was insufficient funding, the counties and the state could prioritize services — emphasizing relative need and cost efficiency;
- individuals and agencies could be immunized from claims for money damages if their actions were "made in good faith . . .";
- any interpretation suggesting a preference for least restrictive available settings would be eliminated.

It was clear that some of the proposed revisions were included as a result of judicial decisions such as those in the Schmidt and Romeo cases and the rash of individual suits brought in the courts of common pleas. The bill stressed that the 1966 Act was not to be thought of as an entitlement statute nor interpreted to guarantee treatment in the least restrictive setting. Furthermore, if the bill had passed, it would have eliminated the state statutory claim relied on by the circuit court in its second major opinion in Pennhurst.

The Pennsylvania Association for Retarded Citizens (PARC) obtained a legal interpretation of the proposed amendments as part of its campaign against House Bill 1824, Overall, the opinion stressed the internal contradictions in the bill and the unrestricted delegations of authority to the Department of Public Welfare and the counties. The opinion was circulated to the legislature, and as a result of pressure from PARC and other interested groups, the bill was recommitted to the Committee on Health and Welfare on October 17, 1981 by a vote of 23 to 25.

To date, the bill has not returned to the floor. Moreover, in the recent elections, the Democrats regained control of the Pennsylvania House of Representatives -- perhaps signifying that the legislation will be more difficult to initiate and pass in the future. Further, during the most recent negotiations between PARC and Department of Public Welfare (DPW) Secretary Helen O'Bannon in the Pennhurst case, one of the key items discussed was DPW's position on amendments to the 1966 Act -- a fact that suggests that the administration may be willing to modify its

support at some point.

2. Failure to Fund the Master

Funds for the Special Master had, until the Governor's budget for 1981-82, been incorporated in the budget for Pennhurst State Center. The separation of the OSM appropriation into a line item was seen by some observers as an attempt by the state defendants to prod the legislature to take independent action and to cut OSM's funds. The plaintiffs saw the state's action as a calculated strategy to reduce the level of resources going to support the court's compliance mechanism. Moreover, there was precedent for such action since the New York State Legislature had recently refused to appropriate funds for the continuation of the Review Panel in the Willowbrook[10] case and had been upheld by the federal court of appeals.

On the other hand, Commonwealth representatives maintained that the shift to a line item for the Master's Office was motivated by a desire to clarify the issues for the legislature and to avoid giving an inaccurate impression of the level of resources devoted to Pennhurst State Center. They also noted that it was necessary to separate OSM costs from total Pennhurst Center costs for Medicaid reimbursement purposes.

The culmination of this issue came during Secretary O'Bannon's testimony before the House Appropriations Committee on the Department's budget. In an interesting series of exchanges with Committee members, Secretary O'Bannon suggested to the legislators that they had the authority to cut the appropriation and that she and not the legislature would be held responsible

for such action. Legislators, based on the available transcripts, appeared sympathetic with Mrs. O'Bannon and unsympathetic to the budgetary needs of OSM.[11] One legislator described the Master's staff as "yo-yos" and. two other legislators avowed their willingness to go to jail with Mrs. O'Bannon if the Judge found her in contempt. In its final action, the legislature cut the Master's Office appropriation from $900,000 to $35,000, and barred the Governor from using other funds to support OSM.

In response to the legislature's appropriation for OSM, the Department of Public Welfare sent the court a check for the full $35,000 noting that they were prohibited from complying with Broderick's monthly payment order (for July it was $67,746.07). In the end, Judge Broderick found the Department and the Secretary in contempt of his payment orders of June 4, 1981 and July 14, 1981. He also assessed a $10,000 per day fine to run each day after September 2, 1981 that the payment orders were not obeyed. The Commonwealth paid the fines until Judge Broderick terminated contempt on January 8, 1982.

The legislature's antagonism toward the court's "intrusion" into state affairs is fairly clear in this series of events. The picture became even clearer in subsequent legislative actions described in the following sections.

3. Legislative Investigation

At the time that the legislature was considering House Bill 1824, legislators were also calling for an investigation of the Office of Mental Retardation (OMR). On October 14, 1981,

Resolution 63 passed unanimously in the Senate and established a five member investigatory committee to review the operations of OMR and, in particular, the community programs it funds and supervises. Increasing pressure from a variety of disaffected groups including parents of institutionalized persons, providers and some county staff played a significant role in the passage of Senate Resolution 63.

Among other things, the resolution cited alleged mismanagement of the $300,000,000 OMR budget, raised questions concerning the quantity and quality of services being provided, and evinced concern regarding the level of training required of provider staff. Some observers feared that the resolution had a more specific purpose -- to discredit the Deputy Secretary for Mental Retardation. The sponsor of the resolution, a Senator from the Southeast Region, had publicly attacked the Deputy Secretary for her lack of sensitivity to parents of mentally retarded persons. Some interviewees suggested that the resolution was passed to dramatize "horror stories" in community facilities and, therefore, to lend credence to the notion that deinstitutionalization promotes unsafe and inadequately prepared community placements.

There was at least an indirect relationship between the Pennhurst decree and the initiation of the investigation since a number of parents with children or adults at Pennhurst, who were anxious to slow and ultimately curtail the community placement process, had lobbied the resolution's sponsor.

The committee hired an investigator who initiated several

data gathering activities including site visits, public hearings, document reviews, and interviews with a cross section of key system informants. Many system observers were concerned that the investigator did not have a background in mental retardation while others saw this as an advantage and an indication that he had no particular biases.

In the final analysis, the dramatic evocation of "horror stories" in the community did not materialize. A number of public hearings were held and preliminary and final reports were issued by the committee. In the final report of the committee, the primary focus was on community living arrangements. Though the committee found them to be the most "home like" of all facilities visited, the report concluded that there is a need for "additional planning, preparation, and safeguards" and that it is time to "take stock."

The major recommendation by the committee was the formation of yet another Senate task force to design needed changes in the Mental Health and Mental Retardation Act of 1966. In making its recommendation, the committee notes that "the legal base upon which the State's MR system is built may no longer be adequate." This concern was directly related to the Pennhurst litigation. In reviewing the actions of both the Third Circuit and the Pennsylvania Supreme Court, the Committee stated:

> . . . these decisions now interpret the Act to entitle all of the MR population the above-stated treatment without regard for the availability of funds [therefore] an obvious shortfall of funds and services exists. Intervention of the courts has created additional legal and manpower costs; has limited the available choices of professionals, parents, and MR clients; has made regional and statewide planning more difficult; and has encouraged a division among Pennsylvania's

advocacy groups. (Pennsylvania Legislature, 1982)

The committee also made recommendations directed at the Office of Mental Retardation. While noting the progress OMR has made in certain areas such as standards for community living arrangements (CLAs), the committee exhorted the Office to re-evaluate its policies regarding private licensed facilities (PLFs), parents and institutional phase-downs. It was also suggested that OMR explore the wide variation in the quality of CLAs, the level of staff turnover and the breadth of staff training. Finally, the committee seriously questioned OMR's policy limiting the development of ICF/MRs to eight beds or less.

The degree of legislative involvement in this review of mental retardation programs was significant. The recommendations that are directed at changes in programmatic philosophy have been reviewed by OMR staff and may or may not lead to a redirection in the Department of Public Welfare's mental retardation programs. However, recommendations concerning the 1966 Act that require legislative action are being followed up with some urgency. As noted earlier, past attempts to change the Act have not succeeded; however, the combination of an increased amount of litigation in the Commonwealth together with pressure from dissatisfied parents may provide the momentum necessary to secure changes.

The Senate task force charged with the reform of the Act was to complete its work by the end of November 1982. Certain key observers were skeptical that the Task Force could initiate and enact specific changes before the end of the current legislative

session. The final decision will more than likely be postponed until the 1983 legislative session.

4. The Pennsylvania 1982-83 Budget

Overall, the legislature followed the Governor's budget recommendations for mental retardation programs in 1982-83. Mental retardation programs received a 5% increase across the board; at the community level, community living arrangements (CLAs) received a 4% increase, while private licensed facilities {PLFs) received a 6% increase — no funding was included for new programs. Moreover, it is not clear whether the legislature included enough funds to annualize programs developed during the fourth quarter of 1981-82. This budget marked the first time since the 1966 Act passed that no new funds were included for program expansions.

In addition, the legislature created some administrative difficulties for counties by separating the appropriation for interim care and CLAs into two separate line items. By enacting this change, the legislature was responding to concerns voiced by organizations representing PLFs and parents who were convinced that the single appropriation was leading to a possible erosion in the number of PLF beds.

Counties and others have always maintained that the state underfunds interim care. Although the state provides 100% financing, the allocations do not always fully cover the costs. Many counties have contributed their own funds to cover shortfalls. Legislators responded by providing a 6% increase for PLFs noting that in the past many facilities had received inadequate

funding from the Commonwealth. By providing PLFs with additional funding, the legislature was responding to those advocates and interest groups that want to continue interim care. On the other hand, OMR staff have characteristically treated this component of the residential services continuum with ambivalence since most of the PLFs are larger than CLAs and therefore are seen as less normalizing.

The question of adequate funding for all mental retardation programs in fiscal year 1982-83 may be raised again during the next legislative session. According to some legislative staff, the legislature will have to consider supplemental appropriations -- even tax increases -- to cover a number of programs that will experience shortfalls. The extent to which mental retardation programs fall into this category remains to be seen. If Judge Broderick issues as detailed an implementation order for 1982-83 as he did for the previous two years, the Commonwealth will have few options for the development of new placements in the Southeast Region. In a recent hearing before Judge Broderick, Secretary O'Bannon testified that the Department's proposed Title XIX community-based services waiver is the only source of funding available for expanded placements. The state matching funds proposed for the Medicaid pilot will be taken out of Pennhurst's budget. The Pennhurst budget remains one of few sources of funding available for the court orders unless the legislature provides additional resources through a supplemental appropriations bill.

5. Summary

Over the past few years, the Pennsylvania Legislature has changed its posture regarding mental retardation programs from a more passive accepting attitude about the course set by state program officials to a more aggressive and inquiring stance. In part, this shift can be traced to a general unease with the pace of deinstitutionalization. The Pennhurst litigation also appears to have influenced the legislature's behavior in two important ways — first, because it forcibly drew attention to the political issues involved in deinstitutionalization; and second, because the legal ramifications of the court's ruling were perceived as a threat to the fiscal integrity of the whole system. The litigation, therefore, had a somewhat ironic and confusing effect on the legislature's relationship with the state defendants. On the one hand, it created tensions over the issues surrounding deinstitutionalization, while at the same time it created a bond as the two entities allied against a common enemy -- the court.

B. Union Opposition

1. Overview

Since the administration of Governor Milton Shapp, the American Federation of State, County and Municipal Employees (AFSCME) has mounted a vigorous legal and political campaign against deinstitutionalization in all facilities operated by the state (i.e., general hospitals, mental hospitals, and mental retardation centers). The campaign has included lobbying to defeat a statewide zoning statute that would have pre-empted local zoning restrictions, and seeking injunctions against the closure or phase-down of several state facilities including Retreat State Hospital in Northeast Pennsylvania and several general hospitals. The intensity of AFSCME's activities, however, definitely increased once the deinstitutionalization character of Judge Broderick's decree became clear.

Although AFSCME's national position regarding deinstitutionalization is well known, their opposition to such changes in Pennsylvania has been especially vigorous. For example, AFSCME's involvement in preventing the passage of a statewide zoning statute was seen by some observers as an attempt to slow the growth of CLAs thereby decreasing the threat to jobs in state centers. Several key observers asserted that in the absence of AFSCME opposition, the bill would probably have passed.

2. AFSCME and the Pennhurst Litigation

AFSCME's active involvement in the Pennhurst litigation was percipitated by Judge Broderick's so-called "employee order" in

1978, which mandated the development of a plan for alternative employment for all Pennhurst employees. The schedule for phase-down made it clear that the court's intent was to close the facility and relocate all residents into community-based facilities. In an effort to address employee issues — usually overlooked in this type of litigation -- Judge Broderick directed the Special Master to establish a mechanism to ensure the protection of institutional employees who would, as a result of his ruling, lose their jobs. Accordingly, the Office of Employee Services (OES) was established and Dr. Irving Rosenstein was appointed as director. Dr. Rosenstein was a former staff person with the New York State affiliate of AFSCME and had academic training in manpower and related issues.

Despite the presence of Dr. Rosenstein and the mission of OES to assist employees with alternative employment, Pennhurst staff were generally unsympathetic with the office. AFSCME had no reason to promote the efforts of OES since the union stood to lose members from the bargaining unit if OES staff were successful in finding alternative, possibly non-union, jobs for Pennhurst employees.

Following the Judge's "employee order," the Parent/Staff Association -- an entity comprised of a portion of the parents of Pennhurst residents and staff members of the facility -- became mobilized to oppose the decree. The Association had argued throughout the trial and relief stages of the litigation that they should be given the opportunity to express their views on the importance of maintaining and improving Pennhurst. The Judge

consistently rejected their requests to participate. However, their involvement in the case changed after the Third Circuit Court of Appeals handed down its first ruling on Halderman v. Pennhurst. In addition to vacating the Broderick order to find alternative employment for all Pennhurst employees, the court of appeals suggested that dissenting parties such as the Parent/Staff Association might be allowed to intervene as an alternative to decertifying the class.

Judge Broderick chose to allow the Parent/Staff Association to intervene on April 24, 1980, making the case even more fragmented and complex. One of the interesting facts about the Association is its close ties with AFSCME and the financial support it receives for legal representation in the Pennhurst case. However, the emergence of the Parent/Staff Association as a defendant intervenor does not mean that the group is necessarily aligned with the state defendants. In spite of the litigation, state program officials and the Parent/Staff Association, including AFSCME, continue to be at odds regarding any further deinstitutionalization at Pennhurst State Center specifically and within the state generally.

3. AFSCME's Current Position

It has been difficult to assess AFSCME's current political stance with respect to deinstitutionalization in Pennsylvania since HSRI staff have been unable to interview key personnel within the union. It is reasonable to assume that their position remains unchanged since the court orders to place Pennhurst residents in the community are still in place. More recently,

the union's efforts regarding deinstitutionalization focused on a number of state mental retardation facilities that are either closed or are slated to be closed.

In 1982, both Marcy State Center in Allegheny County and Harrisburg Mental Retardation Unit were closed. Most of the Marcy clients were placed in community programs while Harrisburg clients were relocated to nursing homes and CLAs. As part of the strategy to close these facilities, the Commonwealth made commitments to the staff that jobs would be available in other state facilities.

A total of 243 staff at Marcy and 74 staff at Harrisburg have been transferred to other state facilities. When the DPW decision to close Marcy was made public on July 31, 1981, AFSCME sought an injunction against the Commonwealth to halt the closure. As a result of the Commonwealth's offer of alternative state employment for the institutional employees, it appears that AFSCME's objections were minimized. It is not known to what extent the union became involved in the Harrisburg unit closure.

The other facility targeted for closure was Cresson State Center. Cresson like Marcy and Woodhaven is one of the smallest state centers. Approximately 120 persons reside at Cresson with 280 staff — 75 of whom were also attached to the Altoona Center. Some of the staff may be hired by a nearby Veterans Administration facility. According to the Governor's 1982-83 budget, the commonwealth will be converting Cresson to a prison.

Opposition to changing Cresson's role has been most forcefully stated by the Pennsylvania League — a newly formed

lobbying and advocacy organization comprised of parents and other individuals concerned with the current direction of Pennsylvania's mental retardation programs. The extent to which AFSCME is represented within this new organization is unknown; however, the interests and concerns of the organization are similar to those of the union.

Although the Commonwealth has not publicly announced any additional institutional closures, DPW'S five year plan update (February 1981) indicates that admissions will be closed at all remaining mental retardation units and at selected state centers targeted for census reduction including Pennhurst, Hamburg, and Ebensburg. However, continuing economic problems within the Commonwealth and reductions in federal support may hasten facility closures and phase-downs in the next five years. As the state hospital population continues to shrink, the complement of institutional employees in various facilities will almost certainly be reduced since per diems will increase dramatically. AFSCME's future role in state facility phase-downs or closures in Pennsylvania may well resemble that of the affiliate in Michigan where AFSCME and other unions have been forced to negotiate concessions in wage and benefit packages in order to save jobs. The alternative for Michigan was — and potentially could be for Pennsylvania— massive layoffs.

C. The Court As Enforcer

1. Historical Perspective

In order to understand the reaction of state officials to the interjection of the federal court into the mental retardation system in Pennsylvania, it is important to note that the Pennhurst case is not the only complex lawsuit in which the Commonwealth has been involved. Further, the requirements outlined by Judge Broderick in the federal district court decree are not the only court-mandated activities that state officials have been required to perform and, in some instances, continue to perform. Though Pennsylvania is not necessarily alone among states as a defendant in multiple lawsuits, the character and extent of the suits are perhaps somewhat unique. The cumulative experience with these several suits may to some extent explain the reaction of Commonwealth officials to the court's continuing oversight in Pennhurst.

The most well-known case is the Pennsylvania Association of Retarded Citizens v. the Commonwealth of Pennsylvania (PARC).[12] That case, which was settled by a consent decree in 1972, required the Commonwealth to provide an appropriate education to all children in the state regardless of handicap. In its initial stages, the PARC consent decree required a variety of new procedures, reviews, hearings, and plans. It also made provisions for a court monitor to oversee the implementation of the decree. These provisions became more or less indistinct with the passage of PL 94-142 — the Right to Education for All Handicapped Children Act — which mandated many of the same

procedures included in the consent decree. Though implementation of the consent decree took on a somewhat pro forma character in the next several years, the issues in the lawsuit erupted again about five years ago over compliance in the Philadelphia schools. After four years of negotiations among the plaintiffs, the school district and the Commonwealth, a supplemental decree has been agreed to.

A second case, Vecchione v. Wohlgemuth,[13] involved the state's role as representative payee for the Social Security benefits of institutionalized persons. The final decree required the Commonwealth to conduct competency proceedings on approximately 10,000 beneficiaries, to establish a state guardian's office, to comply with multiple reporting requirements, and to appoint a guardian officer in each state facility. A third case, Goldy v. Beal,[14] created a new standard to govern a portion of the state's civil commitment provisions for mentally retarded persons. The court-mandated standard is still in effect since the legislature has never enacted alternative provisions.

The Philadelphia Welfare Rights Organization v. Shapp[15] lawsuit resulted in a consent decree that required the Commonwealth to set up a statewide process to implement fully mandates of the Early and Periodic Screening, Diagnosis, and Treatment provisions of Title XIX of the Social Security Act. The decree set up screening targets, a process for conducting the reviews and procedures for referrals. Though, according to state officials interviewed, the Commonwealth developed a model

screening program in response to the decree, the plaintiffs sought a contempt judgment for non-compliance in at least one instance.

Another case, though not in the social or human services area, represents the consummate example of over-reaching on the part of the federal courts according to some state officials interviewed. The case, Delaware Valley Citizens Council for Clean Air v. Commonwealth of Pennsylvania,[16] involved a suit brought against the state to enforce portions of the federal Clean Air Act. After much negotiation, the state signed a consent agreement requiring the development of an auto emission inspection system. The implementation of the order became a bone of contention between the legislature and the Governor and funding of the new system was never appropriated. In response, a federal district court judge froze approximately $400 million in federal highway funds coming into the state. To date, the legislature has still not agreed to provide funding for an acceptable emission inspection system. Interestingly, the group representing the plaintiffs in the case is the Public Interest Law Center of Philadelphia (PILCOP) — the same organization that represents the PARC plaintiffs in the Pennhurst case.

Though none of these cases taken singly is overwhelming, together they have made some state officials leery of federal court oversight and they may very well have influenced the response of the state to the compliance provisions set up to govern the Pennhurst case.

2. The Court in Pennhurst

The creation of the Office of the Special Master (OSM) in Pennsylvania caused a great deal of consternation both because of the extent of its responsibilities and the amount of resources devoted to its operation. Since its inception, OSM has been viewed by the state defendants in particular as an intruder into traditional state prerogatives. In part, OSM's problematic relationship with the defendants stems from its multiple mandates and the individuated nature of much of its compliance mission. The office was also a very large target given its initial budget of approximately $900,000.

It should be noted, however, that the structure of the Office of the Special Master has not been static, but changed over its four years of operation. As it evolved, OSM was vested with a wide range of responsibilities including preparing county plans for resource development, monitoring community facilities, overseeing a friend-advocate program for class members, setting up an office to assist Pennhurst employees whose jobs were threatened by the decree, reviewing individual habilitation plans, supervising the recruitment of county case managers, and monitoring the conditions at Pennhurst State Center.

As time went on, OSM staff tended to focus their energies on particular tasks and some of the original mandates were not fully implemented. Specifically, OSM's planning responsibilities proved unwieldy and inappropriate, and were subsequently abandoned. Further, the friend-advocate program, never really took on the character envisioned in the original order.

The court's compliance monitoring capacity was extended in early 1980 when Judge Broderick issued an order establishing the Hearing Master. The initial function of the Hearing Master was to rule on contested placements into community living arrangements and on applications for admission to Pennhurst. The installation of the new master was Broderick's answer to the circuit court's concern regarding inappropriate deinstitutionalization and deflection of institutional admissions. When the Supreme Court issued a partial stay in 1981 barring "involuntary" placements of class members into the community, Judge Broderick expanded the powers of the Hearing Master to include a determination of "voluntariness" prior to each class member placement.

By early 1982, agreements had been signed between OSM and the Office of Mental Retardation regarding a shift of responsibilities to the Commonwealth. Specifically, the Commonwealth agreed to take over the review of Individual Habilitation plans and the monitoring of community living arrangements. The take over was virtually complete by the fall of 1982 when Judge Broderick issued an order requesting that the Special Master phase out her operations by the end of 1982. The order, however, did not affect the operations of the Hearing Master.

3. Accomplishments and Consequences

A major area in which the Pennhurst litigation has had a positive impact is in quality assurance. As a means of protecting the rights of individual plaintiffs, the original

order included provisions regarding the development of individual habilitation plans (IHPs), and monitoring of community residences where class members were placed. This function and the IHP approval responsibility have been transferred to the state. Whether the state will continue these quality assurance activities if the district court — either voluntarily or involuntarily — relinquishes jurisdiction is not clear. However, some of the monitoring has already been extended to facilities beyond those serving class members, and the individual client monitoring is likewise rapidly expanding beyond the more narrow target group.

Further, by mandating individualized plans, litigation directed at disabled persons both in institutions and in the community has pressed program staff to design service regimens much closer to what might be considered the "ideal" array of supports. Though clearly not all of these plans were fully funded and/or implemented, they did stimulate case managers to explore a wider range of options and to bring techniques into play that might not otherwise have been considered or applied.

Finally, the IHP process and the Hearing Master forum have given the families of mentally disabled persons a formal role in decision-making regarding placement plans for their family members. Parents interviewed — even those who feel that the court's role is inappropriate -- have been impressed with the Hearing Master and note that this is the first time that parents have been treated as peers in decisions regarding their relatives.

One of the negative consequences of the litigation in Pennhurst is the resistance created among state officials. As state officials become more angry about the "interference" of the courts in policy-making, there is a danger that they will also become more resistant to the directions dictated by decrees — even if such directions are consistent with their goals for the mental retardation system in the state. Further, when state officials show disdain for the court's presence by resisting compliance, the difficulties that the judiciary has in enforcing compliance will become more apparent. Bureaucratic resistance, therefore, may have two negative consequences — obstruction of reform goals, and a diminution of the moral suasion that courts have been able to exercise in complex suits.

Additionally, the Pennhurst litigation appears to have exacerbated if not created tensions among the various constituency groups encompassed in the mental retardation system including parents of mentally retarded persons, state employee unions, the legislature, county officials, state officials, and lawyers. The power of litigation to mobilize previously disparate individuals into political coalitions can have both positive and negative consequences. On the one hand it can unify and strengthen. On the other hand, the "mobilization effect" can drive wedges in existing coalitions and can create antagonism and animosity. Evidence of such antagonism is clearly present in Pennsylvania.

Finally, the litigation has diverted significant time, money, and energy from on-going system concerns to the continuing

confrontation between the plaintiffs and the defendants. Though the value of the time spent in attending to the litigation on both sides has not been calculated, over the past eight years the total must be substantial. It is not clear whether this time and money would have been put to any more beneficial purpose. However, the resources expended have become a symbol of the negative aspects of the suit in the minds of the defendants and their sympathizers.

D. Parents at Odds

The Pennhurst litigation appears to have exacerbated if not created tensions among the parents of mentally retarded persons in Pennsylvania. Because of the frank deinstitutionalization character of the remedy, pro-institution parents felt compelled to take sides and ultimately became intervenors on the state's side of the litigation. As a result, there are parents of institutionalized mentally retarded persons on both sides of the lawsuit. In order to understand how such a polarization could come to pass, it is important to understand some of the history of parents groups in the state, and the antecedents of the litigation.

1. Division at Pennhurst

No parents group existed at Pennhurst State Center until a group made up of family members and staff members was convened in 1966. According to some parents interviewed, the meetings were dominated by staff and many parents felt uncomfortable about voicing any criticisms of the institution. Approximately 60 parents split off from this group to form the Parents and Family Association. Both groups continued to work for changes at Pennhurst although along somewhat different lines.

In the midst of continued attempts to upgrade and reform services at the institution and in the community, David Ferleger was contacted by Mrs. Winifred Halderman on behalf of her daughter -- Terri Lee, a resident of Pennhurst. After approaching an administrator at Pennhurst with complaints of injuries that her daughter had received at the institution, Mrs.

Halderman was referred to Ferleger, then director of the Mental Patient Civil Liberties Project. After Ferleger initiated a suit in 1974 on behalf of Terri Lee, he was approached by some of the members of the Parents and Family Association of Pennhurst to discuss the possibility of joining the lawsuit. In the end, nine families became plaintiffs on behalf of their sons and daughters.

Mrs. Halderman had been extremely active in parents groups at Pennhurst and had worked for several years to upgrade the quality of care at the institution. She would later state, when it became clear that the litigation was aimed at phasing out the institution, that closure of Pennhurst was never her intention and that she resorted to litigation as a last resort to seek reforms at the facility. Ferleger, however, maintains that all of the original plaintiffs were made aware of the ultimate deinstitutionalization consequences of the litigation and that all agreed.

Regardless of who knew what when, Mrs. Halderman was clearly associated with the aims of the Parent/Staff Association to improve and maintain Pennhurst. As part of their activities, several members of the Parent/Staff Association worked on a committee to develop the so-called "Plan for Pennhurst." The purpose of the plan was to "bring the community to Pennhurst" by, among other things, establishing commercial enterprises on the grounds. When the plan was formally published in May of 1973, there was an initial positive response from the Shapp administration. Support from the state, however, did not materialize and by early 1974 the plan was officially rejected by

the Deputy Secretary for Mental Retardation. When, in 1975, it became clear that there was no state support for even a compromise version of the proposal, many of the parents that had worked on the plan, including Mrs. Halderman, were very disappointed. The pro-Pennhurst parents felt both betrayed by the state's rejection of the Plan and also by PARC's amended complaint which tipped the balance of the plaintiffs' pleadings from right to treatment to deinstitutionalization.

Members of the Parent/Staff Association were not active during the trial in Pennhurst, but did move to hire counsel once the original federal district court order was issued and the anti-institutional character of the ruling became clear. At that point the Parent/Staff Association moved to become a party to the litigation and attempted to give testimony during the hearing on the children's order. Judge Broderick denied both requests. It was not until after the first circuit court opinion that Broderick granted the Association's request to participate. Since that time, the Parent/Staff Association has been active in the case and has been represented at both arguments before the Supreme Court,

It should be noted that a portion of the funding for the legal activities of the Parent/Staff Association is contributed by the Pennsylvania chapter of the American Federation of State, County, and Municipal Employees.

More recently, members of the parent/Staff Association have assisted in the organization of a new statewide group called the Pennsylvania League which is made up of parents concerned about

the future of institutions in the state. The group has directed its efforts at such things as the closure of the mental retardation unit at the state facility at Cresson, and at the passage of legislation giving parents more say in the placement of their relatives out of state institutions.

2. Unanimity in PARC?

PARC's involvement in the Pennhurst litigation can be traced to the late 1960s when the organization commissioned an investigation of all state schools. In a report to the full PARC membership in 1969, abuses in the system were outlined, particularly those at Pennhurst. Following that meeting, PARC retained Tom Gilhool to act on their behalf. Though PARC decided that pursuing a right to education suit was more fruitful at the time, the possibility of filing a lawsuit on behalf of Pennhurst residents was always present. The opportunity presented itself in 1975 when PARC joined the original plaintiffs in the Halderman v. Pennhurst litigation.

Some of those interviewed over the past three years have suggested that the PARC membership has not always been unanimous regarding the aim's of the litigation. Certainly the leadership of some local PARC chapters — Philadelphia in particular -- have been openly critical of the decree and its subsequent implementation. There have been some defections from PARC, notably a parent from Buck's County who is now part of the leadership of the new Pennsylvania League. As a general matter, however, PARC's public posture has not waivered since its entry into the case in 1975. Further, each time resolutions supporting

deinstitutionalization or the litigation have come before the association's membership, they have passed by a healthy majority.

Behind the scenes, some of those interviewed suggest that from time to time there have been disagreements about tactics employed in the litigation, and discussions regarding the organization's priorities versus those of the lawyers.

More recently, some of the leadership of PARC have attempted to reach an accommodation with the state defendants without the presence of counsel. Though this approach has not proved successful, it does suggest a desire on the part of PARC to reach some conciliation. This observation is strengthened by the fact that PARC has approached representatives of the Parent/Staff Association for initial and tentative conversations in an effort to identify common ground between the two groups.

3. Parents and Placement

A major reason for the schism among parents is attitudes regarding deinstitutionalization. According to the initial survey of parents and family members of residents of Pennhurst, 71% were at least somewhat opposed to the placement of their relative in the community (Latib and Conroy, in Bradley and Conroy, 1982). Though many of these parents eventually change their minds when their relative is actually placed, the feelings of families prior to placement are factors to be reckoned with. It could be predicted that the general reaction of parents to a deinstitutionalization suit would be different from their reaction to a right to education suit. In fact, one of the PARC members interviewed noted that there was more unified support

among the membership for the right to education case than for the decree in Pennhurst.

The movement of Pennhurst residents into the community — in some instances over the objections of their families — has focused attention on the legal procedures surrounding placement. The role of parents of mentally retarded persons in decisions affecting placement emerged as a major issue in late 1981. In December of that year, the Department of Public Welfare issued a policy memorandum regarding parental participation in such decisions. The speculation at the time was that the memorandum was a defensive action to ward off legislative action on the issue.

DPW's new policy underscored the notion that parents and legal guardians should be given an opportunity to participate in all residential placement decisions — the major exception being if an adult client does not want the family involved in the decision. In the event that the adult mentally retarded person cannot express preference, and the family disagrees with the placement, final resolution can be sought in the county court of common pleas. Some parents still feel that this policy is not sufficient and argue that the new policies place parents in a defensive posture. One parent interviewed suggested that the burden should be placed on DPW to prove in court that the recommended placement is the most appropriate. This parent felt that any legal fees should be paid by the Commonwealth regardless of who wins.

Many of these proposals are included in a "parents rights

bill" recently introduced by Senator Ed Howard of Bucks County. The legal framework that would be established if the bill is enacted is similar to the Hearing Master process now in place for Pennhurst class members.

The presence of the Hearing Master, created by Judge Broderick following the initial circuit court ruling, has both emboldened parents and infuriated them. On the one hand, parents interviewed have spoken highly of the way in which families are treated during the hearings, and are appreciative of the opportunity to express their opinions along with those of the professionals present. There is also a sense that the Hearing Master is fair and genuinely concerned for the welfare of class members. However, parents part company with the Hearing Master in those instances where he has over-ruled the wishes of families in order to preserve the least restrictive character of the judge's decree. This opposition was particularly strong when the Hearing Master, backed up ultimately by Judge Broderick, placed a minor child out of Pennhurst over the objections of his parents.

Interestingly, however, parents interviewed seemed to be able to separate those aspects of the Hearing Master they find offensive from those aspects that give families the chance to air their opinions and to ask questions regarding all aspects of their relatives placement and program. Thus, at least among parents, the Hearing Master has achieved a level of acceptance that has not been enjoyed by the Office of the Special Master.

III. THE LEGISLATURE TAKES A STAND

A. Overview

The response of state legislatures to public law litigation has become a central concern in recent years because of the increasing fiscal implications of court ordered reform. The potential resistance of legislators to funding complex decrees poses serious problems for implementation and exposes the issue of federal court jurisdiction over legislative bodies. To date, legislative truculence has garnered mixed results from the federal judiciary. The court of appeals in New York has determined that the state defendants in the Willowbrook case cannot be held accountable for funding the court-mandated compliance panel if the legislature has not provided funding. On the other hand, after the Pennsylvania Legislature reduced the Special Master's budget from $900,000 to $35,000, Judge Broderick held the Commonwealth defendants in contempt and fined them $10,000 a day for not obeying his payment orders (note, however, that it was an executive branch official that was held in contempt, not a legislator) .

Although legal doctrine suggests that federal courts have tenuous jurisdiction over state legislative bodies, the court can pursue indirect methods to force the expenditure of funds (e.g., attachment of public lands). Understandably, federal judges would prefer to avoid using such tactics. In the end, therefore, a legislature's decision to comply or not comply with federal court orders has a significant impact on the course of litigation.

Legislative reaction to long-term litigation can range from cooperative yet somewhat reluctant to hostile and openly resentful. The following section will explore legislative reactions in the four comparison states and will analyze the similarities and contrasts among these states compared to Pennsylvania.

1. Legislative Orientation to Mentally Retarded Citizens

In order to understand legislative reactions to court ordered reforms, it is first necessary to examine the overall legislative response to special needs populations such as the mentally retarded. One indicator is the level of resources available for programs. As in Pennsylvania, legislators in the four comparison states have traditionally been supportive of programs serving mentally retarded persons. Among the four states, allocations by the Maine legislature appear most directly related to the presence of litigation. In that state, observers agree that the consent decree provided the stimulus needed to expand a somewhat undeveloped community mental retardation system.

Minnesota and Michigan legislators have been particularly responsive to the needs of mentally retarded persons. The Minnesota Legislature has continued to expand the range of community services for mentally retarded persons, and even covered cost overruns by counties. Michigan's legislators have been attentive to mental disabilities issues and remain more or less constant despite the recession that has engulfed the state. For example, the community residential services budget

for fiscal year 1982-83 remains substantial even though some cuts were made.

Another indicator of a legislature's concern for mentally retarded persons is its stance on community placement. Michigan legislators have long been proponents of appropriate and adequate community programs. Their position, however, has not diminished legislative scrutiny of the community system. For example, in 1980 a legislative oversight committee was created to explore the existing community system and to make recommendations for change. In general, the committee was supportive of the complex community placement system but cited several immediate concerns such as the need to develop better quality assurance systems and to promote community acceptance. Some Michigan legislators, however, continue to attack the statewide zoning statute passed in 1976 that facilitates community placement, indicating that community placement is not embraced by all members of the legislature. In general, as described by one mental retardation advocate, Michigan legislators have been educated regarding community placement and, for the most part, are committed to a quality community system.

The legislatures in the other three comparison states have also been active in developing appropriate community-based programs for mentally retarded persons. Recently, however, Massachusetts legislators -- who have traditionally supported community programs for disabled persons -- have questioned the existing community system and its future expansion. Much of their concern has focused on the problems surrounding the

deinstitutionalization of chronically mentally ill persons and the need for more rigorous placement procedures by the Department of Mental Health, Potentially, these concerns, could spill over into practices governing the placement of mentally retarded persons.

Legislative reaction to mental retardation issues can also be gauged by the amount and type of legislation initiated and passed that stimulates reform and enhances the development of a community based system. Several state legislatures — Maine, Michigan and Minnesota — have enacted statewide zoning laws while supporters of such legislation in Pennsylvania have been unsuccessful. This type of support also extends to needed legislative initiatives such as family support programs and other non-institutional approaches that must be part of the continuum of services. The Minnesota legislature initiated a family subsidy program in 1976 while the Michigan budget includes $1 million in start-up funds for a similar program to serve severely and multiply impaired children being served in their own homes. In Pennsylvania, the Legislature has supported an appropriation for family resource services for several years. Instead of cash assistance, the program provides support services to families including respite care. The budget £or the program is close to 514 million.

2. Legislative Reaction to Shrinking Funding and Pressure from the Courts for Reform

As in Pennsylvania, legislators in all four states have distinct opinions regarding federal court involvement in state

affairs. Although none of the state legislatures has translated resentment into a critical reassessment of the goals of community placement such as evidenced in Pennsylvania, they have shown their displeasure with court intervention in other ways. In Minnesota, legislators complained that even after the recent stipulation in the Welsh suit that expands reforms to all of the state's institutions, the plaintiffs continue to bring the defendants to court to debate various enforcement details. One legislator noted that he had hoped the stipulation would be a way for the state to get "out from under the court's involvement." This legislator also stressed that the legislature should be involved in making any system reform decisions. Furthermore, if given a second chance, he would be physically present the next time a stipulation agreement is developed.

Legislative staff in Michigan reinforced the notion that legislators want to be involved in decision-making concerning the court-mandated commitment of state resources. Among the legislators that were aware of and interested in the Plymouth case, many became increasingly concerned about the intensive staffing requirements in the consent decree {exceeding those mandated by ICF/MR), and the perception that the facility was becoming an "elite" institution. These concerns were especially important due to the state's poor economy. However, as noted by legislative staff, these concerns did not signify that the legislature would stop funding the decree. A similar reaction was expressed by Minnesota legislators. Even in Maine where the court's presence is more tolerated than in the other states,

certain interviewees noted that legislators are sometimes frustrated with the court's continuing involvement. Moreover, as suggested by one interviewee, legislators in that state tend to be more responsive to concrete needs than to notions of entitlement embodied in court decrees.

The response of the Massachusetts Legislature to the presence of the court may come closest to Pennsylvania. As cited by several interviewees, certain key members within the Massachusetts Legislature wield a significant amount of power and influence. For a number of reasons, including an increasing lack of confidence in the Department of Mental Health, the Massachusetts Legislature has taken several actions that demonstrate its displeasure with the consent decrees in the Commonwealth. Since mental disabilities litigation in Massachusetts is so extensive — five state schools and one state mental health hospital are under court orders -- the price tag associated with reform is very high. Some observers maintain, however, that the legislature's resentment of the court is really directed at the Department of Mental Health and its management of the taxpayers' money.

The fact remains that the consent decrees require an enormous commitment of resources. Even though compliance with the decrees has resulted in Medicaid certification at the five state schools, the total tab of $400 to $500 million is still enormous. While Medicaid certification has made it possible for the state to recoup 55% of the costs from the federal government, such revenue enhancement may be difficult for legislators to

remember when they are confronted with the overall budget figures. This is especially true now that the state is faced with possible decertification unless it obligates $40 million in state funds to correct long-standing deficiencies.

It is easy to understand the Massachusetts Legislature's preoccupation with the escalating costs of the consent decrees. One interviewee estimated that the capital budget alone grew from approximately $40 million at the time the first consent decree was signed to approximately $160 million several years later. The total cost of the consent decrees is difficult to estimate. Some observers note that for 1983-84, litigation-related costs will make up approximately 20% of the total Department of Mental Health (DMH) budget.

In 1980-81, the year that funding for the community plan portion of the consent decrees was first presented to the legislature, the chairperson of the Senate Ways and Means Committee asked DMH officials to identify those items associated with the consent decree. The chairperson then proceeded to remove those items from the Department's budget. The Governor later filed a supplemental budget bill that requested funding for those consent decree items removed from the DMH budget. The end of the 1981 fiscal year came and the legislature still had not acted on the supplemental request. Since the state schools would soon come to a halt, Judge Tauro took action. He subpoenaed the chairpersons of both the Senate and House Ways and Means committees.

Such judicial aggressiveness resembles Judge Broderick's

finding that the Pennsylvania Department of Public Welfare (DPW) and Secretary O'Bannon were in contempt for not fully funding the Office of the Special Master. In this particular action, the state legislature was not directly implicated though it was legislative language in the budget that prompted DPW'S actions. As noted by a system observer in Massachusetts, Judge Tauro is well aware that the court cannot directly order the legislature to act; however, he has attempted to link the legislature to the consent process through transcripts and statements that cite the legislature's role in the litigation.

Judge Tauro's posture concerning the consent decrees has created much bitterness in the legislature. In a very telling comment, the chairperson of the House Ways and Means Committee noted several times during a recent press conference that for the past few years, the Governor's recommendation for the DMH budget has not been "a pure Governor's budget but a plaintiffs' budget or court budget" (Mental Health Bulletin, Massachusetts Mental Health Association, May 5, 1982, p. 1). Moreover, in early 1982, a special sub-committee of the House Ways and Means Committee was formed to investigate and study the numerous consent decrees in Massachusetts. The impetus behind the creation of the special commission was to examine the impact of the Brewster v. Dukakis consent decree -- a mental health case. However, the mental retardation cases were soon included in the investigation. Although the committee requested voluminous information from the Department of Mental Health, it is not known to what extent the investigation produced any tangible results. As noted by one

interviewee, the legislature is, on the one hand, evincing anger at the court's involvement in state affairs, but on the other hand is very wary of being found in contempt for not fulfilling the directives of the court.

B. Analysis

The extent of legislative reaction to court intervention among the four states studied as compared to Pennsylvania is difficult to ascribe to just one or two principal factors. There do, however, appear to be certain themes that characterize the similarities and differences among and between these states. First, the visibility of the compliance mechanism or the consent decree itself appears to provoke strong legislative response. For example, in Pennsylvania, one of the first funding issues to be raised regarding the Pennhurst litigation focused on the $900,000 budget of the Special Master. In Massachusetts, the funding that is necessary to renovate five state schools, increase staffing ratios and develop community placements has resulted in a state budget that has maximum visibility and one that the legislature has difficulty controlling.

The other state consent decrees also require legislative appropriations, but in Michigan the consent is limited to one facility and the Special Master's budget is much less than the original Pennhurst OSM budget. Like Massachusetts, Minnesota's consent decree extends to all of the state facilities serving mentally retarded persons; however, the emphasis is equally spread between institutional improvement and deinstitutionalization. Moreover, the total state hospital population in Minnesota as of 1981 was only 2,600 with 2,915 staff, compared to Massachusetts with 3,728 residents and 9,775 staff in five state facilities in 1982.

One theory regarding the attitudes of state legislatures

vis-a-vis litigation may involve the pervasiveness of the remedy. In states such as Minnesota and Massachusetts -- where the litigation affects the whole institutional system — legislative reaction could be expected to be somewhat negative. Conversely, in Pennsylvania, the negative legislative reaction was initially focused on the compliance mechanism since it was clearly identified in the Governor's 1982 budget as a court-related expenditure. Pennsylvania legislators became more broadly concerned about the case after the second court of appeals decision in which the court affirmed Judge Broderick on the strength of the state's mental disabilities law alone. The court's interpretation of the Pennsylvania statute (which echoed a state supreme court ruling) led many legislators to fear that least restrictive care would became an entitlement in the state with profound financial implications — much beyond the context of the immediate litigation. Legislative scrutiny of other mental retardation issues, including the community living arrangements program, was also indirectly related to Pennhurst since the deinstitutionalization emphasis of the decree brought community issues into strong relief.

Massachusetts legislators have also become very critical of the community system in response to extensive media coverage of ill-prepared and inadequately monitored community placements, especially for chronically mentally ill persons released as a result of a separate consent decree. The concerns regarding the mentally ill in the community have extended to programs for mentally retarded persons.

Quality of care, monitoring and overall management of the community system are issues that have been raised in several of the state legislatures. These issues highlight a second theme that may help explain legislative reaction to court intervention. In Pennsylvania and Massachusetts, the court orders have focused attention on the way in which the state manages services for mentally disabled persons -- especially "in the community.

The legislature's criticism of state program officials in Massachusetts has been especially intense and is driven by a lack of confidence, among some legislators, in the ability of the Department of Mental Health to be fiscally and programmatically responsible. This basic suspicion makes it difficult, therefore, to identify the reason for the legislature's current mood of retrenchment -- is it the litigation or the lack of confidence in the Department?

On the surface, it would appear that criticism of the Pennsylvania Office of Mental Retardation among some state legislators is more ideological than fiscal. Though fiscal issues have arisen, the concerns expressed by some Pennsylvania legislators appear to have more to do with the general orientation of the system than the level of resources. Legislative scrutiny is also evident in Michigan though the tone of the debate may not appear as acrimonious as in Pennsylvania and other states. According to one system observer, the legislature, in general, is critical of the Department of Mental Health; however, this attitude was more pronounced in the past.

In addition to an investigation of the community placement process in 1980-81, the legislature was also involved in curtailing the new construction of AIS/MR facilities. The Joint Capital Committee in conjunction with the state Department of Management and Budget implemented several key decisions that effectively brought to a halt the development of new AIS/MR programs. A major detriment to the development of new programs was the decision to place a cap on the amount of return that an investor could obtain from the AIS program. As a result, between approximately March 1981 and 1983, no new AIS facilities were built. One interviewee attributed this legislative reaction to a number of factors including personal differences between certain legislators and DMH leadership at the time, an anti-community feeling among certain members, and a legitimate concern that developers might be profiteering from the AIS program. Certain legislators have also been very involved with the Plymouth suit and more recently, were very apprehensive when they learned how much it would cost the state to make Plymouth a "quality" institution according to the consent decree. Moreover, the reports of continued abuse and neglect despite an infusion of money into the facility convinced them and others it should close.

Even though the legislature has been critical of certain Michigan Department of Mental Health policies, several DMH staff have developed a good working relationship with those members of the legislature that are interested in deinstitutionalization and quality community programs.

Although some Maine legislators have raised questions concerning the community system, the state office of mental retardation and the Special Master have been very effective in keeping legislators aware of and informed of all activities regarding the consent decree including expansion of the community system. As noted by several interviewees, legislators want to know that progress has occurred and that the state's tax dollars have been spent wisely. Up to this point in the implementation of the Wuori decree, state officials and service providers have been able to persuade legislators that this is the case.

The availability of resources would appear, on the surface, to be a fairly good predictor of legislative reaction to court reforms. In Michigan, the legislature has continued to support mental retardation programs in spite of the painful effects of recession and some criticism of the funding required to meet consent decree requirements. On the other hand, in Pennsylvania and Massachusetts where economic conditions are somewhat better, legislative "backlash" against deinstitutionalization and the court has been translated into a "no-growth" policy for community programs. Although these states are experiencing some fiscal difficulties, the economy does not appear to be the principal factor dictating the legislature's response. In both states, the court appears to have exacerbated an existing distrust of the mental health/mental retardation bureaucracy or created a suspicion that the courts and state program officials have wrested programmatic direction away from the legislature.

C. Future Trends

If national and state economic predictions for the short term were more positive, legislators in Michigan and Minnesota -- based on past behavior -- would probably continue to expand community based mental retardation programs. However, interviewees in both states noted that new community placements may decrease and that such a decline will have an uncertain effect on state institutions. As noted by one system observer in Michigan, the last 50 or 60 clients to be placed out of Plymouth Center will require additional resources because of the special community living supports they need. On the other hand, this interviewee noted that the only alternative for those clients and others is to remain in a custodial setting — an option that the legislature will probably not support. The best guess among those at the state level in Michigan was that institutions will be gradually phased down so that within a few years there will only be a residual population of 300 to 400 clients in state centers. Monies freed up will in turn be used to support community programs.

In Maine, the Special Master projects that another 200 class members will be moved out of Pineland. Officials in the remaining three states in the study do not project as significant a decrease in their state institutional population as Michigan. It is clear that legislators in Massachusetts and Minnesota would like to reach an accommodation with the court and, as one Massachusetts interviewee noted, to "bail out" of the consent decree. If fiscal circumstances deteriorate in Massachusetts, it

is conceivable that the defendants and plaintiffs would have to revise the objectives of the consent decree. However, a major dilemma facing the legislature is the potential loss of federal Medicaid funds if institutions are phased down and clients are relocated to community settings that may be 100% state-funded.

The resource picture for future community programs at the time of the site visits revolved almost entirely around Title XIX. In Maine, legislators were hoping to obtain a Medicaid community-based services waiver in order to fund approximately 60 more clients from Pineland and an additional number from community ICF/MRs in therapeutic foster homes. By moving clients out of ICF/MRs in the community and at Pineland, state officials anticipate saving $1 million. Minnesota and Pennsylvania have also pinned their hopes on the Medicaid community-based services waiver to assist them in developing community programs. "Clearly the availability of the waiver option (if the waiver requests are approved) will make it possible to expand scarce resources and to avoid confrontations between the court and the defendants regarding funding of community decree requirements.

In addition to the issue of resource development, it appears likely that some state legislatures will continue to scrutinize state management and program policies affecting mental retardation. This scrutiny is certainly linked to the limited availability of resources and to the legislative insistence that publicly funded programs be well-managed and cost effective. The focus on costs, however, does not appear to have substantially diminished legislative concern for mentally retarded persons.

Continued legislative involvement in court related programs does suggest that state agencies will need to be more responsive to those issues of primary concern to legislators in order not to jeopardize future funding for both court-ordered and other programs serving mentally retarded persons.

IV. THE UNION AS ANTAGONIST

A. Overview

1. The status of Employee Organizations in the Four Study states

In all four comparison states, public employees working in state mental retardation institutions are represented by several union organizations. Typically, direct care workers are represented by the American Federation of State, County and Municipal Employees (AFSCME) while professional workers, such as psychologists, social workers and others are represented by other unions. In Massachusetts, community-based Department of Mental Health workers are represented by yet another union — the State Employees International.

The control and influence that these unions exert on public mental retardation programs varies from state to state. Moreover, unions within a state may not agree on what strategies to pursue regarding a variety of labor issues including the impact of litigation. For example, the Maine State Employees Association (MSEA) and AFSCME have tried to decertify each other. As one interviewee noted, MSEA's interests go beyond job security and include being involved in reforms of the mental retardation system whereas AFSCME's interests are primarily focused on saving jobs. In the Wuori suit, AFSCME representatives did not appear to be interested in the programmatic reforms created by the consent decree. The Michigan State Employees Association, a union that represents both clerical and professional workers, not only differed with AFSCME

on the Plymouth litigation but also experienced serious internal dissension regarding the state's proposed wage and benefit concessions that led to threats of decertification.

The influence of unions within the four states also varies significantly. Some of this difference in level and extent of influence may be attributed to the history of unionization in each respective state. Even though Michigan is a heavily unionized state, it was approximately ten years ago that state employees were unionized and even more recently that they were allowed to strike. In Maine, collective bargaining for state employees was only introduced in the last three or four years.

Of all the states studied for this analysis, it would seem that union reaction in Michigan would come closest to Pennsylvania. Two reasons support this hypothesis: (1) the history and influence of unions in the state; and (2) the spector of closure raised by the litigation. However, the influence of unions in Michigan differs from Pennsylvania in several ways. One system observer noted that despite other union activity in the private sector in Michigan, it was his understanding that Pennsylvania had unionized a greater variety and number of public employees. This interviewee also suggested that AFSCME's low profile in the Plymouth suit may have been subject to peer pressure from other unions in the state such as the United Auto Workers.

The issue of the influence and power that a union such as AFSCME exerts at the state level was difficult to discern among the four comparison states. Reaction to AFSCME's influence in

Massachusetts on public sector issues generally and litigation specifically was mixed. One interviewee noted that AFSCME was a strong and active union while another suggested that it was not as influential as affiliates in New York and Pennsylvania. To support this point, the interviewee noted that during the first Dukakis administration, the Governor invited all types of organizations concerned with such health issues as certificate of need to make presentations to members of his staff. The unions were never brought into these Cabinet-level meetings. In Michigan, several interviewees cited the strained relationship that developed between AFSCME and certain state legislators. As recalled by one interviewee, Michigan AFSCME brought in national AFSCME representatives to discuss the effects of deinstitution-alization, and the recent budget cutbacks in state facilities; however, their emphasis on job security at a time when many Michigan workers were being laid off did not go over well -- even with legislators who were traditionally pro-labor. The AFSCME affiliate in Minnesota also noted that their work with the legislature had become somewhat defensive — perhaps due to their lobbying to fund the Welsh consent decree during harsh economic times.

2. The Extent of Union Involvement in State Mental Retardation Litigation

Union involvement in mental retardation litigation -- and principally AFSCME involvement -- in the four comparison states has not been as prevalent as in Pennsylvania. In Massachusetts and Maine, the consent decrees focused on upgrading public

institutions with accompanying community system expansion. Although there were some reductions at Pineland because of the need to meet Title XIX ICF/MR requirements, several interviewees noted that there was never any discussion of significant layoffs of public employees (less than 40 state center workers were laid off). Massachusetts state schools were also required to meet Title XIX requirements, but the nature of their consent decree called for massive staff upgrading -- far exceeding the minimum staff to client ratios cited in the Medicaid ICF/MR regulations. As noted in a recent legislative briefing paper, Judge Tauro enjoined the Department of Mental Health from laying off any employees despite a decline in the census at all of the schools since the consent decrees were signed. An illustration of this can be seen in the staffing ratio for one state school. In 1975, Wrentham State School had 1,234 clients and 955 staff, while in 1982 the number of staff climbed to 2,234 and the number of clients went down to 875 — resulting in a 2.55 staff-client ratio. The other four state schools have comparable or higher staff-client ratios.

Clearly, mental retardation workers in Massachusetts have benefited significantly from the litigation. Their favored status has to some extent alienated them from other unions in the state as shown recently when the state legislature underfunded the state school personnel accounts. The legislature's proposal would have affected all of the state schools and eventually would have resulted in a total walk-out. At the time, DMH attempted to involve the unions in resolving the problem. One system

interviewee noted that the special status of mental retardation workers, including increased salary levels as a result of the decree, worked against them in this situation. No union was willing to "go to bat" for their fellow union members with the legislature.

To date, state mental retardation employees in Massachusetts have been protected by the court and the decrees. The extent to which these decrees will continue without some attempts to scale down the number of staff at the five facilities remains to be seen. Judge Tauro and the plaintiff parents remain committed to the existing staffing standards. As noted by one parent, the consent decrees never mentioned developing staffing ratios and as far as he is concerned, that is not a point of discussion.

As in Massachusetts and Maine, the initial thrust of the litigation in Minnesota was to upgrade Cambridge State Hospital. Union representatives noted there was some discussion to intervene in the suit on behalf of the plaintiffs since the focus was on institutional reform. Although the union did not, intervene, the AFSCME interviewee noted that given another opportunity, they would join the plaintiffs in their suit. The AFSCME representative did note that the first consent decree signed at Cambridge in 1974 was not very popular with the employees who felt that the suit was an attack on their competence. Subsequently this resentment diminished as it became clear the litigation was basically beneficial for the union. State actions in other areas, however, have angered the union's membership. In 1975, the Minnesota Department of Public Welfare

circulated a plan for deinstitutionalizing state facilities. Since that time, two facilities have been closed. As a result, state workers were forced to relocate from the southern part of the state to the Iron Range -- a geographically isolated area that is currently experiencing extreme economic hardship. These concerns have affected AFSCME's position on the mental retardation litigation.

Perhaps the state where union involvement in the litigation would have made the most sense was in Michigan. Although an attempt was made by the union to intervene in the suit, the consent had already been signed and the judge ruled against AFSCME. The reasons provided by interviewees as to why AFSCME waited so long to intervene varied. Some interviewees suggested that AFSCME simply missed their opportunity by not intervening; one person noted that the local Plymouth AFSCME unit was very upset with Michigan AFSCME for not becoming involved at an earlier date. An AFSCME representative acknowledged that they became involved in the litigation too late, but noted that the forces behind the litigation at the time were simply too strong to fight. Since the Plymouth suit involved serious allegations of staff abuse and neglect, it was difficult to find parents or other plaintiffs who were interested in supporting the union's point of view. On the other hand, an AFSCME representative stressed that they did intervene on behalf of 50 Plymouth employees who were discharged as a result of the suit — 47 were later reinstated. As expressed by this interviewee, the climate in Michigan at the time of the suit was very anti-institutional,

and the Detroit Free Press articles highlighting "child torture" and other staff negligence at Plymouth heavily influenced the remedy.

During the initial stages of the Plymouth consent, hundreds of new employees were hired to meet the court-ordered staffing improvements. However, the state was soon faced with extensive budget cuts as a result of the recession and had to renegotiate the decree and reduce the staffing requirements. Michigan AFSCME, unlike unions in the other comparison states and Pennsylvania, has been forced to negotiate wage and benefit concessions with the state in lieu of increased lay offs of state workers. From January 1980 to July 1982 (approximately 30 months), 5,542 Department of Mental Health employees were either laid off or left state service. The reduction of the DMH work force from 17,314 persons to 11,772 persons represents the largest single reduction of state employees in the history of Michigan. The number of mentally disabled residents was also reduced from 9,809 to 7,594 during this time period. The biggest decrease in personnel occurred in centers for mentally retarded persons -- staff were reduced by 3,509 (from 8,462 to 4,953) and residents by 1,800 (from 4,969 to 3,167). This loss of workers also translated into a significant loss of union members since AFSCME's membership is predominantly made up of mental health workers. As noted by one interviewee, whenever economic conditions deteriorate in the state, the legislature usually looks to the Department of Mental Health — the largest state employer -- as the place to make budget cuts.

As cited above, AFSCME, together with other Michigan unions representing mental health workers, did negotiate certain concessions in exchange for limiting the number of lay offs of state mental retardation workers. Briefly, the concessions include six payless days in 1982-83 for all workers and in 1982-83 the removal of 5% of benefits for vision care. In exchange for these concessions, the state agreed not to lay off more than 12.5% of institutional employees in any one bargaining unit as a result of deinstitutionalization. This percentage would be lower for lay offs occurring for other reasons. In the view of several interviewees, the state's agreement with the unions is quite significant. Interestingly, there was intra-union strife over the concessions. Those workers with more seniority did not want to give up and negotiate any wage and benefit reductions in return for job security since they would not be the ones to lose their jobs. One interviewee also noted that while other unions were fairly quick to agree to the concessions, AFSCME did not "give in" until much later in the negotiating process.

An AFSCME representative noted that the jobs agreement was probably the best bargain they could secure during a recession, and that at least the restrictions on the number of lay offs will help keep facilities open. This last point was raised by another interviewee who noted that tying deinstitutionalization to jobs may eventually be counterproductive for the state. However, state DMH staff point to the closure of two facilities, Alpine and Hillcrest Centers in 1981-82, and the planned closure of two more (Plymouth and Northville Training Center) in 1983. In the

recent mental retardation facility closures, state DMH staff indicated that there was little activity by unions. Moreover, the state was able to negotiate a number of concessions (several million dollars paid out in severance pay and early retirements) or to relocate staff to other facilities. Interestingly, an AFSCME representative noted that their current efforts are focused on mental health in order to prevent the closure of three large facilities serving mentally ill children and adults. Even though many of the Michigan system actors interviewed during this study acknowledged the state's serious budgetary problems, most suggested that reductions in state facilities, if not total closure, would continue in Michigan.

B. Analysis

As presented in the Overview, none of the four comparison states has experienced the level of union involvement in litigation as seen in Pennsylvania. The reasons are tied to specific forces operating within a state as well as to general system constraints. For example, the power that AFSCME wielded in the state capital in Pennsylvania is not duplicated in other states. This holds true even in Michigan where AFSCME must compete with other perhaps more powerful and visible unions and with other more pressing concerns growing out of the state's economic problems.

Another possible factor influencing the level of involvement of AFSCME and other unions in litigation is the focus on institutional reform as opposed to deinstitutionalization and facility closure. Representatives in Maine, Massachusetts and Minnesota all suggested that AFSCME would have been much more active in their respective states in resisting the consent decrees if closure had been the ultimate objective. The one state that does not fit the mold is Michigan. Even though the initial thrust of the Plymouth suit was to upgrade the facility, the resource implications of achieving institutional reform amidst a worsening state economy provided the impetus to modify the decree and to close the facility. Moreover, parents and others concerned with the welfare of residents currently residing at Plymouth realized that no amount of "additional resources would ever transform Plymouth into the type of facility they envisioned. As noted by one interviewee, examples of neglect are

still being uncovered at the institution despite the presence of the court. As a result of the convergence of these two forces - a worsening state economy and continuing staffing problems - union objections regarding closure would not have been persuasive.

It is also clear that the membership of the various unions in Minnesota, Maine and Massachusetts benefited greatly from the consent decrees negotiated in their states. Even though the consent decrees in those three states have some deinstitutionalization or community component, institutional reform is at least a co-equal objective. In Maine and Massachusetts, it would have been difficult for the unions to resist community development since locally-based programs were only marginal at the time. As such, the consent decrees in those states did not pose a serious threat to the union membership. In Pennsylvania where the community system was already well established, the Pennhurst suit, and the possibility of other similar suits, could permanently shift the balance of care in the state to the community, thus impairing AFSCME's strength as a political force.

C. Future

The level of continued union activity in mental retardation litigation will depend upon a number of factors. As evidenced in Michigan and Minnesota, the effects of the national recession on state policies will dictate how much influence unions will have at the bargaining table. In order to minimize future lay offs, concessions such as those negotiated in Michigan may be in order. Michigan DMH officials are also not discounting future facility phase downs or even closures. The recession may also affect Pennsylvania in the same manner.

Since state institutional systems are being streamlined, unions could explore other options, such as supporting the need for publicly-run community facilities, organizing existing community providers or ensuring that former state employees have first priority in community settings. However, all three options have been difficult, if not impossible, to implement in the four comparison states and in Pennsylvania. First, several system interviewees noted that the existing objective in most states in deinstitutionalization or facility closure is to "get out" of direct service. To consider the option of publicly-operated programs does not appear attractive to many states. As a result, a Michigan AFSCME representative and other interviewees noted that this issue has little support, not only within the state bureaucracy but also in other segments of the system. Michigan AFSCME representatives did contemplate applying for a federal grant to demonstrate state-owned and operated community programs, however, the proposal never materialized. A Minnesota AFSCME

representative also noted that in Minnesota the decision to rely exclusively on privately operated programs was made in the late 60's and early 70's.

The second option, that is organizing existing community employees, has been attempted but problems with logistics and resources have prevented the successful implementation of this strategy. Michigan AFSCME noted that there is a large local union group representing foster care workers in the Detroit area but to expand this type of effort statewide would require a county by county effort and far too many resources. As he stressed, since the community mental retardation system is so decentralized and the size of the work force limited, it may not make sense for AFSCME to focus on community organizing. Certain community mental retardation providers in Minnesota are already unionized, and state AFSCME representatives have held discussions with the Minnesota organization representing community mental retardation providers regarding future organizing.

Another option available to unions (i.e., further emphasis on the relocation of state institutional workers into community settings) has also met with limited success. Aside from the well-known problem of achieving comparable wage and benefit packages, the stigma attached to being a former institutional employee has been hard to overcome for many employees. A Michigan AFSCME representative noted that certain community facilities have given priority to state workers who have been laid-off; however, this type of activity has been limited, and there does not appear to be any momentum to increase the hiring

of former institutional workers. For the most part, institutional workers have found jobs in other segments of the state institutional system. Interestingly, Massachusetts is using the state employees in response to inadequacies in the existing vendor system. As of July 1, 1983, 22 class members in the Ricci v. Greenblatt lawsuit were without vendors. The state was able to reallocate 39 excess staff positions to provide services in the community. As suggested by several observers, if the vendor system continues to exhibit signs of instability, it is conceivable that more state workers will be redeployed to staff community programs.

Interviewees in Massachusetts and Maine also underscored the problems with relocating institutional workers into community settings. Nonetheless, a bill was introduced in the Maine Legislature to provide parity (i.e., the same pay levels and benefits) for those workers transferred to the community. The bill was subsequently withdrawn because the Department of Human Services agreed to a substantial increase in the pay for community workers. One interviewee suggested that full parity was bound to come, while another was less confident that parity would be achieved.

In sum, the options for former state institutional workers in the future appear to be somewhat limited. In general, given the size of most community systems, it will be difficult to absorb former institutional workers in any great numbers. States will have to focus on options such as early retirement, additional severance pay or opportunities for work in other parts

of the state system. In states such as Michigan, significant losses of state workers are inevitable. Unions will have some tough battles to face in the short term with the possibility of additional personnel reductions in the mental retardation system.

V. THE STATUS OF COURT ORDERED REFORM

A. Overview

1. Recent Rulings

It can be argued that the Pennhurst case represents the full flowering of public law litigation in the field of mental disabilities because of its ambition and the scope of restructuring intended by the remedy. Some might even suggest that the federal district court decision in Pennhurst is the high water mark for plaintiffs in such cases given retrenchment embodied in recent Supreme Court rulings. That the pendulum may be swinging back toward a more conservative judicial attitude regarding social change should not be surprising. As Scheingold (1981) has observed, "Judicial support for policy change responds to its own internal logic as well as to cyclical patterns of activism and self-restraint" (p. 219).

Judicial "self-restraint" is clearly present in the Supreme Court's decision in Pennhurst.[18] On April 20, 1981, the Supreme Court ruled, in a six to three decision, that Section 6010 of the Developmental Disabilities Assistance and Bill of Rights Act does not create any substantive rights to "appropriate treatment" in the "least restrictive" environment. The Court, therefore, rejected Section 6010 as a legitimate basis for the comprehensive district court remedy which had been affirmed in the main by the court of appeals. In its opinion, the Court did not address itself to any of the legal underpinnings relied on by the district court including Section 504 of the Rehabilitation Act of

1973, the Eighth and Fourteenth Amendments to the Constitution, and the state's Mental Health and Mental Retardation Act of 1966. These grounds were left to the circuit court for further consideration along with alternative provisions of the Developmental Disabilities Act not addressed by the Supreme Court.

The decision provides only partial guidance to lower courts regarding the future course of similar litigation. It does not have the effect of automatically vacating the Pennhurst ruling nor does it require an immediate dismantling of the compliance mechanisms established by the district court. Strictly speaking, the decision knocks out one legal basis for Pennhurst type suits, and leaves the viability of the remaining legal justification in doubt.

The rhetoric of the majority and dissenting opinions, however, does convey a somewhat negative attitude regarding the extent of the Pennhurst remedy and the elaborate monitoring and compliance entities set up to ensure implementation of the decree. Though the Court decided on very narrow grounds, the language of the opinions suggests that further arguments before the Court on alternative grounds may be equally unsuccessful. The Court is not unsympathetic with the plight of mentally retarded persons, but does not seem enthusiastic about the use of federal courts to bring about other than improvements in the immediate circumstances of institutionalized persons. In any event, the opinions in this case contain language suggesting a less than hospitable attitude toward comprehensive system

restructuring of the type envisioned in the Pennhurst remedy. The validity of this interpretation will be tested during the 1983-84 Supreme Court term when the Justices will once again hear arguments in the case.

Another major case, Romeo v Youngberg,[19] represents the first time that the Supreme Court considered the substantive constitutional rights of involuntarily committed mentally retarded persons. In reviewing the lower court opinion in Romeo, a majority of the Supreme Court found that involuntarily detained mentally retarded persons have the following constitutionally protected rights: reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and minimally adequate training as reasonably may be required by these interests.

With respect to a "right to treatment," the Court defined the term narrowly to mean habilitation that would diminish Romeo's dangerous behavior and therefore avoid unconstitutional infringement of his safety and freedom of movement rights. This interpretation was far different from the court of appeals finding that such persons have a right to treatment in the least restrictive fashion and according to accepted medical practice. The Supreme Court also noted that in determining whether an individual's constitutional rights had been violated, his liberty interests must be balanced against relevant state interests. The Court also stated that in ascertaining liability, the Constitution only requires that courts make certain that professional judgment is exercised and that judges should not

take sides regarding which of several professionally acceptable choices should have been made.

Though the conservative character of these decisions may signal a slowdown in the use of public law litigation to bring about change in the field of mental disabilities, much of the litigation of the 1970s is ongoing. In only a few of the major cases (e.g., Wuori v. Zitnay) has a judge terminated oversight over some or all of the decree. This fact together with the probability that the pendulum of judicial involvement could swing back to the more activist end of the continuum, makes an assessment of judicially created compliance mechanisms significant to both current and future policy contexts.

2. Nature of Compliance Mechanisms

a. Office of the Special Master

The functions of the Office of the Special Master (OSM), as outlined in Judge Broderick's original March 17, 1978 order and in succeeding decrees, represent both broad mandates and highly specific responsibilities. The multiple roles assigned to the Master are not, taken individually, that surprising considering the types of responsibilities vested in masters in public law litigation in general. The sheer range of responsibilities, however, is somewhat unusual and suggests a compliance entity able, and in many instances required, to intervene at almost every juncture in the implementation process.

The breadth of the Special Master's responsibilities grew out of the plaintiffs' assessment of the performance of compliance mechanisms in similar litigation, and their fear that,

given the contested nature of the case (and perceived past failures on the part of the state), the defendants would be unwilling to carry out the steps necessary to move large numbers of Pennhurst residents to community living arrangements. As a result, they proposed the most wide-ranging mechanism consistent with the intent of the litigation.

OSM's responsibilities range from general system functions (e.g., planning, goal setting, etc.) to discrete, day-to-day monitoring obligations. The original district court order (March 17, 1978) states that the Office of the Special Master shall have "the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further orders of the Court." With regard to planning, the original order directed the Master to prepare a Plan of Implementation to include the following elements:

- County by county plans specifying the quantities and types of community services required, existing service capacity, responsibility for program generation, funding required, and timelines;
- A report on individualized plans for discharge and placement specifying the resources required, a schedule of evaluations, and monitoring standards;
- A plan for the recruitment and training of sufficient numbers of qualified staff to prepare individualized plans for class members and to create, develop, maintain, and monitor community services;
- A plan to provide necessary information to class members regarding all aspects of the litigation;
- A plan to provide information to parents and families of class members regarding the litigation and plans being developed on behalf of their individual family members.

In addition, the Judge also ordered the Master to prepare a plan for the interim operation of Pennhurst including the

specific means by which the Master would monitor the administration of medication, use of restraints, appropriate feeding procedures, maintenance of sanitary conditions, prevention of physical abuse, use of seclusion, modification of wheelchairs and other equipment, and any other aspect of institutional operations likely to threaten the life, safety, or well-being of residents. On March 5, 1979, following the completion of the Pennhurst plan, Judge Broderick ordered the Master to appoint a liaison to the institution whose responsibilities included assistance to the Pennhurst superintendent in all matters related to the litigation, and the orientation of institutional staff regarding the components of the plan for Pennhurst.

The March 5th order added two other components to the remedy -- the appointment of case managers in each county to serve the needs of the Pennhurst class, and the development of a network of certified advocates at the disposal of class members and their families. To facilitate the development of these two new client protections, OSM was ordered to provide training to case managers, to coordinate their duties, and to establish procedures for the activities of the certified advocates.

While in office, the Master and her staff also prepared proposed orders, submitted monthly reports to the Judge, and prepared numerous ad hoc memoranda on various issues in the litigation. Further, in order to carry out the multiple functions envisioned in the decree, the Master negotiated modifications in implementation as circumstances warranted,

interpreted aspects of the multiple court orders, prepared information for the press, and provided orientation to the various key actors in the litigation including parents, county administrators, providers, and external advocate.

The compliance or monitoring functions of OSM were numerous and complex and grew with each succeeding court order. Activities ranged from monitoring conditions at the institution to reviewing quarterly allocation projections made by the Pennsylvania Department of Public Welfare. The following outline briefly describes some of the particular compliance activities according to the dates they were ordered by Judge Broderick:

- March 5, 1979 (Interim operation of Pennhurst, case managers, and certified advocates)
  - monitor compliance with all institutional standards included in the order;
  - review and approve the employment of all case managers and case management supervisors;
  - review and approve all Individual Habilitation Plans based on OSM guidelines developed pursuant to the original order.
- June 8, 1979 (Movement of school-aged children out of Pennhurst)
  - review case management progress reports one month after placement of each school-aged child;

    make reports to the court regarding progress on implementation of the order.
- April 24, 1980 (Modification of decree based on court of appeals decision)

  monitor the defendants' efforts to provide community living arrangements and other services necessary to implement Individual Habilitation Plans;

  present evidence, where necessary, before the Hearing Master in cases involving contested placements, changes in individual residential circumstances, and

applications for admission to Pennhurst;

- direct counties to develop alternative services for individual class members based on findings by the Hearing Master;
- review various submissions by county administrators regarding changes in residential circumstances of individual class members.

The April 24, 1980 order also created a formal dispute resolution mechanism through the appointment of a Hearing Master responsible directly to the court. In line with the court of appeals decision, the order set up an individual determination process in cases of contested placement out of the institution and entrance into the institution. The Hearing Master was directed to establish procedures for hearings, ensure that notice is given to all parties, set hearings at specified times, review the evidence on both sides, and make decisions regarding the legitimacy of placement objections or institutional admission requests.

The functions of the Hearing Master were somewhat changed subsequent to the Supreme Court stay (June 30, 1980) of the portion of the decree that mandated community placement. Pursuant to the district court's clarifying order of July 14, 1980, the Hearing Master was required to conduct a hearing on each placement out of Pennhurst to ascertain whether it was voluntary. If he found that the placement was not voluntary, arrangements for movement were terminated. This function was eliminated by the Judge early in 1983.

b. Comparison States

In the four comparison states — all of which are

functioning under consent agreements -- the court-appointed compliance mechanisms are somewhat more circumscribed insofar as the breadth of their responsibilities and the level of resources dedicated to their operations. Though there are more similarities than differences among the four compliance entities, each has a distinct character and approach dictated by the peculiarities of the state and the orientation of the individual selected as overseer of the decree.

In the Plymouth case in Michigan, the 1979 consent decree provides for the creation of an Office of the Special Master to replace a five person monitoring committee established under the preliminary injunction. The Master was originally appointed for an 18 month term to be renewed as required. The Master's budget (which is part of the Plymouth budget) in fiscal year 1981 was $302,200, and in 1982 the budget grew to $330,000. At the time of the site visit in fiscal year 1982-1983, the budget stood at $280,000. This sum covered three professional staff and two clerical positions. The Master in Michigan has the authority to "investigate and evaluate any community program, as well as services at the Plymouth Center for Human Development that relate to the habilitation of residents and placement in the community." He may also make formal recommendations regarding implementation of the decree. In this capacity, the Master and his staff conduct onsite community monitoring in addition to other responsibilities. As stated in the order appointing the Master and his assistant -- and as borne out in interviews -- the Judge in this case sees only a minimal operational role for the

court and leaves the day-to-day supervision of the decree to the Master and his staff.

The person initially appointed by the court to serve as Master was David Rosen who had held several key state jobs in the' Michigan mental retardation system — Director of the Macomb-Oakland Regional Center, Associate Director of Mental Retardation in the Michigan Department of Mental Health, and interim acting Director at the Plymouth Center. Unlike masters in the other states, Rosen was distinctly an "insider" who was intimately familiar with the workings of the state system. At the time of the site visit, Rosen had left the Master's position and the court had appointed a former attorney for the Michigan Association for Retarded Citizens (the plaintiff in the case).

In the Wuori v. Zitnay case in Maine, the Special Master was originally appointed by the court on July 21, 1978 and was continued by a series of orders that extended its existence until November 14, 1982. The maximum budget for the Master was established by the Judge at an amount not to exceed $45,000. This amount covered travel, compensation, and clerical assistance. The decree gave the Master the responsibility to prepare reports to the court on the progress of implementation, the power to make recommendations regarding the conduct of the decree, and access to all facilities, documents and records relevant to the status of compliance. The person initially appointed to serve as Special Master was David Gregory, a law professor at the University of Maine, Gregory's more assertive and insistent style contrasted sharply with his successor,

Lincoln Clark — a former professor of marketing at New York University and administrator of the Court Mediation Service for the Judicial Department in Maine.

The compliance mechanism in the Welsh v. Noot case in Minnesota has a relatively long history. Initially, when the case was limited to Cambridge State Hospital, the court's orders were monitored by plaintiffs' counsel and attention was primarily paid to staffing requirements. In 1977, the Cambridge consent decree provided for a part-time Monitor funded at $15,000 for 18 months. Again, the primary monitoring activity revolved around compliance with mandated staffing levels. In 1980, the scope of the consent decree was expanded to include all eight state facilities serving mentally retarded persons and it was necessary to extend the capabilities and powers of the Court Monitor. The responsibilities of the Welsh Monitor now include review of compliance, conduct of hearings on allegations of non-compliance, and preparation of recommendations to the court. Unlike Maine and Michigan, however, the Minnesota Monitor's recommendations do not become part of the decree if no exception is filed by any of the parties. A limited budget of $55,000 was approved by the parties subject to annual adjustment. Though the plaintiffs have sought to augment this sum to expand the ability of the monitor, they have been unsuccessful. To extend the capabilities for compliance monitoring, the plaintiffs' attorney hired a mental retardation professional to review individual habilitation plans.

The parties to the Welsh litigation agreed that the monitor should be a mental retardation professional. By agreement of the

parties, Dr. Lyle Wray -- who had been a building director at Brainerd State Hospital — was selected. In order to preside over any contested evidentiary hearings, Dr. Wray also retained a hearing officer. The appointment of the monitor expires in 1987 — the scheduled deadline for the development of community programs and upgrading of institutional conditions.

The Court Monitor for the five Massachusetts cases took office on March 12, 1979. The Monitor's office, during the first full fiscal year it was in operation (1979-80), was funded at approximately $100,000. This budget supported the court monitor, four assistant monitors, an administrative assistant, and two administrative assistant/secretaries. During that year, however, only four of these persons were on staff for the full year. In the following fiscal year, the office grew to a full-time staff of eight and a budget of $229,330. In fiscal year 1982-83, the Massachusetts Legislature cut the Monitor's budget almost in half and allocated $124,000. This amount is currently supporting five full and part time staff, although the Monitor predicts that the sum will not be sufficient to carry out her mandated responsibilities through the end of the fiscal year. The Monitor's functions, which extend to compliance at the state's five state schools for the mentally retarded, include the submission of reports to the court on implementation progress, development of formal recommendations regarding compliance that can become binding unless appealed, responsibility to respond to complaints or problems and to take the necessary action, and coordination, mediation and facilitation of issues affecting the

parties and implementation of the decree.

The first Court Monitor appointed by the Judge was a lawyer, Steven Horowitz. Horowitz limited his role to intervention in procedural rather than substantive or policy making matters. To Horowitz, this meant "gathering . . . information, publicizing acknowledged deficiencies, demanding and enforcing correction of. identified legal wrongs without specifying the precise form of the remedy, [and] mediating and adjudicating." (1981, p. 8) Horowitz was followed by Anne Berry, a lawyer but also someone with substantial experience in the field of mental retardation and in Massachusetts state government. Unlike Horowitz, Berry has directed more of her energies to day-to-day implementation details and to the resolution of individual class member problems.

B. Analysis

A variety of factors may influence the efficacy of court-appointed compliance monitors or masters including the personal orientation of the individual selected, the judicial style of the judge in the case, the political context in which the decree is being implemented, the extent of the powers of the compliance entity, and the level of resources devoted to carry out the court mandated tasks. The following section assesses each of these variables as it pertains to the Office of the Special Master in the Pennhurst case and to the compliance monitors and masters in Michigan, Maine, Minnesota, and Massachusetts.

1. Orientation of the Monitor or Master

The office of the Special Master in Pennsylvania has engendered a significant amount of controversy and antipathy — especially among the state defendants. In order to understand the conflict, it is important to sort out what portion of the consternation is directed at the Master's staff per se, and what portion is aimed at the Judge's orders. This is particularly appropriate in the Pennhurst case given the contested nature of the litigation.

The Office of the Special Master began under the direction of Robert Audette, former director of special education in Massachusetts. Audette, though he served in the position for only four months, made a significant impression on all involved in the case. According to those interviewed, Audette was a charismatic individual who set about immediately to win over the families of class members as well as other groups affected by the

litigation. He had begun a detailed planning process that would have resulted in the development of OSM county plans spelling out what clients would be moved, when they would be moved, and into what sorts of arrangements. If the pattern of Audette's involvement in detail and programmatic concerns had continued, it is safe to assume that his style as Master would have been highly directive, aggressive, and personal.

Carla Morgan took over when Audette left and was acting master for several months before the Judge made her the permanent Special Master. Morgan, though she had been active in the retardation field in the Southeast Region of the state, did not command the same recognition that Audette had garnered based on his more prominent reputation in the field. Perhaps partially because of this fact and partially because of her own orientation, Morgan's style was much different from Audette's and her management of the Office relied less on the power of personality and more on a democratic process for problem-solving and decision-making. Her approach to compliance was more at arm's length than Audette's and did not involve as much personal persuasion, or involvement in county and state programmatic decision-making, Morgan concentrated on setting up routines for monitoring, IHP review, and case management training. Though confrontations did occur between OSM and certain of the defendants, they were usually played out in correspondence rather than in face-to-face discussion.

Though clearly much of this analysis must be in the realm of speculation because of Audette's short tenure, it can be

hypothesized that he himself might have become a source of controversy had he stayed. Alternatively, his powers of persuasion might have gone some distance in ameliorating the defendants' resistance. In any event, it is Morgan that left her imprint on the office and given her less dominating style, it was the decree and the ensuing "red tape" not her personal leadership that primarily preoccupied and angered opponents of the litigation.

On the other hand, the personal style of the person appointed as Hearing Master, Michael Lottman, does seem to have had a substantial impact on the way key actors in the system have responded to this portion of the compliance structure. A combination of fairness, commitment to the aims of the decree, and capacity for frank and unflinching rhetoric have impressed some system actors and alienated others. One group that appears to be supportive is parents and family members. This is particularly interesting given that Lottman sometimes rules against their wishes and in favor of placement in the community.

It should be noted that Lottman, like Audette, enjoyed a certain amount of prominence given his previous positions as head of the Special Litigation unit in the U.S. Department of Justice and director of the American Bar Association Commission on the Mentally Disabled.

Professional orientation and personal style also appear to have been factors in the reception afforded masters and monitors in other states. In Michigan in the Plymouth case, the first Master appointed by the court was David Rosen -- a man with a

long history in the field and prominence within the state system. In announcing the appointment of Rosen as Master and Gerald Leismer as Assistant Master, Judge Joiner made the following statement: "The court believes that this team will provide more knowledge about community placement, more sensitivity to the needs of the individual clients, and a greater desire to see that the system as outlined in the Order works than could be provided by any two other persons in this country."

Rosen's style of operation, according to those interviewed in the state, involved substantial programmatic oversight and involvement -- not surprising given his knowledge and previous experience in the system. This style is in contrast to Rosen's successor David Verseput (former counsel for the plaintiffs). Verseput is not a programmatic expert and therefore spends more of his time in monitoring and overseeing other facets of compliance. On other hand, Verseput suggests that the difference between Rosen and himself is not related to personal style but rather to the specific requirements imposed by the lawsuit on the position of court monitor at the time each served in that capacity. For example, Dave Rosen was monitor when there were 600 clients in Plymouth, thus requiring that he spend a great deal of time on the day to day problems in the facility. When Dave Verseput became monitor, the facility had only 300 clients and the focus had shifted towards overseeing the community placement process. He frankly admits to the limitations of litigation, and therefore attempts to use the moral suasion of the court to resolve disputes.

In Maine, the first Master appointed by the court, David Gregory, was also an aggressive advocate for the decree. Gregory, a lawyer, saw his job as creating a climate in which the aims of the litigation would be taken seriously and in which the defendants could carry out the reform aims embodied in the consent decree. His assertive manner eventually brought him into conflict with the defendants and he subsequently stepped down from the post. Lincoln Clark, the second Master, stresses persuasion and a more low key approach to securing compliance. Instead of telling the defendants what to do, Clark is much more liable to ask first. His style has been successful in securing cooperation from the range of actors involved in implementation.

In Minnesota, the Monitor selected to oversee compliance with the Welsh consent is a program expert and a strong advocate for the decree. His task, however, is enormous given the scope of the decree and the number of hospitals implicated. Wray has been aggressive in attempting to secure resources and assistance where possible from other agencies, but as of this writing he had only been partially successful.

Finally, in Massachusetts, the court initially appointed a young lawyer with no previous programmatic experience. He had, however, been Judge Tauro's law clerk. As mentioned earlier, Horowitz limited his involvement to checking on the progress of defendants in meeting the letter of the decree. Though Horowitz conceived of his role as non-substantive, some in the state found his style to be intense and sometimes abrasive. Interviews suggest that his successor has become more involved with

individual families and clients, but is not seen as being as tenacious and aggressive as Horowitz.

2. Posture of the Judge

Just as the professional orientation and style of the person selected to manage the compliance mechanism influences its direction and position in the system, the judicial philosophy of the judge also shapes the implementation of the decree. It is difficult to contrast Judge Broderick's demeanor in the Pennhurst case with that of the judges in the other four cases because of the contested nature of the litigation. Some general themes, however, do emerge. Of all of the federal judges, Broderick appears to occupy a middle position with respect to enforcement -- somewhere between tough and persistent oversight, and reserved and cautious distance. Broderick has been willing to use the power of the court to enforce his orders in two notable instances — against the Secretary of the Department of Public Welfare for non-payment of his reimbursement orders for the Office of the Special Master, and against some of the county defendants for failure to meet placement deadlines. In the first case, Broderick found the Secretary in contempt and assessed $10,000 per day coercive fines. In the second case, he found the tardy counties in contempt but did not assess any fines.

In other instances, however, the Judge has appeared reticent to insert himself into compliance issues. For example, the decree had been in force for three years before Judge Broderick issued an implementation order stipulating a schedule for the movement of class members into community living arrangements.

Though clearly some of the hesitation was the result of the multiple appeals filed by the state and the uncertain status of portions of the decree, the Judge's inaction did delay any significant movement of class members out of Pennhurst until 1981. The Judge's dismantling of the Office of the Special Master as spelled out in his August 1982 order was also seen by some as a retreat from a strong enforcement posture. All in all, however, it is difficult to know if any Judge could have been more effective given the resistance of the state defendants, the specter of being over-ruled by the circuit or Supreme Court, state budget limitations, and the inability to hold the legislature accountable to provide funding for the decree.

In Michigan, Judge Charles Joiner made the following statement in his order appointing the Master and Assistant Master: "It is the hope of this court that the parties will be able to manage . . . the terms of this Decree . . . with the help and assistance that the Master and the Assistant can give in such a way that no further action by this court will be called for." According to interviews in the state, this is exactly what occurred. Judge Joiner is now somewhat of a dim presence in the case and meets only intermittently with his Master.

Judge Gignoux in Maine appears to have exercised more direction than Judge Joiner in Michigan. He was active in the negotiations surrounding the replacement of his first Master and is the only Judge to date in similar cases around the country to terminate at least a portion of his jurisdiction {i.e., enforcement of the Pineland requirements emboided in Appendix A of the

decree). He has weekly contact with his Master, and in this way Lincoln Clark stays close to the details of implementation.

Judge Larson in Minnesota has been involved in the Welsh litigation for a decade -- from 1973 when the case was filed to 1983. During these years, the Judge has watched the case grow from primarily a right to treatment case to a consent decree covering all the state's facilities for the mentally retarded and mandating significant deinstitutionalization. During this period, the Judge has been available to all parties and has been willing to use the authority of the court to back up plaintiffs' allegations of non compliance on certain issues.

Finally, Judge Tauro in Massachusetts has probably been the most consistently and personally involved in the implementation of the five consent decrees. He also has gone the furthest with respect to forcing a confrontation with the state legislature. As noted earlier, in 1980, when the legislators refused to pass a supplemental appropriation to continue support for implementation of the decree, Tauro sent federal marshals to the legislature to subpoena the heads of the two legislative bodies — an act which incensed the legislative branch, Tauro, unlike his colleagues, had made himself available to the media and has personally interjected himself into the case on numerous occasions. In response to criticisms of the federal court role in the mental retardation system, Tauro is quoted in the Boston Globe as saying:

> The decrees that have guided the remedial phase of these cases are not the whim of the federal court, nor do they represent an activist intrusion on the prerogatives of state government. Rather they represent an acknowledgement by the

> Commonwealth that, for too many years, our retarded citizens were "benignly" permitted to exist in filth and squalor, despite the best efforts of staff too few in number to have any chance of meeting their professional responsibilities, {May 16, 1982)

3. Political Context

None of the cases under analysis was either brought or implemented in a vacuum. The political context of the state heavily influenced the original lawsuits, the type of relief requested, and the way in which implementation has proceeded. In Pennsylvania, a tight state budget and a fiscally conservative administration made implementation of the decree a continuing struggle between the plaintiffs and the defendants. More recently, the state legislature has also shown its hostility towards the court's intervention by failing to fund fully the Master's budget. The combination of political factors and the contested nature of the case has created an acrimonious atmosphere among the parties. Given these circumstances, it is difficult to know how the Special Master and her staff could have been any more effective in securing compliance.

In Michigan, the political context definitely contributed to the speed with which the original consent decree was signed and the pace of implementation. Specifically, the conditions at Plymouth had become an issue in the press and the public pressure for reform was significant. The Governor had little choice under the circumstances but to move quickly to rectify the situation. Further, implementation was facilitated by the fact that an amicable relationship existed among the parties prior to the litigation. Moreover, several of the key actors in the system

had worked together over the years (i.e., at Macomb-Oakland) and had developed a sense of trust and mutual respect.

In Maine, though there was a shift in administration midway in the implementation of the decree, the general political context continues to be supportive of the aims of the litigation. According to one key informant in the state, the defendants have increasingly come to recognize the ways in which the plaintiffs and the Special Master can help them achieve their system reform goals. All interviewees in the state were proud of the progress that has been made, though there was some difference of opinion regarding the pace of recent compliance.

In Minnesota, the course of the litigation has been influenced by numerous shifts in administration and political circumstances. Initially, the case became bogged down when the legislature refused to appropriate sufficient funding to support the reforms mandated at Cambridge State Hospital. More recently, an inability to get needed resources from the state administration to support additional community placement has slowed implementation. To complicate the situation, the mental retardation program in the state has essentially been turned over to the counties in the form of block grants thereby limiting — according to the state defendants — their ability to influence resource development and placement.

The course of the consent decrees in Massachusetts has undergone two changes in administrations. The consent orders were originally signed by Governor Michael Dukakis, but shortly thereafter the Governor lost his bid for re-election to Ed

King. Governor King and his staff were faced with implementing a series of mandates that they had no part in crafting. Implementation lagged and the result has been the sacrifice of the community portion of the consent decrees and a continuing concentration on institutional improvement. This focus can also be attributed to Judge Tauro's preoccupation with institutional conditions — a continuing concern growing out of his initial outrage when he personally visited some of the facilities. Finally, the legislature in the state has posed obstacles to implementation and has displayed an increasing concern with the level of resources devoted to compliance.

4. Extent of the Decree

Again, a comparison of the court decree in the Pennhurst case with the decrees in the other four states is difficult because of the contested nature of the case. The level of intrusiveness of the Pennhurst decree is predictably greater given the resistance of the defendants. To some extent, however, the extent of the decree has also served to exacerbate the defendants' hostility given what they perceive to be an untoward penetration of bureacratic prerogatives. The level of detail in Broderick's various orders shaped the way the Special Master operated since it required the establishment of a variety of paper procedures. As a result, the Master was forced to attend to detail rather than to the more general issues of system structure and policy development.

In Maine, Michigan, and Massachusetts, the powers of masters and the monitors are comparable with each having the ability to

make formal recommendations that can become part of the decree if no objection is filed or if, after a hearing, the Judge is persuaded that the recommendation is valid. In Minnesota, the defendants opposed this provision and the Monitor's powers, therefore, are more limited. According to the plaintiffs' counsel in Welsh, the Court Monitor's powers have been sufficient where funding has not been an issue. However, where funding has been an issue (e.g., with respect to staffing standards), the attorney asserts that the process has been more cumbersome and less responsive (Grandquist, 1982). In Maine, the Special Master has never exercised the power since all differences to date have been mediated.

5. Level of Resources

The final variable that may have an impact on the efficacy of the compliance mechanism is the level of resources devoted to its functions. In the case of the Office of the Special Master in Pennsylvania, the magnitude of financial support required for its operations -- approximately $900,000 at its peak — made OSM a very exposed and vulnerable target for those opposed to the litigation. In addition to the size of the total budget, the level of salaries was also a subject of criticism by the defendants. -Numerous comments were made by the defendants regarding the fact that some OSM staff made as much if not more than staff at the Office of Mental Retardation. Even if these commentators had taken into account the fact that OSM staff were not paid any fringe benefits, they still would have complained about what they considered OSM's exorbitant budget.

In Minnesota, the level of resources devoted to the compliance mechanism became an issue when the plaintiffs attempted to secure foundation funding to augment the modest budget of the Court Monitor. The Judge subsequently ruled against the plaintiffs on the grounds that the use of private funding to support a court-appointed official was inappropriate. Problems have also arisen in Massachusetts where the legislature has recently cut the Court Monitor's budget in half. In the remaining two states, funding for the compliance function has not become an issue.

6. Summary

Given the numerous factors that influence the ability of a court-appointed official to affect change, it is difficult to point to any one variable as more predictive of outcome than any other. All in all, those court monitors and masters that were most widely accepted by key system actors tended to avoid center stage and to limit their activities to more narrow compliance issues. However, those court officials that inserted themselves into the process clearly expedited implementation of the decrees -- particularly in the early stages. These two observations may suggest that different orientations and personal styles are required in different types of litigation and in different phase of a particular case.

C. Future Trends

As described, the Office of the Special Master created to oversee the implementation of the Pennhurst case is one of the most complex and far reaching entities established in such cases to date. The reasons why the plaintiffs proposed such a comprehensive structure are two-fold. First, the case was contested by the defendants and it was thought that securing compliance would therefore be more difficult. Second, lawyers for the plaintiffs were persuaded that compliance mechanisms set up to manage the course of compliance in other cases had not been effective (Lottman, 1975).

Though OSM had its successes, it is probably safe to say that such an all-encompassing organization will not be replicated in other cases in the foreseeable future. For one thing, scarce resources at the state level make the probability of funding an enterprise of the scope of OSM unlikely. Secondly, the experience with OSM in Pennsylvania suggests that the creation of a shadow bureaucracy to manage implementation not only aggravates tensions in the litigation, but blurs the important distinctions between the judicial and other two branches of government (D. Horowit, 1982). Finally, the Supreme Court's rulings in Pennhurst and in Romeo strongly suggest that judges (or their monitors or masters) should not be involved in those details of compliance that are in the purview of mental health professionals. As Justice White wrote in the dissenting opinion in Pennhurst, Judge Broderick should not have undertaken "the task of managing Pennhurst." Though this is not an accurate

statement regarding the role of OSM at the facility, it reflects the Court's suspicion of overweaning compliance activities.

As far as the future of the compliance mechanisms just explored, the Office of the Special Master in Pennhurst was terminated at the end of December 1982, though the Hearing Master will continue his responsibilities indefinitely. In Maine, Lincoln Clark is now scheduled to terminate his responsibilities in September 1983. The Monitor in Minnesota, based on Judge Larson's order, will be in operation until 1987 when the state is expected to reach full compliance. In Michigan, David Verseput will presumably step down when the consent decree expires.

In all likelihood, masters and monitors will continue to be present in large scale litigation in this field since the day-to-day issues surrounding the implementation of even the most amicable agreement require more oversight than most judges have the time to provide. The shape of future compliance mechanisms, however, are likely to be more like the scaled down entity in the Welsh case than the multi-faceted body designed for Pennhurst. It would also seem clear, based on the analysis conducted in Pennsylvania and the four comparison states, that the appointment of a prominent and authoritative individual with standing in the mental disabilities system in the state will enhance the influence of the court. Further, the appointment of a hearing master or other independent review body to hear the points of view of parents and family members as well as clients regarding placement decisions has been a valuable way of ensuring that individuals have an opportunity to express themselves in a forum that is less formal than the courtroom.

VI. WHO SPEAKS FOR PARENTS?

A. Overview

As discussed earlier, the parents and family members of mentally retarded persons in Pennsylvania have lined up on both sides of the litigation and on both sides of the debate regarding deinstitutionalization. In the past few years, a pro-institutional parents group has grown up to challenge the traditional hegemony of the Association for Retarded Citizens in the state. In the four comparison states, conflicts among parents have not reached this level of factionalism, although stresses and strains are apparent.

In Michigan, relationships between the state ARC and local, institutionally-based ARCs have been characterized by some system observers as somewhat distant. Another interviewee, however, suggested that the relationship between the state ARC and institutionally-based ARCs is not any different from that found in other states. As noted by this interviewee, the difference is in emphasis not substance. Institutionally-based ARCs are more supportive of institutional reform but also encourage community development while MARC favors community development but continues to support institutional reform as facilities phase down and eventually close. Moreover, these differences become less evident as more and more clients are placed in community programs and parents can observe that the community system works. On the other hand, these differences should not be discounted, especially during the course of litigation when the stresses and strains of a deinstitutionalization mandate bring the concerns of

parents with institutionalized children or adults to the surface

The Plymouth suit began solely as an institutional reform case that was premised on violations of the right to be protected from harm and the right to treatment. The MARC plaintiffs first began to consider litigation five years ago when reports of abuse and neglect at Plymouth were brought to their attention by - members of the Plymouth ARC (PARC). PARC members obtained the assistance of a Detroit Legal Aid attorney who together with support from attorneys for the MARC and the Michigan Protection and Advocacy filed a mandamus action in the Michigan Court of Appeals in December 1976. This suit, Karolak v. Dempsey, named the Michigan Department of Social Services as a defendant and sought an injunction to force the state to implement provisions of the state's child protection statute. The case was sent back for additional information.

Soon after Karolak was sent back to the circuit court, the original Legal Aid lawyer transferred the case to attorneys at MARC and the Michigan Protection and Advocacy organization. The MARC lawyers determined that the next step should be a class action suit in federal court and the case was filed in February 1978.

Though the lawyers relied on the facts developed for the previous suit, the emphasis in the plea for relief was shifted to mixed institutional reform and community placement. When a new stipulation was signed in 1981, which called for the eventual closure of Plymouth, members of the Plymouth ARC were very uncomfortable with the plan and some even felt used by the state

organization. On the other hand, the PARC board did vote to approve the stipulation. In the events surrounding the most recent modification of the decree, PARC members have played a more active role, especially concerning the particulars of the modification. In general, the Plymouth ARC did not break ranks given their conviction that no amount of money could bring about substantial improvements at the institution. Had conditions at the facility been better, the situation among parents in Michigan might have been similar to the schisms that occurred in Pennsylvania. Instead, the state ARC took on the responsibility of educating parents regarding deinstitutionalization and brought in experts from around the country to conduct workshops.

The ARC in Maine has a troubled and turbulent history. Recently, the organization was forced to close its doors even though representatives from the national ARC came into the state in an attempt to increase membership. Local ARCs are still functioning in the state. Though the state ARC was in existence when the Wuori suit was brought, the membership was not active in the litigation. According to those interviewed, most of the vocal parents in the state have been pro-deinstitutionalization, although some older parents of retarded residents of Pineland were initially opposed to movement of their family members to the community. At the time of the site visit, the major parents' groups in the state were the Pineland Parents and Friends Association, and the Consumers Advisory Board and 150 "correspondents" around the state created as a result of the litigation.

more institutionally oriented. Relationships among the multiple parents groups in the state are complex and often fraught. Interviews with legislators and legislative staff suggest frustration with the inability of parents in Massachusetts to speak with a unified voice. According to one state interviewee, the ARC faces three major conflicts: 1) disputes regarding priorities on institutional versus community programs; 2) tensions among families of class versus non-class members; and 3) conflicts between provider and advocacy elements in the organization.

Because of the intensity of its internal struggles, the characteristics of the parents movement in Massachusetts come closest among the four comparison states to those described in Pennsylvania. The issues, however, are totally reversed since the majority of resources are going to institutional improvement. In Massachusetts, then, it is the community parents rather than the institutional parents that feel alienated.

The Minnesota ARC is still a viable statewide organization. although there have been some defections over the years. Wore recently, the leadership has managed to accommodate most points of view within the organization's political agenda. In Minnesota as in Maine, the ARC was not the moving party in the litigation and the leadership feels that this has been beneficial to the group and that it has enhanced their flexibility. As noted earlier, it was not until 1980 that the Welsh case changed from primarily an institutional improvement case to a mixed deinstitutionalization case. According to parent observers interviewed, some ARC members were nervous about the specter of substantial deinstitutionalization and, according to these parents, the ARC might have sided with the state had a reasonable consent decree not been signed.

Other key system actors interviewed in Minnesota noted that the influence of the state ARC has been declining recently and that their clout with the state legislature is fading. ARC officials admit that it has been increasingly difficult to recruit new members and to maintain the level of enthusiasm and commitment. The lull in organizational development is attributed ironically to the organization's past successes in such areas as education. These gains, it is felt, have led to complacency, especially among younger parents.

Finally, in Massachusetts, three of the five class action suits were brought by institutional parents groups and two were brought by the state. Remedies in the first three suits initially differed from those in the last two suits and were much

B. Analysis

The possible reasons for the differences in parental attitudes regarding litigation and other system issues, both within the states addressed and among states, may be associated with the following variables: 1) the nature or extent of the court decree; 2) the extent to which institutional care has been closed off to the class members; 3) the extent to which parents are involved in designing the remedy and participate in decisions regarding services for their family member; 4) the perception of institutional conditions and the viability of community programs.

1. Nature of the Decree

The extent of the Judge's decree in Pennsylvania clearly had an impact on the attitudes of some parents in the state --particularly the so-called employee order that included a two year schedule for the ultimate closure of Pennhurst. The starkness of the order forced those parents who still thought institutional improvement was possible to face the full import of the litigation. It also made some parents realize that their family member would almost certainly be placed in the community. Even though the decree has been somewhat modified over the years, the deinstitutionalization character of the case is still clear.

In Michigan, the first consent agreement signed by the parties in the Plymouth suit stated that no more than 100 residents would remain in the institution by the agreed to date. The residual population left open the possibility that not all residents, especially medically fragile residents, would be

placed by the date specified in the decree. As noted by one interviewee, the unstated but generally understood notion was that efforts to place all clients would continue but that more time and experience was needed concerning the placement of severely disabled, medically involved residents for whom few service models in the community existed at the time. According to interviewees in the state, anxious parents took refuge in the possibility that their relative would be among the 100 who stayed. By the time the stipulation agreement that called for the closure of Plymouth was signed, most parents saw that the problems and costs involved in improving conditions at the facility were not necessarily going to be resolved. It had also become apparent that family members of non-class members were voicing resentment regarding the vastly enriched staffing ratios at Plymouth.

The Wuori decree is combined institutional improvement and deinstitutionalization. Initially some of the parents were anxious that their family member might return home or not be well taken care of in the community. In an interesting strategic move, the family members of the most resistant parents were selected for early placement in order to show them and other parents that the process was rational and beneficial to the clients. The success of these early placements calmed the most outspoken parents and persuaded others that the process would work.

The Welsh case in Minnesota began as an institutional improvement case and more recently expanded to encompass

deinstitutionalization aspects. Though there was some initial anxiety among parents regarding the magnitude of the shift in emphasis, the language of the consent decree appears to have struck a balance agreeable to most parents.

The five consent decrees in Massachusetts vary, and initially only the last two suits involved a community component. The so-called community plan has now been expanded to cover all institutions. Some of the plaintiffs, however, have continued to focus on implementation of institutional improvement aspects as opposed to the development of community programs. This is not to suggest that significant deinstitutionalization has not occurred at some of the state schools. For example, Belchertown's resident population decreased by approximately 65% since the consent decree was signed in 1973. Recently, another group of plaintiffs at one of the institutions has attempted to bring a new law suit challenging the standing of the existing plaintiffs and calling for closure of the facility. Judge Tauro, however, did not consider the new suit appropriate and the issue was dropped.

2. Institutional Alternatives

A topic that is closely related to the nature of the decree is the extent to which the institution {or other institutions) continues to be available to class members as a back-up resource. In Pennsylvania, prior to the first circuit court opinion, class members could not be readmitted to Pennhurst once they were placed in the community. However, even though the circuit court left open the possibility that some class members

might stay at Pennhurst or be readmitted to Pennhurst, return to the facility is extremely difficult given the least restrictive setting presumption in the decree. To date, the Hearing Master has allowed only one class member to return on a temporary basis. Some parents interviewed in the state worried that there would be no alternatives to fall back on if their family member could not make it in the community. Pennhurst administrators underscore this concern and note that the fact that residents cannot return to the facility once they are placed out is the single greatest stumbling block in persuading families to accept community care. Their fears were compounded by the fact that placement of class members in other private or public institutions is almost as difficult as placing them back in Pennhurst.

Between 1978 and 1980, class members in the Plymouth suit class members could be transferred to other Michigan facilities and, if necessary, returned to Plymouth. In the Spring of 1982, however, the Department of Mental Health informed other state facilities that class members could not be returned to Plymouth — a policy that has been in effect ever since. As noted by one interviewee, for the most part, class members transferred to other state centers have been placed in the community. Interestingly, in the most recent modification to the decree, some transfers are allowed if it is in the "best interests" of the client. In Maine, class members have been recertified back into the institution — particularly those retarded persons with accompanying behavior problems. Likewise, in Minnesota and

Massachusetts, class members can and have returned to institutions under court order.

3. Level of Parental Involvement

The Pennhurst case originally involved two parents groups in addition to the named plaintiffs -- the Parents and Friends Association of Pennhurst, and the Pennsylvania Association for Retarded Citizens. Eventually another group, the Parent/Staff Association, became involved on the defendants' side of the litigation because its members felt that the views of parents desirous of institutional improvement were not being represented. In addition to involvement in the litigation, the role of parents was clearly spelled out in the decree and involved participation at all stages of the development of the Individualized Habilitation Plan. Further, with the initiation of the Hearing Waster, parents had the opportunity to appeal placement and provisions of the IHP. Parents and family members, however, do not have a veto over placement and in fact their wishes have been over-ruled by the Hearing Master on several occasions. Parents interviewed, however, agree that the Hearing Master process has been fair and that it has provided them an opportunity to speak their piece.

The suit on behalf of Plymouth residents was brought by the Michigan Association for Retarded Citizens and the Plymouth Association for Retarded Citizens. According to a MARC spokesperson, the organization has attempted to involve families, at all stages of the litigation including the design of the decree. The aim was to provide families with as many options as

possible and involve them in the selection of appropriate services.

The Maine ARC was not involved in the litigation. However, a Consumers Advisory Board was formed after the decree was signed to advise the Master and the Department regarding "compliance. Since the site visit, the Board has become increasingly active and will play a role in monitoring once the Office of the Special Master is terminated. Maine families might have felt alienated from the process had it not been for the actions of George Zitnay — superintendent of Pineland and Commissioner of the Department of Mental Health and Corrections in the early phases of the decree. According to interviewees in the state, Zitnay met personally with parents in their homes, went with them to the proposed living arrangement, and spent hours answering their questions and reassuring them. This approach appears to have worked since no parent to date has taken advantage of provisions of the decree that allow for parents to contest placement.

Like Maine, the Minnesota ARC has not been involved in the Welsh law suit and in fact some members were concerned about some of the mandatory placement features. As noted by one parent observer in the state, it didn't seem fair to move the offspring of resistive parents when there were so many other parents who were eager for community placement. In fact, according to others interviewed, parents of class members do have a de facto veto over placement.

Parents in the Massachusetts cases are intensely involved in implementation of the decrees. In fact, some of the parents of

named plaintiffs have been involved in approving capital plans for institutional improvement. Those parents that feel left out have children in the community and are concerned that the benefits of the litigation will not "trickle down" to their relatives.

4. Mature of the Mental Retardation System

The final variable that may affect parental attitudes about court-mandated change is the general perception of the viability of the institutional and community system. In Pennsylvania, it is generally acknowledged that the community system is fairly well developed compared to other states. However, in a survey of Pennhurst families, one of their biggest concerns about deinstitutionalization is the potential insecurity or instability of the community system (Latib and Conroy, 1982). Interestingly, even among parents who are won over to the virtues of community placement, permanence is still a major concern. Fears regarding lack of permanence have been aggravated recently by the state's financial problems and a "no growth" budget for community development -- aside from the possibility of some program expansion under the provisions of the Medicaid waiver.

With respect to Pennhurst Center, conditions at the facility at the time the suit was brought were generally agreed to be poor and in fact the state defendants did not attempt to defend against the allegations made by the plaintiffs. In the past few years, the application of the ICF/MR standards and a declining population have improved conditions at Pennhurst, and some observers feel that the institution is able to mount a higher

level of programming than was possible in the past. Problems of staff abuse of clients, however, continue to appear in the press from time to time.

Efforts to place Plymouth residents in the community have been implemented by several regional centers, including the Macomb-Oakland program -- a nationally recognized model of community-based care. To date, placements have been fairly evenly divided among three major centers -- Macomb-Oakland, Northfield Residential Training Center and Southgate Regional Center -- and the Plymouth foster care program. As a general matter, the legislature in the state remained supportive of community programs in spite of the state's dire fiscal situation. As discussed earlier, conditions at Plymouth had been the subject of a major scandal in the state and attempts to improve the facility through the litigation were eventually terminated based on a consensus among the parties that no amount of money or staff could curb abuse.

Most would concur that community programs in Maine at the time of the litigation were in a somewhat embryonic state. Since that time, a variety of community living arrangements have been developed though some observers continue to be concerned with the over use of board and care homes and the shortage of staff in the community skilled in behavior management. Conditions at Pineland were also the subject of newspaper articles at the time the law suit was filed. Since that time, interviewees noted that the facility had improved.

Minnesota community programs have received national

recognition and are generally felt to be among the leaders in the country. Over time, however, the system has become dependent on the use of ICF/MRs as the primary source of residential care and it has only been recently that other alternatives are being discussed. The development of a county block grant for mental retardation services and a declining state economy have also slowed the momentum of system development and innovation. At the time of the site visit, counties were contemplating cut-backs in day program services and a bill to take advantage of the Medicaid waiver was stalled in the legislature.[20] Parents were concerned that community providers were not interested in serving more seriously disabled clients. Institutions in the state, according to those interviewed, had improved as a result of the litigation but there were still trouble spots.

Finally, among parents in Massachusetts, there appears to be a fairly high level of anxiety regarding the stability and viability of community programs. As noted earlier, this fear is fueled by the legislature's failure to fund fully the community component of the consent decrees and the general no growth policy it has adopted in the recent past. Many are concerned that this attitude coupled with the effects of inflation on community providers will increase instability. As in Minnesota, parents in Massachusetts are also concerned that community providers are not interested in serving more seriously disabled class members. Conditions" in the institutions were clearly unsatisfactory when the various suits were filed, but some observers see significant improvements in the past few years.

5. Summary

One of the factors that appears to have a positive influence on the attitudes of parents toward broad scale litigation is the presence of an escape valve in the decree - either the ability to return a class member to an institution when necessary or the ability of parents to influence the nature and timing of placement. The Pennhurst decree, included no such escape valve and the polarization of parents may have been one by-product. Family involvement also plays a role in parental attitudes especially when personal contact is made with families to reassure them and to explain the process. Overall, it is clear that parents are concerned about permanence and stability regardless of the nature of the suit. In deinstitutionalization cases, however, these feelings and perceptions become a major key to parental acceptance.

Interestingly, relationships among parents appeared somewhat more strained in those states — Massachusetts and Michigan — where the parents organization(s) had become plaintiffs in the litigation. Further, all parent group representatives reported a certain decline in vitality in their organizations ironically because of their past successes. Now that public education has been extended to all handicapped children, for instance, recruitment of the parents of young children has fallen off.

C. Future Trends

The conflicts between parents in Pennsylvania are likely to continue until the leadership of the anti-deinstitutionalization group is persuaded that their family members are receiving appropriate care and attention. With respect to PARC, their attempts at reconciliation with the Parent/Staff Association, and their efforts to find a common ground with the leadership of the Department of Public Welfare, suggest that PARC members will devote their energies to solidifying their gains and trying to mend political fences. In Maine and Minnesota, the problems faced by parents have more to do with rebuilding their organizations and re-establishing their political presence with the legislature and state program staff. In Michigan, parents face a similar problem of organization building -- in this instance finding ways to encompass the needs and interests of institutional and community-based ARCs within one organization.

In Massachusetts, the problem is much more complex and involves the development of a strategy to reconcile provider and advocacy aims, and to ameliorate the differences between institutional parents and community parents. According to certain system observers, the role of the Massachusetts ARC as a provider of community services compromises its ability to advocate for that very system. In response to this continuing debate--advocate vs. provider--some parents have formed organizations focused solely on advocacy activities.

As a general matter, tensions among parents may intensify, especially in an era of shrinking resources which brings

differences regarding the locus of services (i.e., community versus institutional) into the debate about the allocation of funds at the state and local level. Litigation that forces states to make definitive choices between community and institutional alternatives is likely to aggravate these schisms. Resource problems are also likely to exacerbate tensions between class members and non-class members as the disparity in the level of services between these two groups grows.

Declining funding may also intensify parental concern regarding the stability of community living arrangements. This may make parent organizations less likely to push for remedies that rely on substantial deinstitutionalization. Regardless of the nature of the decree, remedies that include families in a formal way in the design of services generally and for their family member specifically have the potential of engendering more support than those that do not.

That parents groups may back off of deinstitutionalization as a major goal, however, is not borne out by recent actions of the National Association for Retarded Citizens (NARC). At their annual convention in the Fall of 1982, NARC members passed a formal resolution asserting that all persons, regardless of the severity of their disability, are entitled to community living. Further, in January of 1983, the NARC Governmental Affairs and Program Services Committees passed unanimously a motion to endorse the concept of transferring Medicaid dollars from the institution to the community over a phased-in transition

period. The motion directed staff to pursue a study to develop the appropriate legislative approaches. Both of these activities indicate that a fair amount of consensus regarding the goals of system reform still exists at the national level.

For parents groups involved in litigation, it has been a lengthy process that to some extent has resulted in tensions within organizations and has taken momentum away from other reform agendas. Though litigation has resulted in significant change, it may be that in the next period of time, parents will concentrate on rebuilding state organizations and working on program and resource questions at the state level. Further, as the proportion of parents with children in institutions declines, these questions will increasingly be shaped by parents with family members in the community who have become used to the availability of services through the public education system. Whether the predominance of this group will mean a more strident voice or a less impatient voice remains to be seen. What is clear is that these parents will not be as preoccupied with institutional issues and will be more likely to concentrate on the expansion of community services.

Most importantly, the experiences reviewed in this study strongly suggest that parents — regardless of their orientation — will be working to gain more participation in program decisions involving their family members and will be pressuring for ways to ensure long-term service stability.

VII. CROSS-CUTTING THEMES

While the issues discussed in this analysis fall into four distinct categories, there are clearly themes that run throughout the discussion and that appear to shape the events in virtually every state. The first major theme is the effect that scarcity or austerity has on the acceptability of litigation and on the reaction of key groups in the system to broad scale reform. Judge Jack B. Weinstein, Chief Judge of the federal district court in New York, sums up the influence of scarce resources on judicial reform as follows:

> First, the court's flexibility is limited because there is no opportunity to "sweeten" a plaintiff's remedy with services defendants or the public desire; second, because there is no surplus or redundancy in the system, remedies require the redistribution of present services and resources, generally from one poor group to another; third the importance of better utilizing present operating line professionals is increasing as austerity worsens; and fourth, the clients of our social institutions are increasingly exclusively the poor who cannot help themselves and who, with each day, have fewer friends among the powerful. (1982, p. 146)

Weintein's remarks echo much of the previous discussion — an increasing restiveness among some defendants who no longer see litigation as furthering their own aims, resentments between class members and non-class members, and divisions among line staff and professionals.

Weinstein also argues that austerity intensifies the conflict between the legislature and the court. Though the Judge does not believe that a lack of funds is an excuse for the denial of constitutional rights, he does state that "no judge will ignore the central reality that it is the legislature, and the public, not the courts, which raise funds and decide how they are

to be spent" (p. 146). Given this reality, the Judge advises those concerned with social reform to rely less heavily on the courts for institutional improvement and to spend more of their energies on the other branches of government where resource decisions are made.

The second major theme that emerges is the durability of court-ordered reform over time and the factionalization and polarization that sometimes occur as implementation of a decree extends over a prolonged period of time. Steve Horowitz, former Court Monitor in the Massachusetts cases, makes the following observation on this theme:

> . . . judicial intervention often seems to move easily at first but gradually elicits bureaucratic and legal resistance, even where consent decrees have been signed . , .. political groups not represented before the court become more vocal as their interests are affected in ways that may have been less apparent or less painful when the decree was first adopted. As the pressure of initial crises fade, bureaucratic defendants may be emboldened in their recalcitrance, particularly if they inherited the legal obligations from a previous administration. These officials often have a growing resentment of judicial involvement simply because they do not like to be directed by outsiders, particularly judges, who lack their expertise. (1981, p. 17)

The effects described by Horowitz can certainly be seen in Pennsylvania and to a smaller extent in the other four states.

Even given the problems of durability of decrees, public law litigation receives support in those states where the aims of the litigation continue to be consonant with the political and programmatic agendas of various groups within the state. This reflection is borne out in Minnesota, Maine and Michigan where the objectives of the law suit continue to be acceptable to the majority of constituencies in the mental disabilities system. In

each of these states, the content of the decrees also changed over time to accommodate shifting political and system expectations.

Finally, as with other analyses conducted as part of the Longitudinal Study, the intensity of the issues that have surfaced in Pennsylvania is not as great in those states where litigation has been settled by consent decree. A fully-litigated case appears to cause much more polarization and choosing up of sides. It also engenders more bureaucratic and legislative resistance. However, the analysis of the four comparison states suggests that some polarization does occur in consent states but it is much more subtle and subject to the character of the state system and the expectation of the various mental disabilities constituencies.

In conclusion, litigation is clearly responsible for major improvements in the lives of mentally disabled persons. However, in the absence of authoritative reaffirmation of the legal theories that underpin public law cases in this area, the pace of broad-based suits brought in this country may slow considerably. In those instances where litigation continues to be pressed, warning signals such as reluctance to consent and growing legislative resistance should be heeded. Given these realities, reformers are likely to spend the next period of time consolidating and enforcing the direct and indirect gains of public law litigation. In other words, the appeal to broad principles made in the 1970s will no doubt be followed by concrete and concentrated efforts at implementation. The

armamentarium of those who continue to seek change, therefore, will probably not be limited to one tactic, but will include multiple judicial and extra-judicial strategies.

FOOTNOTES

1. Wyatt v. Stickney, 344 F. Supp. 373 and 387 (M.D. Ala. 1972), aff'd sub. nom., Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir.. 1974).

2. Welsch v. Noot, 373 F. 2d. Supp. 487 (D. Minn. 1974).

3. Halderman v. Pennhurst, 101 S. Ct. 1531 (1981).

4. The Longitudinal Study is funded by the Office of the Assistant Secretary for Planning and Evaluation of the Department of Health and Human Services and is a multifaceted five-year analysis of the implementation of the court decree in the Halderman v. Pennhurst State School and Hospital

5. Wuori v. Zitnay, No. 75-80-SD (D. Maine July 14, 1978).

6. Michigan Association for Retarded Citizens et al. v. Donald Smith, M.D., C.A. NO. 78-70384.

7. Ricci v. Greenblatt, C.A. No. 72-0469-T (Belchertown); McEvoy v. Mitchell. C.A. No. 74-02768-T (Fernald); Gauthier v. Benson, C.A. No, 75-3910-T (Monson); and M.A.R.C, v. Dukakis, C.A. No. 75-5023-T (Wrentham); M.A.R.C. v. Dukakis. C.A. NO. 75-5210-T (Dever).

8. In re Joseph Schmidt, 429 A. 2d 631 (1981).

9. Romeo v. Youngberg, 102 S. Ct. 2452 (1981),

10. New York State Association for Retarded Children and Parisi V. Rockefeller, 357 P. Supp (E.D.N.Y. 1973), order entered as NYSARC and Parisi v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975).

11. For a full discussion of the issues surrounding the contempt proceedings see: Human Services Research Institute, Historical Overview IV, December 1981.

12. Pennsylvania Association for Retarded Citizens v. the Commonwealth of Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972),

13. Vecchione v. Wohlgemuth, 558 F. 2d 150 (3rd Cir. 1977).

14. Goldy v. Seal, 429 F. Supp. 640 (M.D. Pa. 1976).

15. Philadelphia Welfare Rights Organization v. Shapp, 602, F.2d. ( )

16. Delaware Valley Citizens Council for Clean Air v. Commonwealth of Pennsylvania, 674 F. 2d. 976 (3rd Cir. 1982).

FOOTNOTES, continued

17. One of the key informants from Michigan who responded to the draft of the implementation analysis noted that since the site visit in the Fall of 1982, community resistance to placement had intensified, and placement of Plymouth residents was considerably behind schedule. The presence of a number of new legislators makes any predictions regarding continued support for deinstitutionalization uncertain.

18. For a complete analysis of the Supreme Court's ruling in Pennhurst, see: Human Services Research Institute, Historical Overview IV, December 1981.

19. For an analysis of the Supreme Court's decision in the Romeo case see: Human Services Research Institute, Historical Overview VI, January 21, 1983.

20. According to one respondent in Minnesota, momentum in the state has picked up, the waiver authorization has passed, and an expansion of community services is planned.

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