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The Institutionalized Child's Right to Counsel: Satisfying Due Process Requirements Through the Protection and Advocacy for Mentally Ill Individuals Act

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THE INSTITUTIONALIZED CHILD'S RIGHT TO COUNSEL: SATISFYING DUE PROCESS REQUIREMENTS THROUGH THE PROTECTION AND ADVOCACY FOR MENTALLY ILL INDIVIDUALS ACT

I. INTRODUCTION

Children incarcerated in institutions for the mentally ill are deprived of their physical liberty, their friends, their family, and their community.[1] As institutionalized patients, the children live in unnatural surroundings under the continuous control of strangers and are subject to intrusive medication or treatment.[2] These conditions may violate the child's bodily integrity.[3] Children in mental institutions are labeled as abnormal and sick, both while hospitalized and after their release.[4] Furthermore, institutionalized mentally ill children are vulnerable to abuse as well as inadequate nutrition, clothing, education, health care, and inadequate discharge planning.[5] Commitment[6] to a mental hospital entails an indefinite term of confinement;

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1. Parham v. J.R., 442 U.S. 584, 626 (1979) (Brennan, J., concurring in part, dissenting in part). Justice Brennan explained why institutionalizing children is a "massive curtailment of liberty." The *Parham* Court faced the issue of what process is constitutionally due to a minor child whose parents or guardian seek state institutional care. The Court held that confinement inevitably affects "fundamental rights." *Id. See also* Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193-94 (1974) (stating that commitment is a restriction on liberty).

2. Typical treatments in psychiatric institutions may include the forced administration of psychotropic drugs, aversive conditioning, convulsive therapy, and possibly psychosurgery. For examples of these treatments, see the cases cited in *Parham*, 442 U.S. at 626 nn.1-4 (Brennan, J., concurring in part, dissenting in part).

3. *Id.*

4. *Id.* at 626-27 (citing Note, *supra*, note 1, at 1200). *See* Note, *supra* note 1, at 1200-01 (stating that the stigma of mental illness can be as socially debilitating as a criminal conviction). *See also* PSYCHIATRIC PATIENT RIGHTS AND PATIENT ADVOCACY 59-79 (B. Bloom & S. Asher ed. 1982) (Vol. VII, Community Psychology Series) [hereinafter PSYCHIATRIC PATIENT RIGHTS] (regarding the stigma of patienthood).

5. National Mental Health Association, Protection and Advocacy for Mentally Ill Individuals Act (PL 99-319) Summary 2 (1986) [hereinafter P&A Summary]. *See also* Rosenberg & Yohalem, *Litigation on Behalf of Mentally Disabled Children: Targets of Opportunity* (pt. 1), 10 MENTAL & PHYSICAL DISABILITY L. REP. 70 (1986) [hereinafter Rosenberg (pt. 1)] (patients continue to be subjected to physical harm, neglect, segregation, idleness, and regression).

6. Note, *supra* note 1, at 1201 (stating that the state has power to hospitalize a person). *See also* Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974) (to be civilly com-

therefore, the confinement may be both a more serious abridgment of an individual's personal freedom and more stigmatizing than imprisonment.[7] Thus, while children are confined to mental institutions, their liberty interests are "massively curtailed."[8] Since these liberty interests are constitutionally protected, an institutionalized child is entitled to the due process safeguards provided by the fourteenth amendment.[9]

A multitude of cases, legislation, and publications have promoted the rights of mentally ill individuals.[10] Federal and state statutes,[11] common law decisions, as well as consumer organizations,[12] have influenced the *quality* of care and remedies available for children confined in state-operated institutions.[13] However, these developments have only touched the sur-

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mitted, the individual must be considered a danger to others, danger to self, or in need of treatment, care, supervision, or custody); Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 840-52 (1974) (explaining the differences between involuntary and voluntary commitment requirements).

7. *Donaldson*, 493 F.2d at 520 (confinement is indefinite, thus so is the destruction of one's liberty). *See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (stating that stigma is a deprivation of liberty in the constitutional sense). *See also infra* notes 81-83 and accompanying text.

8. Baxstrom v. Herold, 383 U.S. 107, 113 (1966) (confinement to a mental institution involves a massive curtailment of liberty affecting a fundamental right); *In re* Gault, 387 U.S. 1, 27 (1967) (explaining why institutionalization restrains one's liberty). *See also* Note, *supra* note 1, at 1201 (commitment involves state power that may deprive an individual of his liberty).

9. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1. *See* Vitek v. Jones, 45 U.S. 480 (1980); Humphrey v. Cady, 405 U.S. 504, 509 (1972) (stating that hospitalization is a curtailment of freedom and thus a liberty interest is affected; therefore, due process is required). *See also* Parham v. J.R., 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment."); Romeo v. Youngberg, 644 F.2d 147, 157 (3d Cir. 1980) (stating that involuntary commitment is a massive curtailment of liberty and is circumscribed by due process protections).

10. PSYCHIATRIC PATIENT RIGHTS, *supra* note 4, at 15 (stating that the amount of litigation, statutes, and regulations of psychiatric patients' rights has dramatically increased over the past fifteen years). *See also id.* at 37-47 (a discussion of mentally ill adult patients' rights); Morris, *Institutionalizing the Rights of Mental Patients: Committing the Legislature*, 62 CALIF. L. REV. 957 (1974) (overview of mental patients' rights).

11. *See, e.g.*, notes 17, 143 & 185 and accompanying text.

12. For example, National Mental Health Association (NMHA) and the National Alliance for the Mentally Ill.

13. Rosenberg (pt. 1), *supra* note 5, at 70. See *infra* notes 17, 20-23 & 185 for various acts. *See also* Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980) (the court gave children in institutions the right to adequate treatment and protection based on the fourteenth amendment); Stroul, Child and Adolescent Service System Program (CASSP), System Change Strategies; A Workbook for States 1 (1985) (CASSP is an organization under the National Institute of Mental Health [hereinafter NIMH] that addresses the needs of seriously emotionally disturbed [hereinafter SED] children).

face of the many problems associated with committing children to mental institutions. Even with these added safeguards, the due process rights of institutionalized children remain inadequately protected because they have no one to effectively represent their interests.[14]

The current mental health system has left mentally ill children legally isolated and the "most underrepresented of individuals."[15] Institutionalized children are extremely susceptible to hardship, neglect, and violation of their rights;[16] yet they have little or no redress under current statutes or common law.[17] The best way to ensure that institutionalized children's in-

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14. Rosenberg (pt. 1), *supra* note 5. *See* Parham v. J.R., 442 U.S. 584 (1979) (the Supreme Court has not required states to provide similar due process safeguards to institutionalized children even in commitment proceedings).

15. Rosenberg (pt. 1), *supra* note 5, at 70.

16. National Mental Health Association Position Paper, Mental Health Care for Children and Youth 1 (1987) [hereinafter Position Paper] (stating that over 70% of mentally ill children do not receive the necessary and appropriate services to effectively treat their illnesses); Isaacs, Technical Assistance Package for the Child and Adolescent Services System Program 7 (1984) (stating that youth, especially SED children, are a grossly underserved population and that few children with serious mental health problems receive adequate, comprehensive care for these problems). Most mentally ill children receive services in an uncoordinated or inappropriate manner, if at all. *Id.* at 9. *See also supra* note 5 and *infra* notes 171 & 198 and accompanying text.

17. The existence of a private right of action and the scope of the remedy are extremely limited. Rosenberg (pt. 1), *supra* note 5, at 70. "The Supreme Court has placed formidable procedural and substantive obstacles before litigants restricting their access to the courts and the scope of relief that may be granted," thereby making statutes difficult to enforce and limiting the scope of relief. *Id.* Rosenberg states that if there is a private remedy, the action must be against an institution that takes funds under The Developmental Disabities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-81 (1982 & Supp. II 1984) (DDA Act). *Id.* at 71.

The DDA Act has led to protective councils in each state, which are mandated to develop comprehensive statewide plans for handicapped persons. *Id.* Also, the article states that there is a strong suggestion that only programs receiving DDA Act funds can be sued; therefore, remedies under this Act are severely limited because few institutions receive funding. *Id.* In order for the Bill of Rights to apply to children, a parent or guardian must pursue the rights and, as this note discusses, this step is rarely taken. *See infra* text accompanying notes 113-14, 204, 215. Further, these DDA Act rights are expressed as a "Sense of Congress," which means they are not binding on the states. *P&A Summary*, *supra* note 5, at 6.

The Medicaid Act, 42 U.S.C. § 1396d (c), (d) (1982 & Supp. IV 1986), may also be applied to the mentally ill in some circumstances. Rosenberg (pt. 1), *supra* note 5, at 71. Although private actions are not explicitly authorized by statute, there may be some judicial support allowing a mentally ill individual to bring a suit. *See* Smith v. Heckler, 747 F.2d 583 (10th Cir. 1984) (class action by Medicaid recipients against the Department of Health and Human Services for not informing residents of their Medicaid entitlements). Strict enforcement of the Medicaid Act could improve the quality of care in institutions. Currently, these Medicaid regulations are ineffective in the protection of institutionalized children, because they do not apply to psychiatric institutions. Rosenberg (pt. 1), *supra* note 5, at 71.

Quality assurance in psychiatric institutions is the responsibility of the Joint Commission on the Accreditation of Hospitals (JCAH). *Id.* However, the JCAH has done an inadequate

terests are protected and to satisfy the due process clause of the fourteenth amendment is by recognizing an institutionalized child's right to counsel.[18]

Advocacy for institutionalized mentally ill children, unfortunately, is virtually nonexistent despite many years of institutional reform.[19] However, other past underrepresented classes, such as the poor, handicapped, elderly, and neglected children, are offered advocacy services through Medicaid,[20] the Education for All Handicapped Children Act (Handicapped Children Act),[21] the Rehabilitation Act,[22] the Long Term Ombudsmen program for the elderly,[23] representation for abused and neglected children,[24] and the Legal Services Corporation (civil assistance to the poor).[25] Unfortunately none of these programs are specifically geared toward advocating the rights and needs of institutionalized children,[26] which is striking given the United States' commitment to the needs of children.[27] Thus, children's rights are often overlooked due to of the absence of advocacy programs for institution-

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job. "Its reviews and enforcement of correction plans are extremely lax," and there is a conflict of interest in cutting off any funds when violations are found. *Id.*

Also, few tort actions are brought due to lack of counsel, because families often cannot afford to hire an attorney. *Id.* at 71-72. However, a damage action can be successful and may provide an impetus to systematic change. *Id. See also infra* notes 202-04 and accompanying text.

18. When an individual is deprived of liberty, the state must provide adequate due process. U.S. CONST. amend. XIV, § 1. For the statute's full text, see *supra* note 9.

19. J. PAUL, G. NEUFELD & J. PELOSI, CHILD ADVOCACY WITHIN THE SYSTEM 95 (1977) [hereinafter CHILD ADVOCACY]. "It is remarkable that such a necessary and effective monitoring device has never been included in the desire to bring decency to the lives of those institutionalized." *Id.*

20. 42 U.S.C. § 1396d (c), (d) (1982 & Supp. IV 1986). *See supra* note 17.

21. 20 U.S.C. §§ 1400-61 (1982 & Supp. IV 1986).

22. 29 U.S.C. § 754 (1982). The Rehabilitation Act has played an important role in litigation involving young children and young adults. Rosenberg (pt. 2), *infra* note 223, at 146. Strict enforcement of this Act could improve the quality of care in institutions and be a valuable vehicle to protect individual rights, by allowing a private right of action, if discrimination of the handicapped can be shown (the care received is below community standards). Rosenberg (pt. 1), *supra* note 5, at 71.

23. Older Americans Act, 42 U.S.C. §§ 3021-30d (Supp. IV 1986); Scallet, Protection & Advocacy Systems For People Receiving Mental Health Services 3, 10-11 (1986) (available from the NIMH, Rockville, Maryland) (explaining that Title III of the Older Americans Act establishes an ombudsman program to investigate and work on residents' complaints and to monitor their care).

24. For a summary of state statutes requiring legal representation for maltreated children, see Butz, *Lawyering for the Abused Child: "You Can't Go Home Again,"* 29 UCLA L. REV. 1216, 1245-48. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.630 (West Supp. 1988); VA. CODE ANN. § 16.1-266 (1988).

25. Scallet, *supra* note 23, at 10-11. These programs have also overlooked protection for mentally ill children in psychiatric hospitals. Telephone interview with Natalie Reatig, coordinator of the Protection and Advocacy Program at the NIMH (Mar. 3, 1988).

26. *See supra* note 17.

27. CHILD ADVOCACY, *supra* note 19, at 95.

alized children. The absence of such programs can largely be attributed to the states' financial concern[28] and the states' hesitancy to usurp parental rights.[29]

The unconstitutionality of inadequate representation and violation of due process rights during the child's confinement to a mental institution must be addressed. The solution is to provide an efficient and effective method for implementing the child's right to counsel that takes into consideration parental rights and financial priorities. This note proposes that advocacy programs for institutionalized children should be implemented through the most recent institutional reform act, the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (P&A Act).[30] However, to more effectively provide services to children, the P&A Act should have an amendment explicitly including children, with proposed guidelines for the state protection and advocacy (P&A) program geared toward institutionalized children. For example, under the proposed guidelines, advocates of a child's rights would be able to: work with the hospital staff and the parents to ensure institutionalized children receive quality treatment and care, bring actions against doctors and hospitals, and represent children before review boards, all without usurping parental rights. Thus, through the proposed P&A program, the advocate would provide the protection required to satisfy due process requirements.

This note begins by discussing the implications of the due process clause of the fourteenth amendment as applied to institutionalized children. Next, this note seeks to establish an institutionalized child's right to counsel by analyzing the various interests involved throughout the child's hospitalization. Then, the private interests of the parents and the children, the government's interests, and the risks associated with the present system are weighed against the presumption that denies children the right to counsel. Third, this note suggests that an institutionalized child's right to counsel can best be implemented through advocacy programs offered under the P&A Act, to which this note proposes an amendment that explicitly includes children and contains guidelines for its application. This note also presents an example of how the P&A program could be implemented to ensure proper education for institutionalized children. Finally, this note examines the problems associated with the expansion of the P&A Act and solutions that will mitigate these potential problems.

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28. *See infra* note 106, 206, 222 and accompanying text.

29. *See infra* notes 96-101, 105, 208-09 and accompanying text.

30. 42 U.S.C. §§ 10801-51 (Supp. IV 1986). This Act has recently been changed as amended in Pub. L. No. 100-509, Oct. 20, 1988; however, these changes do not effect the discussion in this note.

II. Procedural Due Process as Required under the Fourteenth Amendment

Procedural due process is a constitutional guarantee of fair procedure when "state action"[31] deprives an individual of life, liberty, or property.[32] Therefore, confinement to a mental institution through involuntary commitment by a court, or voluntary commitment to a public hospital by a parent over a child's objection, requires procedural due process.[33] Procedural due process protects the child's liberty interests and substantive rights. These rights include the right to reasonably safe conditions of confinement and the right to freedom from unnecessary bodily restraint.[34]

The courts determine what process is due to protect an individual's liberty interest by considering the three factors set out in *Mathews v. Eldridge*:[35] 1) the private interest that will be affected by the official action, 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards, and 3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. From the patients' perspective, a court must assess two of these factors: the importance of the liberty interest at stake and the extent to which the suggested procedure may reduce erroneous decision-making.[36] These factors must then be weighed against the remaining factor: the government's interest in avoiding the increased administrative and fiscal burdens imposed by the additional procedural requirements.[37]

The Supreme Court has imposed a presumption against the right to counsel when the increased procedure consists of the right to counsel. This presumption against the right to counsel can only be overcome by meeting the requirements of the *Mathews* balancing test, unless the individual will be deprived of his physical liberty by the present procedures, in which case the right to counsel should be freely recognized by the courts.[38] The three

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31. J. Nowak, R. Rotunda & J. Young, Constitutional Law 498 (2d ed. 1983) [hereinafter Constitutional Law] (stating that state action exists if the court finds the alleged conduct to have sufficient connections to the government).

32. *Id.* at 534.

33. *Id.* at 535 (however, the courts have not clearly defined the procedures required).

34. *See id.* at 536.

35. 424 U.S. 319, 321 (1976). These factors were applied to the confinement of children to mental hospitals. Parham v. J.R., 442 U.S. 584, 599-608 (1979).

36. Constitutional Law, *supra* note 31, at 560.

37. *Id.*

38. Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The Supreme Court considered whether indigent parents have a due process right to counsel in parental termination hearings and held that counsel is not required for every status termination proceeding. *Id.* at 24-32. The Court reviewed prior right to appointed counsel cases and determined that a presumption against the right to counsel existed. *Id.* at 25-27.

elements of the balancing test are then weighed and balanced against the presumption denying the right to appointed counsel.[39] If a right to counsel is granted, the courts look to whether appointed counsel will add to the fairness of the proceedings and advance a government interest.[40] Thus, judges make case-by-case determinations[41] as to whether the failure to appoint counsel for an institutionalized child would be so fundamentally unfair as to violate due process.[42]

Courts have already extended a right to counsel to delinquent juveniles[43] and to adult mental patients[44] in order to protect their liberty interests through adequate procedural due process. However, this same protection is not presently given to institutionalized mentally ill children.[45] In order to promote fairness through the application of procedural due process, courts should also extend a right to counsel to institutionalized mentally ill children.

III. ARGUMENTS FOR AN INSTITUTIONALIZED CHILD'S RIGHT TO COUNSEL: SATISFYING DUE PROCESS REQUIREMENTS

The institutionalized child should be afforded the same constitutional rights that every citizen in the United States is granted. American citizens have a number of personal rights that are inherent in our judicial system. First, citizens have the right to be protected from the choices or actions of another. This includes both the right not to be physically restrained in an institution without due process of law and the right not to have one's property taken without just compensation.[46] This right does not require a certain level of competence or intelligence; thus, the denial of these rights to children cannot be justified.[47] In fact, rights that are intended to protect individuals from unfair action should be strengthened when the individual is

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39. *Id.*

40. *Id.*

41. *Lassiter* cites with approval Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973), which states that each case is decided individually to determine whether probationer or parolee should be represented by counsel to satisfy due process. *Lassiter*, 452 U.S. at 26.

42. *Id.*

43. *In re* Gault, 387 U.S. 1 (1967). For a further discussion of *In re Gault*, see *infra* notes 53-60 and accompanying text.

44. Coe v. Hughes, No. K-83-4248 (D. Md. filed Dec. 12, 1983) (order granting consent decree). For a further discussion of *Coe*, see *infra* notes 84-94 and accompanying text.

45. *See* Ellis, *supra* note 6; Kleinfeld, *infra* note 62.

46. U.S. CONST. amend. XIV (As to property, the fifth amendment is applied to the states through the fourteenth amendment.). For the pertinent text of this amendment, see *supra* note 9.

47. Kleinfeld, *infra* note 62, at 322 (arguing that even animals are given rights, "no matter how unintelligent or imprudent" they may be).

young and less competent.[48] Second, individuals have a right to counsel in civil cases, if required to satisfy the due process clause of the fourteenth amendment,[49] and in criminal proceedings to satisfy the sixth amendment.[50]

For over twenty-five years, courts have extended personal rights through the due process protection of minors in juvenile delinquency proceedings[51] and the due process protection of prospective mental patients in initial commitment proceedings.[52] Even though the representation of children has historically not been a common function of attorneys in the United States' legal system,[53] the Supreme Court in *In Re Gault*[54] extended a right to counsel to all juveniles in delinquency proceedings.[55] The Court stated that neither the fourteenth amendment nor the Bill of Rights[56] is limited to adults only, and, therefore, juvenile delinquency hearings must meet the essentials of due process and fair treatment.[57] The Court did not discern any material difference between an adult's right to, and need for, counsel

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48. *Id.*

49. U.S. CONST. amend. XIV. For the pertinent text of the amendment, see *supra* note 9. *See also* Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (civil case determining if a right to counsel is required).

50. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."). The Court in Gideon v. Wainwright, 372 U.S. 335 (1963), held that lawyers for indigent criminals are not a luxury but a necessity, because of the inability of defendants to competently defend themselves. *Id.* Therefore, a criminal defendant has a fundamental right to counsel, and the denial of this right violates due process. *Id.* The right to counsel is given to delinquent youth under Kent v. United States, 383 U.S. 541 (1966). In *Kent*, the Court held that delinquency proceedings require procedures that satisfy due process. *Id.* at 561-62. However, the delinquency hearing does not have to conform with all the requirements of a criminal trial or an administrative hearing. *Id.* For a general history of the juvenile court system and its policies, see *In re* Gault, 387 U.S. 1, 14-19 (1967).

51. *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 89 & n.1 (1979) (see cases cited); *Kent*, 383 U.S. at 561-62; Schall v. Martin, 467 U.S. 253, 263 (1984) (certain constitutional protections enjoyed by adults are also applicable to juveniles).

52. *The Supreme Court, 1978 Term, supra* note 51, at 89 n.2 (see cases cited).

53. *In re Gault*, 387 U.S. at 14. "In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles." *Id.* For the rationale behind the differences between adult and juvenile rights, see *id.* at 17.

54. *Id.*

55. *Id.* at 26, 41. However, the Court was concerned that counsel would lead to an adversarial climate in juvenile proceedings and hinder the therapeutic environment. *Id.* at 15-16.

56. U.S. CONST. amend. I-X.

57. *In re* Gault, 387 U.S. 1, 30-31 (1967) (however, the hearing need not measure up to the requirements of a criminal trial or administrative hearing). *But see id.* at 61 (Justice Black concurred and dissented in part stating that the right to counsel is unequivocally granted by provisions of the fifth and sixth amendments, which are applicable to states under the fourteenth amendment.). "[I]t would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that . . . children be denied the same constitutional safeguards" as adults are afforded. *Id.*

and a juvenile's right to and need for counsel.[58] Thus, the Court stated that it would not be sufficient for either a court or a probation officer to represent a child's interest when a parent fails to represent the child.[59] The Court further held that in order to meet the requirements of procedural due process in a delinquency proceeding, a court must notify the parents that the child has a right to counsel and appoint counsel when the parents are unable to afford representation.[60]

The due process requirements set forth in *Gault* should apply to institutionalized children, not only during the initial commitment proceedings but also throughout their confinement. Institutionalized children, like the juveniles in *Gault*, are subject to continuous state action that deprives them of their liberty.[61] However, few children in psychiatric institutions have access to effective counsel who can advocate and protect their rights, interests, and needs.[62] This absence of effective counsel is partly attributed to a child's inability to hire an attorney. Further, even if the parents are able and willing to hire an attorney, children have few rights for the attorney to enforce.[63] Some of these "rights" may include the right to: sufficiently qualified mental health professionals, teachers, and staff, who have specialized skills in the care and treatment of children and young adults; recreation and play opportunities conducted outside and with proper facilities; arrangements for contact between the hospital and the child's family; adequate psychological treatment; and opportunities for publicly supported ed-

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58. *Id.* at 36. "A child charged with delinquency requires a guiding hand of counsel at every step of the proceedings." *Id.* (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)).

59. *Id.*

60. *Id.* at 38-41. *See also* N.Y. JUD. LAW § 241 (McKinney 1983). This section of the Family Court Act states that minors have a right to the assistance of counsel of their own choosing or a legal guardian in a neglect proceeding under article III of the Act. The Act is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. *In re Gault*, 387 U.S. at 40. (footnotes omitted). *See id.* at 38 n.63 for more Acts regarding counsel for children. Also, in Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), the court stated that it was the duty of the court to safeguard the constitutional rights of those confined. *Id.* at 157 (advocacy services, however, would not depend on parents asking for counsel).

61. Parham v. J.R., 442 U.S. 584, 599-600 (1979). For a discussion of state action, see CONSTITUTIONAL LAW, *supra* note 31, at 536 & n.17.

62. Kleinfeld, *The Balance of Power Among Infants, Their Parents, and the State*, 4 FAM. L.Q. 320, 340-41 (1970) (stating that children have not been given adequate representation). A major reason for poor representation of child patients in commitment proceedings is the heavy caseload of public defenders and appointed counsel in many jurisdictions. Other than civil commitment hearings, representation is nearly "obsolete." Ellis, *supra* note 6, at 882. The reason behind the lack of representation probably is more closely related to finances than legal doctrine. Since children lack funds, they are not able to hire counsel, and without representation, children, being minors, do not have standing. *Id.* at 886.

63. *Id.*

ucation that is tailored to the child's mental condition.[64] Although states have enacted statutes promoting children's rights,[65] the enforcement of these rights depends on a child's right to counsel.[66]

To establish a child's right to counsel, courts must engage in a balancing test. First, the Court must balance and analyze the factors set out in *Mathews v. Eldridge* and then weigh them against the presumption that denies a child's right to counsel.[67] An exception to this presumption against the right to counsel exists if the child's liberty interest is continually threatened.[68] However, even disregarding the fact that the child's confinement may satisfy the exception, the presumption can be outweighed by the three factors established by the Supreme Court in *Mathews*.[69] As previously indicated, the three factors the courts must analyze are the private interests involved, the government's interests, and the risks associated with the present system compared to the value of the proposed procedures.[70] An analysis of these factors will determine if the institutionalized mentally ill child receives the due process guarantees established in the Constitution. If the court determines that the state is not providing the institutionalized child with adequate due process as required by the fourteenth amendment, the presumption against the right to counsel will be outweighed.[71] Assuming the presumption against the right to counsel exists, that is, the child's

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64. These rights were included in Alabama's special provisions for children in reaction to Wyatt v. Stickney, 344 F. Supp. 373, 385 (M.D. Ala. 1972), *aff'd sub nom.*, Wyatt v. Aderhold, 503 F.2d 1305 (5th Cir. 1974) (a class action brought for proper treatment standards). The *Wyatt* court recognized the deprivation of a patient's constitutional right to "a realistic opportunity to be cured and to improve his or her mental condition." *Wyatt*, 344 F. Supp. at 374. The court appointed human rights committees to oversee the implementation of the court ordered minimum constitutional standards. *Id.* at 376. The committees are to oversee and assist patients who believe their rights have been infringed upon. *Id. Wyatt* was an examination of the plight of patients and serves as a vehicle for reform.

65. *See, e.g.*, N.M. STAT. ANN. § 43-1-18 (1978). "A minor . . . in a residential facility . . . shall be provided such education . . . as necessary . . . . In no event shall a minor be allowed to remain in a residential facility for more than thirty days without receiving educational services." *Id.*

66. Ellis, *supra* note 6, at 886. For a historic summary and recent developments, see PSYCHIATRIC PATIENT RIGHTS, *supra* note 4, at 32.

67. Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (see *supra* note 38 for further discussion of the presumption). For an example of a right to counsel, see Vitek v. Jones, 445 U.S. 480 (1980) (indigent prisoner is entitled to appointed counsel before being transferred to a mental hospital).

68. For arguments that a child's physical liberty is threatened, see *supra* notes 1-9 and accompanying text.

69. Mathews v. Eldridge, 424 U.S. 319 (1976). *See also Lassiter*, 452 U.S. at 25-27 (the presumption against counsel can be overcome by a strong private interest, weak state interests, and a peaked risk of error). For a discussion of these elements, see text accompanying notes 73-137.

70. *Mathews*, 424 U.S. at 335; *Lassiter*, 452 U.S. at 27.

71. *Lassiter*, 452 U.S. at 27.

physical liberty is not threatened by the current procedures, the *Mathews* factors involved in an institutionalized child's right to counsel case must be explored in order to establish an institutionalized child's right to counsel.

A. An Analysis of the Private Interests Involved

The first factor in determining what process is due to institutionalized children is to decide what private interests are at stake in the current mental health system. The child has several private interests at risk while he or she remains in a mental institution. First, the child has a substantial liberty interest in not being confined unnecessarily for medical treatment.[72] The child should have "the freedom to go in and out of the door, to run and play, . . . to go to school, . . . to go to Sunday school and church, . . . to watch and listen or not watch and listen to television."[73] Second, a child has an interest in not suffering from the adverse social consequences related to institutionalization, such as stigmatization.[74]

In *Parham v. J.R.*, the Supreme Court focused on stigmatization as the private interest at stake, but the Court argued that the problems relating to the social stigmatization of the institutionalized child were minimal compared to the proper diagnosis and treatment that institutionalization can provide.[75] The Court felt that the adverse social reactions to institutionalizing a child should not be equated with the state labeling the child as a delinquent or as mentally ill, because the state's child commitment procedures are generally voluntary.[76] Furthermore, the Court stated that even an untreated mentally ill child is subjected to at least as much negative stigma and ostracism as a child receiving treatment in a psychiatric hospital.[77] Since the Court focused on the issue of stigmatization as a private interest at stake, the Court failed to adequately consider the many other interests of an institutionalized child. Specifically, the Court did not address the issue of whether these interests continue after the initial commitment, regardless of the voluntary commitment and diagnosis.

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72. Parham v. J.R., 442 U.S. 584, 600 (1979).

73. J.L. v. Parham, 412 F. Supp. 112, 136 (M.D. Ga. 1976) (lower court opinion).

74. *Parham*, 442 U.S. at 600. The *Parham* Court recognized that civil commitment produces adverse effects because of the reaction of society to the discovery that the child received psychiatric care. *But cf.* Addington v. Texas, 441 U.S. 418, 425-26 (1979) (stating that the societal reaction would be more severe for a child who is not institutionalized and continues living in the outside world); W. Schmidt, Jr., *Considerations of Social Science in a Reconsideration of Parham v. J.R. and the Commitment of Children to Public Mental Institutions*, J. OF PSYCHIATRY & L. 339, 341-45 (Fall/Winter 1985) (discussing the inadequate foundation and sources relied on by the *Parham* court).

75. *Parham*, 442 U.S. at 600-01.

76. *Id.* at 600-01.

77. *Id.* at 601.

Even when a person is incarcerated or confined following fair administrative or judicial procedures, his liberty interests are not completely terminated.[78] Juveniles, whether mentally ill or not, have an interest in freedom from institutional restraint. This liberty interest of the juvenile, like an adult, is substantial even if the incarceration of the juvenile is only brief.[79] As previously noted in the *Gault* decision, the Supreme Court has recognized that counsel is needed for minors facing criminal detention in juvenile proceedings. Likewise, the Court should recognize that mentally ill juveniles who face an indefinite term of detention also need counsel.[80]

Juvenile mental patients may have an even greater need for an attorney's assistance than juvenile delinquents. First, mental patients are generally subject to "even more far-reaching interference" with their rights than those convicted of crimes,[81] due to the negative effects associated with stigmatization, medication, and poor hospital review procedures.[82] More importantly, mental patients are generally less likely than criminals to fully understand the nature and consequences of the proceedings affecting their rights or to represent their own interests while institutionalized.[83] Therefore, the institutionalized child also needs counsel, not only because he has the same private liberty interests at stake as a juvenile delinquent, but also because of the mentally ill child's diminished capacity to understand his rights.

Institutionalized children should have at least the minimum level of advocacy services that are offered to adult mental patients. Adult mental patients' rights were recognized by the Maryland District Court in *Coe v.*

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78. CONSTITUTIONAL LAW, *supra* note 31, at 536-39. Even those individuals who are on probation or parole retain their liberty interests. *Id.* at 536. *See also* sources cited *supra* note 1 (regarding liberty interests).

79. Schall v. Martin, 467 U.S. 253, 265 (1984). However, the Court qualifies this by stating that juveniles are always in some form of custody. *Id.*

80. The *In re Gault* Court stated that counsel is needed for juveniles to cope with problems of law, to make a skilled inquiry into the facts, to insist upon regularity of proceedings, to ascertain defenses, and to prepare and submit the case. *In re* Gault, 387 U.S. 1, 36 (1967) (all of these needs, along with a myriad of others, such as monitoring treatment and educational rights, also are essential for the mentally ill child). Parham v. J.R., 442 U.S. 584, 631 (1979) (Brennan, J., concurring in part, dissenting in part) ("A child who has been ousted from his family has even a greater need for an independent advocate."). *See also The Supreme Court, 1978 Term*, *supra* note 51, at 89, 94.

81. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY 91 (1971). Criminals are guaranteed counsel before they are tried and convicted; however, the mentally ill are not afforded the same protection, even though both are subject to a curtailment of their liberty interests.

82. *See supra* notes 1-7 and accompanying text.

83. Ellis, *supra* note 6, at 882 (quoting Professor Kittrie). *See also* Note, *supra* note 1, at 1284 (stating that the mentally ill have less ability to protect their own interests because of "ignorance, feeble mindedness, [or] illiteracy. . . .).

Hughes.[84] The decision explained the proposition that institutionalized mental patients have private interests at stake that require legal assistance. In *Coe*, the plaintiffs sought to establish a constitutional right of access to the courts for the patients of Maryland's psychiatric hospitals.[85] The case was brought in response to a United States Supreme Court case that placed affirmative obligations on states to assure prison inmates adequate, effective, and meaningful access to their courts.[86] The *Coe* plaintiffs demanded comparable legal resources for mental patients because of the patients' inability to use the various self-help techniques, which the Supreme Court had offered to prison inmates.[87]

The court in *Coe* entered a consent decree after the defendants voluntarily decided they would implement a legal assistance program and a resident grievance system in inpatient mental facilities.[88] This program, known as the Legal Assistance Program,[89] does not assist patients during civil commitment proceedings, since the public defender already provides for such services.[90] Instead, the Legal Assistance Program represents *adult* mental patients throughout detainment in regard to their civil rights, entitlements to government benefits, and other basic legal problems that interfere with effective treatment.[91] All of the services that the court found important for adults would also benefit institutionalized mentally ill children.[92] Thus, a program similar to the Legal Assistance Program should be offered to institutionalized children.

Institutionalized children have more compelling reasons for a right to counsel than do adult mental patients. Mentally ill children are often confined for longer periods than adults.[93] Furthermore, childhood is a particularly vulnerable time of life, and children erroneously institutionalized during their "formative years may bear the scars for the rest of their lives."[94]

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84. No. K-83-4248 (D. Md. filed Dec. 12, 1983).

85. *Id.*

86. *See* Bounds v. Smith, 430 U.S. 817 (1977) (decision required prison authorities to assist inmates in preparing and filing legal papers by providing law libraries or persons trained in the law).

87. *Id.*

88. *Coe*, No. K-83-4248, at 8 (order granting consent decree) ($500,000 a year granted to offer full range of services to 2,800 inpatients).

89. *Id.* at 2, 5.

90. Rosenberg (pt. 1), *supra* note 5, at 72 & n.13.

91. *Coe*, No. K-83-4248, at 2 (rights advisors and independent attorneys will help enforce claims to benefits, entitlements, and basic civil legal problems). *See also* Rosenberg (pt. 1), *supra* note 5, at 72 (ensuring adequate institutional conditions and rights).

92. *Coe*, No. K-83-4248, at 4 (the definition of "resident" does not specifically include institutionalized children, but children should fit within the definition).

93. Parham v. J.R., 442 U.S. 584, 628 (1979) (Brennan, J., concurring in part and dissenting in part).

94. *Id. See also supra* note 74, *infra* note 134 and accompanying text; Eddings v.

Despite these problems, the courts have not granted institutionalized children equivalent court access, largely due to the fear of usurping parental authority and financial concerns.[95]

In *Parham v. J.R.*, the Supreme Court stated that the evaluation of the child's interest is "inextricably linked with the parents' interest in and obligation for the welfare and health of the child."[96] Therefore, the child's private interest must be combined with the parents' concerns and rights.[97] In considering the parents' interests, the Court adopted the historical approach of giving broad parental authority over children.[98] The Court left "life's difficult decisions" to the parents because it is recognized that parents generally act in the child's best interest.[99] Thus, the Court felt that government involvement in the parents' decision is repugnant to American tradition and should only be used in extreme cases of abuse and neglect.[100] The Court concluded that a presumption exists that a parent acts in the child's best interest.[101]

However, when the courts give total discretion to the parents with a presumption of good faith, the courts ignore the problem that if the child does not have an alternate form of representation, rarely will the *parents'* neglect of the child's best interest be recognized. Even though parents should act in the child's best interest, this is not always the case.[102] In fact, the Supreme Court and other observers have recently questioned the *presumed* benevolence of the family.[103] Unfortunately, parents and hospitals may have a conflict of interest with the child, or the parents may be unaware of the existing safeguards for children in institutions; therefore, the

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Oklahoma, 455 U.S. 104, 115 (1982) (minority "is a time and condition of life when a person may be more susceptible to influence and psychological damage").

95. See *infra* notes 205-32 and accompanying text regarding interference in the parent-child relationship and financial concerns.

96. *Parham*, 442 U.S. at 600.

97. *Id.*

98. *Id.* at 602.

99. *Id.* (citing to 1 W. BLACKSTONE, COMMENTARIES *447; 2 J. KENT, COMMENTARIES ON AMERICAN LAW *190 (stating that "natural bonds of affection lead parents to act in the best interests of their children")).

100. *Id.* at 602-03 (see cases cited as to when courts intervene).

101. *Id.* at 604. *But cf. id.* at 626 (Brennan's concurrence and dissent states that this presumption is inaccurate.).

102. *The Supreme Court, 1978 Term, supra* note 51, at 92 & n.28. *See id.* at 93-94 (explaining why the parent-child relationship regarding institutionalization is distinguishable from the ordinary parental role). Also, the *Parham* Court's confidence in the medical diagnosis, treatment, and psychiatric decisions is questioned in the article. *Id.*

103. *Id.* at n.28 (citing Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976)); O'Connor v. Liberty, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring); T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963); Albers, Pasewark & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception*, 6 CAP. U.L. REV. 11 (1976); Ellis, *supra* note 6, at 849, 851-52.

parents are unable to adequately promote the child's best interests.[104]

B. The Government Interests Involved

The second factor that must be considered in determining what process is due to institutionalized children is the government's interest in the present mental health system and the additional burdens that providing counsel (an advocate) would create. First, the government has an interest in protecting the parents' decision-making rights in the areas of childrearing.[105] Second, the government has an interest in medical decisions regarding children to ensure that the hospital is providing adequate care and is limiting confinement to those children in genuine need of this type of treatment, so as to not waste funds nor a psychiatrist's time in unnecessary treatment and testifying in adversary hearings.[106] Third, the state has a significant interest in not imposing unnecessary procedural obstacles that may discourage the child or his family from seeking any needed psychiatric assistance.[107]

In *Parham v. J.R.*, the Court felt that many parents would forego care for their child if they had to participate in adversary proceedings that questioned their motives and looked into private family matters.[108] However, the Court's concern was whether parental admission of the child to a psychiatric hospital met procedural due process standards. Additionally, the Court did not analyze the continuing liberty interests and the due process rights of children throughout their confinement in a mental institution. Since the Court did not analyze either the institutionalized child's right to counsel while being detained in a mental institution nor how the proposed P&A services could be utilized in light of due process concerns, the risks of the present system and the value of the proposed amendment and guidelines require discussion and analysis.

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104. *See infra* notes 107, 116-17, & 120 and accompanying text.

105. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 602 (1979) (stating that the child's interests are clearly subordinate to the parents, even when a child's liberty or safety is threatened); Wisconsin v. Yoder, 406 U.S. 205 (1972) (where parent's rights outweighed the state's compulsory education laws); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (courts limit the state in displacing parental authority over children).

106. *Parham*, 442 U.S. at 604-06; Graves v. AFSD, 708 P.2d 1180, 1186 (1985) (stating the government's interest in giving the least costly care and keeping financial and administrative burdens to a minimum).

107. *Parham*, 442 U.S. at 605.

108. *Id.*

C. An Analysis of the Risks of the Present System and the Value of the Substituted Procedures

1. The Risks of the Present System

Without counsel, the existing rights of children are overlooked and new rights are not created,[109] thereby denying children due process and halting the advancement of institutional care.[110] The present mental health system, however, leaves much of a child's advocacy to the parents, a guardian, or the hospital staff.[111] In the cases where courts have left the job of protecting a child's rights to the parents, who must seek private counsel,[112] the courts' reliance on parents may be illusory because employing counsel may be financially impossible for many parents.[113] Even if the parents have the necessary funds to hire counsel, parents rarely seek redress when the hospital fails to give proper care to the child or violates the child's rights. Unfortunately, parents tend to give deference to medical staff[114] and hospital review boards,[115] who may not be adequately protecting the child's interests.

Parents of institutionalized children may be unaware of the advantages and disadvantages of hospitalization or alternative services.[116] Thus, uninformed parents may waive their child's due process rights by mistakenly accepting court orders or consenting to the child's commitment.[117] Under

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109. Kleinfeld, *supra* note 62, at 324.

110. *Id.*

111. Parham v. J.R., 442 U.S. 584, 607-09 (1979) (The Court found that interests would be safeguarded by medical judgment, thereby assuming independent medical evaluation, which may actually be coupled with conflicting interests.). *See infra* note 112.

112. Rosenberg (pt. 1), *supra* note 5, at 72 ("[c]ourts may well decide that parents are able to adequately represent the child's interests and are free to seek counsel in the community" when the interests of the parent and child are consistent). The major claimants for the child are parents, whose prerogatives generally supersede the prerogatives of others. CHILD ADVOCACY, *supra* note 19, at 143.

113. *See* Rosenberg (pt. 1), *supra* note 5, at 71-72.

114. *See Parham*, 442 U.S. at 592-95 (the medical staff is involved in the child's admission and periodic review, but a psychiatrist must make the final admission decision).

115. The patients' constitutionally protected liberty interests are protected by independent review boards, which are professional review prior to and after admission or commitment. *Id. But cf.* sources cited *supra* notes 102-03 (questioning the hospital's protection of children's interests).

116. *See, e.g.*, American Association of Children's Residential Centers, Meeting the Needs of Children with Serious Emotional Disturbances Through Education for Handicapped Children Act (PL 94-142); Statement of Problems, Consensus Paper #1 (available from the NMHA, Alexandria, Virginia) (stating that parents, legal guardians, and surrogate parents usually do not have the knowledge or skills necessary to effectively advocate for a SED child's educational needs).

117. *Id. See also* Parham v. J.R., 442 U.S. 584, 632 (1979) (Brennan, J., concurring in part, dissenting in part) (stating that since the parents are uninformed regarding institutionalization, their conclusion is not "informed or intelligent").

the current system, the child or parent can waive counsel in the initial commitment proceeding.[118] Because a child may be hesitant to ask for counsel if parents and doctors are opposed to intervention, the child's rights should not be waivable at any stage of the commitment proceeding.[119] Moreover, risks are involved with parental waivers when the parent's decisions are in conflict with the child's well-being because the parents may not be seeking the best alternative or treatment for the child or they may be seeking institutionalization as a matter of convenience. Studies suggest that parents are not always able or willing to act in their child's best interest.[120] For example, parents may institutionalize their children as a result of incompatibility with the family, a problem that is unrelated to the child's mental condition.[121]

Even if parents do seek counsel or if counsel is provided, representation is usually only for the purpose of commitment proceedings.[122] Representation for indigents in this instance is provided through the public defender's office.[123] Unfortunately, overworked public defenders often do not have the time or knowledge to ascertain alternatives to commitment; thus, public defenders cannot be effective advocates for the protection of institutionalized children beyond the commitment proceedings.[124] Therefore, the existing safeguards and representation, such as the parents, hospital, and public defender, may be inadequate. Since these ineffective protections raise the risk of erroneous liberty deprivation, the institutionalized child's need for effective counsel becomes even greater.

2. The Value of an Advocacy System for Institutionalized Children

The rights of institutionalized children during confinement will continue to be violated, with a dim prognosis of an immediate beneficial

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118. *See* Ellis, *supra* note 6, at 887.

119. *Id.* (juveniles are less likely to assert a position about his or her welfare).

120. *Parham*, 442 U.S. at 632 (Brennan, J., concurring in part, dissenting in part) (arguing that many studies reveal that parental decisions are often not related to the child's mental condition). The Supreme Court recognized possible conflict of interests and the need for separate counsel. The Court stated that neither a probation officer nor judge was able to represent the child due to a conflict of interest in representing both sides. *In re* Gault, 387 U.S. 1, 36 (1967). *See also* Kleinfeld, *supra* note 62, at 347 (conflict of interest exists when parents seek commitment).

121. *Parham*, 442 U.S. at 632 (Brennan, J., concurring in part, dissenting in part) (citing Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW 133, 138 (1972); VOGEL & BELL, *The Emotionally Disturbed Child as the Family Scapegoat*, in A MODERN INTRODUCTION TO THE FAMILY 412 (N. Bell & E. Vogel ed. 1968)).

122. *See supra* note 112.

123. *See* Parker, *Lake v. Cameron: Involuntary Civil Commitment Storm Warnings*, 4 FAM. L.Q. 81, 85-86 (1970).

124. *Id.*

change, if preferential legislative and judicial attention is not given to vindicating their rights.[125] Advocacy for institutionalized children is extremely important to ensure that their rights are upheld, that their care and treatment are adequate, and that their incidental needs are met.[126] Proper advocacy of the child's welfare will also lead to a smoother transition both in and out of the mental hospital, thus aiding in the hospital's rehabilitative goals rather than compounding the adverse and stigmatizing effects of institutionalization.[127]

In *Parham v. J.R.*,[128] the Supreme Court recognized both the risk inherent in giving parents total discretion over their child and the value of advocacy.[129] The Court held that this risk of error was sufficiently great to justify the use of a "neutral factfinder"[130] to determine whether statutory requirements for commitment were satisfied.[131] The Court also recognized the importance of a child's need to have his commitment reviewed periodically through similar independent procedures.[132] By recognizing the risk of complete parental deference in committing the child and the need for periodic review, the *Parham* case suggests the value of advocacy services on behalf of children. In fact, the *Parham* Court suggested that the denial of protection and advocacy of the children's rights could have violated their

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125. Rosenberg (pt. 1), *supra* note 5, at 70. The National Mental Health Association firmly states that institutionalized children must be protected and advocacy efforts must be promoted. Position Paper, *supra* note 16, at 4.

126. Ellis, *supra* note 6, at 890. Various functions and needs of counsel for children may include:

1. Commitment proceedings (usually the role of the public defender);
2. Helping clients settle personal affairs, which may be affected by hospitalization;
   a. Taking care of car,
   b. Arranging a smooth withdrawal from school,
   c. Protecting right to re-enroll,
3. Financial arrangements;
   a. Providing for installment payments that may be due,
   b. Adjusting property and trust interests,
   c. Determining how hospital costs can be met.

Id.

127. *See generally* CHILD ADVOCACY, *supra* note 19.

128. 442 U.S. 584 (1979).

129. In *Parham*, an action was brought by minor children alleging that they had been deprived of their liberty without procedural due process under a Georgia law, which allowed voluntary admission of minors to mental hospitals by parents or guardians. Even though the courts held that this was not per se unconstitutional, the Court recognized the risk of error inherent in parental decisions to have a child institutionalized for mental health care. *Id.*

130. *Id.* at 606. The "neutral factfinder" usually is a staff physician. *Id.* at 607.

131. *Id.*

132. *Id.* at 586. The Court held that subsequent, independent review of the patient's condition provides a necessary check against possible arbitrariness in the initial admission decision. *Id.* at 607 n.15.

due process rights.[133]

In *Parham*, Justice Brennan recognized that mentally ill children should be entitled to at least the same procedural safeguards as adults in mental institutions, due to the children's vulnerability and impressionability.[134] Representation of children is needed, however, beyond the commitment proceedings and periodic reviews. An advocate would provide continuity and stability for the child throughout their confinement, unlike the current system's sporadic visits of many social service workers[135] and lawyers. The advocate would provide the child with an ongoing relationship—one that does not end abruptly and one upon which a child can rely.[136] In addition, while the hospital staff must be primarily concerned with the child's care inside the institution, an advocate would continue to seek follow-up care once the child is discharged. Further, the parent and child who are frustrated with the mental health system or unaware of the possible services would have available assistance. Thus, institutionalized mentally ill children would be receiving the valuable procedural safeguards that courts already grant to adults.

Full-time advocates are needed within institutions to constantly inspect the machinery of bureaucracy. Institutions must be monitored to see that the institution presents requests and priorities that reflect the true needs of children who are without their parents or who, because of handicap or special needs, cannot speak for themselves.[137] Even for those children who have parents making decisions, independent review by the advocate is needed to ensure that the child is in the least restrictive environment. Unlike an adversary position, an advocate reinforces proper behavior on the part of the

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133. The Court stated that the district court on remand may consider whether hospital procedures for periodic review of patients' needs for care are sufficient. *Id.* at 617. For the balancing factors used to determine if due process was given under the state procedures, see *id.* at 599-600.

134. Parham v. J.R., 442 U.S. 584, 627-28 & n.7-8 (1979) (Brennan, J., concurring in part, dissenting in part). *See also*, CHILD ADVOCACY, *supra* note 19, at 7-8, which states that:

> [C]hild advocacy sees the child as an individual with a certain potential which is markedly influenced over time by the quality of the child's interaction with his own environment. . . . The child is vulnerable and needs help in growing up. He is not helped by being punished or demeaned for practicing the bad habits he has learned from his environment.

Id.

135. *See* Butz, *supra* note 24, at 1216, 1244 (referring to the representation of abused children).

136. *Id.*

137. CHILD ADVOCACY, *supra* note 19, at 95. For specific roles and steps in implementing advocacy programs, see *id.* at 106-22. *See also* CRISIS IN CHILD MENTAL HEALTH, *infra* note 228, at 15-25; PSYCHIATRIC PATIENT RIGHTS AND PATIENT ADVOCACY, *supra* note 4, at 27-29 (various available types of advocacy programs found in institutions in general).

hospital service delivery staff.[138] Advocates can negotiate for change directly with those responsible for the child's interests on a daily basis if change is needed.[139] An in-house, yet independent, advocate also serves as an intercessor to the institution's professionals in order to explain the residents' needs.[140] The mere presence of an advocate improves the hospital's quality of treatment and programming and is a reminder of the residents' rights.[141] Because the protection and advocacy services could resolve problems without adversary proceedings, provide services without the child actively seeking them, and be available without charge, a protection and advocacy program for children would be highly valuable.[142]

IV. Implementing Advocacy Services to Institutionalized Children Through the Expansion of the Protection and Advocacy for Mentally Ill Individuals Act of 1986

In 1986, Congress passed the Protection and Advocacy for Mentally Ill Individuals Act (P&A Act).[143] Congress' goal was to meet the advocacy and protective needs of the mentally ill that had not been effectively met.[144] Other goals of the Act were to increase patient, staff, policymaker, and community awareness of patient rights, thus hopefully leading to an effective response to mentally ill patients' needs and concerns.[145]

The P&A Act was passed in response to the inadequate existing mental health services provided in institutions for the mentally ill.[146] Prior to the Act's passage, state regulatory systems that existed monitored the hospital's compliance with state law in respect to the rights of the mentally ill, but those systems were inadequate in investigating complaints, ineffec-

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138. *See* Ziegenfuss & Lasky, *Attitudes Toward Mental Patients' Rights: Program Modes and the Ideology of Nurses*, 14 J. of Psychiatry & L. 469, 474 (1986). This study suggests that the presence of an attorney results in more staff awareness of patient rights and more involvement in conflict resolution regarding patient rights issues. *Id.* These conflicts are usually initiated by lawyers questioning the program's policies and practices. *Id.*

139. Deciding if representation is needed must be consistent and not decided on a case-by-case basis as in Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973).

140. Child Advocacy, *supra* note 19, at 97.

141. Ziegenfuss, *supra* note 138, at 474.

142. "Advocacy could be the catalyst for a lasting and productive reformation." Child Advocacy, *supra* note 19, at 92. *See also id.* at 91 (explaining why advocacy is essential in institutions). *But cf. id.* at 96 (giving reasons against advocacy).

143. Pub. L. No. 99-319, 100 Stat. 478 (codified at 42 U.S.C. § 247(a) & §§ 10801-51 (1987)).

144. S. Rep. 109, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 1361, 1362. For a summary of the Act, see *P&A Summary*, *supra* note 5, at 2 (discussing why protection and advocacy is needed).

145. *See* Scallet, *supra* note 23, at 17. *See also P&A Summary*, *supra* note 5, at 2.

146. U.S. Code Cong. & Admin. News, *supra* note 144, at 1362-63.

tive in disciplinary actions, and inconsistent in application.[147] Furthermore, although the quality of care in many state psychiatric facilities are subject to external review by the private Joint Commission on Accreditation of Hospitals (JCAH) and the Health Care Financing Administration (HCFA), Congress was not satisfied.[148] Congress considered these reviews insufficient due to the predictability of visits by the JCAH and the HCFA. Additionally, Congress focused on the hospital's capacity to provide treatment, instead of the treatment and care actually provided.[149]

Since the JCAH and HCFA programs were inadequate, Congress required the P&A systems to be implemented through a program that is independent of any service provider[150] and specific to the patients' mental health needs.[151] The P&A Act accomplishes these goals by authorizing designated agencies and review boards to pursue legal, administrative, and other appropriate remedies to ensure the protection of the institutionalized mentally ill and to provide the monies to accomplish these actions.[152] In addition, the P&A Act provides funds for advocacy services to protect the patients' existing state and federal rights.[153]

Some administrative aspects of the P&A program are expressly mentioned in the Act. According to the Act, the federal government will pro-

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147. *Id.* (Much of this insufficiency was due to the lack of financial resources.) Also, the limited authority given to advocates seriously impeded the effectiveness of protecting the mentally ill. *Id. See also P&A Summary*, *supra* note 5, at 2.

148. U.S. CODE CONG. & ADMIN. NEWS, *supra* note 144, at 1362-63.

149. *Id.*

150. *Id.* The P&A agency cannot duplicate the efforts of a guardian, conservator, or legal representative unless the guardian requests counsel or fails to act in the child's best interest within a reasonable time. *P&A Summary*, *supra* note 5, at 5.

151. National Institute of Mental Health, Fiscal Year Report on the Protection and Advocacy Program for Mentally Ill Individuals (1986) (unpublished report submitted to the Department of Health and Human Services pursuant to the P&A Act breaking down the dollar appropriations made by each state). The Act seeks to keep the P&A money separate from other existing DDA Act programs that have already been established for persons with developmental disabilities, severe handicaps, and rehabilitation programs for the elderly so that the mentally ill are not overlooked. *Id.* The intent of the P&A Act is to cover any residential facility that provides care or treatment for individuals who have a significant mental illness or emotional impairment, which would allow monies also for children. *P&A Summary*, *supra* note 5, at 2.

152. The monies are provided under the P&A Act and are to be used to supplement existing non-federally supported resources or programs for the protection and advocacy of the mentally ill. *Id.* at 3-6. *See also* Scallet, *supra* note 23, at 19 (stating that the future of federal advocacy funding is uncertain due to federal budget pressures). Despite severe funding problems for mental health programs generally, the potential is high for mental health advocacy to join with similar programs for other disabled or disadvantaged populations, which have experienced a continuing, slow growth in the past several years. *Id.* With the establishment of programs in each state, advocacy likely will continue to expand as an integral feature of the mental health system. *Id.*

153. *P&A Summary*, *supra* note 5, at 1.

vide funding to the P&A program, a branch of the National Institute of Mental Health (NIMH) Alcohol, Drug Abuse, and Mental Health Administration. The P&A program then supervises the state P&A systems that are implemented and provides states with the technical assistance[154] necessary to implement an effective P&A program.[155] Congress, as suggested by the Labor and Resources Committee who wrote the P&A Act, chose the existing Developmental Disabilities Assistance and Bill of Rights Act's (DDA Act)[156] protection and advocacy services to effectuate the legislative goals of the P&A Act because of the DDA Act system's past accomplishments.[157] Even though Congress chose to utilize the DDA Act's services, Congress designed the P&A Act to separate the services to be offered to the mentally ill from the existing developmental disability services.[158] Initially, the funds allocated to the P&A program under the Act are distributed to this preexisting DDA Act agency, which was designated by each state governor.[159] These agencies may then subcontract the mental health services to other state agencies or nonprofit organizations[160] that currently do not provide services to the mentally ill.[161]

The P&A program at the NIMH, which is a program in response to the P&A Act, coordinates the funding and technical assistance to the state P&A systems.[162] The typical P&A program, in every state and in the United States' six territories,[163] is a small not-for-profit organization.[164] The NIMH, through the Alcohol, Drug Abuse, and Mental Health Administration's P&A system, grants money to state P&A systems to be used specifically for mentally ill patients;[165] however, the NIMH does not set regulations for the state P&A systems.[166] Thus, the implementation of the Act is

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154. *See* Scallet, *supra* note 23, at 19 (summarizing the type of technical assistance given).

155. *See* U.S. CODE CONG. & ADMIN. NEWS, *supra* note 144, at 1363.

156. 42 U.S.C. §§ 6001-81 (1982 & Supp. II 1984).

157. *See* U.S. CODE CONG. & ADMIN. NEWS, *supra* note 144, at 1363.

158. *Id.* at 1362.

159. *P&A Summary*, *supra* note 5, at 3.

160. *Id.*

161. *Id.* at 4 (however, DDA agencies may subcontract to existing organizations that provide advocacy services to the mentally ill).

162. Telephone interview with Natalie Reatig, Coordinator of the Protection and Advocacy Program at the NIMH (Mar. 3, 1988) (stating that she provides contract information, program material, and gives her interpretation of the Act to states that ask for explanations). Whenever the Act refers to "Secretary," this refers to Natalie Reatig's position. *Id.*

163. *Id.*

164. Only six to eight states have a state government office. *Id.*

165. The NIMH received $10,555,000 from Congress. *Id.* This money is a separate budget appropriation from the DDA Act funds that the original P&A system receives for the developmentally disabled. The DDA Act funds are to be used for the developmentally disabled; the NIMH funds are to be used for the mentally ill. *Id.*

166. Interview, *supra* note 162. Natalie Reatig stated that there was not enough time

left to the states' discretion and their individual advisory boards, which should be a part of each P&A system.[167]

The P&A Act is the answer to many of the problems that an institutionalized mentally ill person faces. However, even though the Act is designed to represent all mentally ill individuals,[168] the Act's implementation fails to properly protect children who are mentally ill.[169] Although the Act enables the P&A program to provide services to children,[170] many state systems have failed to provide adequate P&A services to institutionalized children.[171] P&A monies may be used to fund P&A services in facilities for children, but due to the lack of time and money, adults usually are given priority.[172] Therefore, the P&A programs must rely on the hospital staff to protect the child's interests by reporting any abuse or neglect of these interests caused by the child's guardian or parent.[173] However, rarely will a hospital staff person intervene when the parents do not represent the child's interests, because the parent may later initiate an action against the hospital.[174] Because states have interpreted and implemented the P&A program in different and ineffective ways,[175] an amendment explicitly including children, with clear guidelines set by the NIMH, must be implemented and enforced. The institutionalized child will then receive the appropriate and needed advocacy services, thereby satisfying the due process requirements of the fourteenth amendment.

V. PROPOSED GUIDELINES

States must have some deference in implementing the P&A program in accordance with local preferences, policies, and patients' needs. However, since children do not have a strong influence in lobbying for services that

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and resources to set regulations. Instead, her office works with the state P&A systems in problem-solving, policy interpretation, and material distribution. *Id.*

167. *Id.* Also, the National Alliance for the Mentally Ill is proposing amendments to the Act to require that the advisory boards are correctly utilized, since there have been various problems with board appointments. Interview with Richard Greer, Deputy Executive Director of The National Alliance for The Mentally Ill, Arlington, Virginia (Mar. 9, 1988).

168. 42 U.S.C. § 10802(3)(A)(B) (1986).

169. Interview, *supra* note 162.

170. 42 U.S.C. § 10807(a) (1986) (states generally that the P&A program can take administrative and legal action if proper action is not being taken on behalf of a mentally ill person).

171. Interview, *supra* note 162 (stating that institutionalized children are an underserved population).

172. *Id.* (stating that the advisory boards set the priorities).

173. "There is no law to allow us to intervene. We cannot take cases over parental objections unless it is an egregious case." *Id.* "The NIMH's P&A program can only hope that state P&A systems offer services to children." *Id.*

174. Rosenberg, *supra* note 5, at 72.

175. Interview, *supra* note 162.

are legally available to them but not actually provided, the proposed guidelines should be required before the NIMH gives a state P&A system any funding or technical assistance. The following are the proposed guidelines that state P&A systems should implement:

1. The availability of P&A services on a daily basis to respond to patient, parent, staff, and court requests, which begin immediately after the child is institutionalized and continue during immediate follow-up care. (The P&A program may be staffed by individuals such as social workers, concerned parents, law students, and at least one attorney, depending on the local needs);

2. Frequent monitoring of the hospital's care to children in regard to the quality of the hospital's facilities, treatment programs, and educational services. Since children are often unsure about what protections and services are available, the advocate would provide monitoring without being requested;

3. Frequent visitations by the advocate with the institutionalized child to ensure that the legal needs of the child are being effectively met by the child's parents or guardian and the hospital system. If the parents, guardian, or hospital are not complying with the law, the advocate would first negotiate with the institution for the change. If the parents, guardian, or hospital failed to respond to the child's needs, the advocate may then pursue appropriate remedial legal action;

4. Making any necessary complaints to state hospital boards or the JCAH, who are only able to make infrequent visits, if the institution fails to comply with their regulations;

5. Working with the parents, while maintaining the attorney-client relationship with the child, to settle the child's personal affairs that may be affected by hospitalization. However, if the parents do not act in the child's best interest, the advocate could proceed independently; and

6. Ensuring that the children's hospitalization remains the least restrictive environment and that proper follow-up care is being pursued. Thus, advocates would represent the child before commitment review boards and would periodically and independently review the commitment.

Expanding the P&A Act would offer children the necessary advocacy services to represent their best interests and monitor the institution's quality of care, while at the same time ensuring that the child's rights are not violated. Even though problems may arise in the Act's implementation, these problems should be dealt with on a case-by-case basis instead of denying children legal representation all together.[176] Otherwise, the child's best in-

176. *See infra* notes 205-32 and accompanying text regarding problems with granting a

terests will be overlooked in order to avoid possible conflicts, conflicts that are minor when weighed against a child's liberty rights.

VI. An Exemplary Implementation of the P&A Act for Children: Monitoring the Institution's Educational Services

The inadequate educational services that many institutions provide for mentally ill children is one of the most detrimental problems facing an institutionalized child. Since both the government and the child have a strong interest in continuing the child's proper education, an advocate is needed to pursue these interests. Through the proposed guidelines and amendment, the advocate will be able to both detect violations of a child's educational rights and pursue the child's best interest. As an example of how the proposed guidelines can be implemented, this section of the note briefly illustrates how an advocate could monitor an institution's educational services.

Mental institutions have historically failed to provide patients with an adequate education. The absence of an adequate education in mental institutions, therefore, has been a matter of serious concern.[177] Since education is closely related to the mental health of children,[178] proper education can be effective both in preventing emotional and mental disorders and in promoting the healthy growth and development of children.[179] Even though the importance of a child's education is recognized,[180] the child does not have a constitutional right to an education.[181] However, although inequality of ed-

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child advocacy services.

177. *See* National Mental Health Association, Legislative Goals for the 100th Congress . . . and Beyond (unpublished material that is available from the NMHA office in Alexandria, Virginia) (stating that education for SED children is a big concern of the Congress).

178. Final Report of the Joint Commission on Mental Health of Children, Inc., *Digest of Crisis in Child Mental Health: Challenge for the 70s* 33 (1969). *See generally* Crisis in Child Mental Health, *infra* note 228, at 383-404 (discussing the role that education plays in mental health).

179. *See* sources cited *supra* note 178.

180. The Supreme Court in Brown v. Board of Education, 347 U.S. 483, 493 (1954) stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

181. The Supreme Court has not held that education is a fundamental right. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). However, once educational

ucation alone, when education is provided, may not create a cause of action,[182] it can be argued that some level of minimal educational opportunity might be considered a constitutional right.[183] Federal courts have held that the deprivation of a proper education is unconstitutional if a state denies education to a class of individuals.[184] In response to these decisions, both federal and state legislatures have enacted legislation that provides special educational services to all handicapped children; this includes many institutionalized children as well.[185] However, the problem of institutionalized children receiving an adequate education remains pervasive because the majority of psychiatric hospitals offer only minimal, if any, educational services, and the education that is provided is often improper and inadequate.[186]

Currently, adequate remedies that would guarantee an institutionalized

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rights are granted, they cannot be terminated without due process safeguards. Goss v. Lopez, 419 U.S. 565 (1975).

182. *See, e.g., San Antonio Indep. School Dist.*, 411 U.S. at 35. Poor families brought an action challenging a state law as violative of their fourteenth amendment equal protection rights. *Id.* at 4-5. They believed that the imposition of a property tax would hurt the education of their children because their school would receive less funding than upper-income residential schools. *Id.* Even though education is extremely important, the Court did not recognize equal protection problems. The Court felt that the imposition of taxes was a legislative role "and one for which the court lacks both authority and competence." *Id.* at 30-31.

183. *Id.* at 36-37 (the Court suggests that "some identifiable quantum of education" may be required).

184. Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972). The *Mills* court stated that failure to provide education to children with behavior problems is a violation of due process under the 14th amendment. *Id.* at 867. Also, if the inadequacies in education bear more on an exceptional child than on a normal child, equal protection issues are raised. *Id.* at 874. The Court in *San Antonio Indep. School Dist.*, 411 U.S. at 36, stated that some education is a prerequisite to the meaningful exercise of first amendment rights.

185. *See, e.g.*, N.M. STAT. ANN. § 43-1-18 (1978).

> A minor who is a client in a residential facility shall be provided such education and training as necessary to encourage and stimulate developmental progress and achievement. Such minor shall be educated in regular classes with nonhandicapped minors whenever appropriate. In no event shall a minor be allowed to remain in a residential facility for more than thirty days without receiving educational services.

Id. See infra text accompanying notes 194-99 for a discussion of the Handicapped Children Act.

186. *See infra* notes 187-98 and accompanying text. *See also* Special Project, *A Policy Analysis of "Least Restrictive" Education of Handicapped Children*, 14 RUTGERS L.J. 489, 498 (1983) (the Handicapped Children Act fails to provide educational programs to some institutionalized children). The statute, like N.M. STAT. ANN. § 43-1-18 (1978), gives the institution thirty days to provide education. By allowing a thirty day lapse, these statutes have failed to consider the importance of a child's education remaining consistent. Other states also lack continual education programs for institutionalized children. American Association of Children's Residential Center, Meeting the Needs of Children With Serious Emotional Disturbances Through Education for Handicapped Children Act (PL 94-142), Consensus Paper #3 (unpublished material available from the NMHA). Consequently, if a child returns to classes he will probably be behind and then further stigmatized.

child a proper education do not exist. Review board activity[187] may lead to educational improvements, but the change may be too late; therefore, more immediate relief is necessary.[188] Many hospitals depend on the JCAH to review the constitutionality and adequacy of the mental hospital's procedures and care, but these reviews are rare and usually ineffective.[189] Also, these procedures and other beneficial programs[190] that are offered to ensure an adequate education for mentally handicapped children must be instigated by the parent or guardian, who may be overwhelmed by the procedural difficulties.[191] However, if the institutionalized child does not have parents and is a ward of the state, the child is usually left unrepresented by an advocate, guardian, or surrogate parent.[192] Unfortunately, "[t]he entire procedure cannot work without an assertive, questioning advocate for the child," because the child is unable to protect the rights that his parents and the hospital have failed to protect.[193]

The most recent step taken by the government to ensure an adequate education to mentally ill children is The Handicapped Children Act.[194] The Handicapped Children Act substantively guarantees a right to free appropriate public education and "related services" to seriously emotionally disturbed (SED) children[195] in residential facilities.[196] Many children in

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187. *See* Education of the Handicapped Act, 20 U.S.C. §§ 1400-61 (1982) (explaining review boards). *See also* Note, *supra* note 186, at 499-500 (frequently now represented by school advisory panels).

188. Without adequate procedural safeguards, available relief and review may only result in a continuation of existing programs or a new hearing. Fialkowski v. Shapp, 405 F. Supp. 946, 957 (E.D. Pa. 1975). The *Fialkowski* court recognized relief under the Civil Rights Act § 1983 for the exclusion of individuals from school, but there are no adequate safeguards to prevent this total exclusion of education. *Id.* However, the proposed advocacy system could prevent total exclusion of education.

189. Rosenberg, *supra* note 5, at 71.

190. The NIMH has a new program called the Child and Adolescent Service System Program (CASSP) in twenty-four states promoting concepts and strategies for changing the service systems to meet the needs of SED children. Interview, *supra* note 162. However, these are not mandatory programs.

191. THE RIGHTS OF CHILDREN: LEGAL AND PSYCHOLOGICAL PERSPECTIVES 235 (J. Henning ed. 1982). *See also id.* at 238-39 (regarding the clout parents are given in the implementation of the Handicapped Children Act, but that parents are unprepared to "take the task").

192. Special Project, *supra* note 186, at 499. Therefore, an institutionalized child receives less protection than children in either neglect proceedings or criminal proceedings.

193. THE RIGHTS OF CHILDREN: LEGAL AND PSYCHOLOGICAL PERSPECTIVES, *supra* note 191, at 235.

194. 20 U.S.C. § 1400-61 (1982 & Supp. IV 1986).

195. Seriously Emotionally Disturbed Children, 34 C.F.R. § 300.5(8) (1988).

[i] This term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

A. An inability to learn which cannot be explained by intellectual, sensory, or health

mental hospitals fit this description;[197] yet, even if they are covered under this Act, children in many mental institutions remain deprived of a minimally adequate education, because hospitals and school boards have failed to sufficiently implement the statute or Act.[198] Because of this failure to properly effectuate these new laws, both SED children and other institutionalized mentally ill children who are not covered by the Act are deprived

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factors;

B. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

C. Inappropriate types of behavior or feelings under normal circumstances;

D. A general pervasive mood of unhappiness or depression; or

E. A tendency to develop physical symptoms or fears associated with personal or school problems.

Id.

However, each state interprets this definition of SED children differently. Georgetown University Child Development Center, A Community Workbook for Developing Collaborative Services for Seriously Disturbed Children 4 (Mar. 1985). The unclear definition results in a tremendous disparity of the Act's application throughout the states. American Association of Children's Residential Centers, *supra* note 116, at Consensus Paper #2.

196. The Handicapped Children Act has provided handicapped children (including the seriously emotionally disturbed) adequate facilities and education and advisory boards to safeguard these educational interests. The Act gives parents an advocacy role in the educational planning for their child and a right to a de novo hearing in federal court to review the adequacy of the proposed educational placement. Those children who are wards of the state or institutionalized are usually deprived of parental advocacy as a vital resource. Rosenberg (pt. 2), *infra* note 223, at 146.

Therefore, the Act mandates the appointment of a surrogate parent for administrative appeals to protect the child's rights. The surrogate parent program could supplement the existing minimal services to a child with an individual program designed to meet the child's needs. Rosenberg (pt. 1), *supra* note 5, at 73. But, school districts have failed to make such appointments or have done so insufficiently. *Id.* (courts have named surrogates whose interests conflict with the child). *See also* Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMPLE L.Q. 961, 984, 989-93 (1977) (review and critique of the Act).

197. Interview with Mary Crosby, Assistant Director for Governmental Affairs, American Academy of Child Psychiatry (Mar. 8, 1988) (stating that mentally ill children in hospitals are covered if defined as SED. However, "[i]t is a case-by-case determination, depending on the school district and what the parents want.").

198. *Id.* By failing to provide institutionalized children with proper public supported education, school boards have violated their own statutes and regulations. Mills v. Board of Educ., 348 F. Supp. 866, 874 (D.D.C. 1972). Even when the *Mills* court imposed a duty on the defendant school board, the defendants continually failed to produce necessary proposals and plans for the alleviation of the problems posed. "This lack of communication, cooperation and plan is typical" and contributes to the existing problem. *Id.* at 873. In *Mills*, a special master was appointed to insure that the institution would provide adequate education when the institution failed to abide by a court order. *Id.* at 877. Therefore, an advocate is needed to pursue the child's interest effectively. *See, e.g., id.* at 869-70 (cases depicting educational deprivation to children with behavior problems in and out of institutions); Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975) (complete denial of educational opportunities for retarded children).

of a proper education. Therefore, these children need an advocate to pursue appropriate educational services for them.[199]

By following the proposed guidelines to the P&A Act, an advocate could monitor the enforcement or take the necessary actions to guarantee that laws promoting the education of handicapped children are upheld. An advocate could bring an equal protection claim by arguing that an institutionalized child should be considered a suspect class[200] and that the lack of education interferes with a constitutionally protected right.[201] If the state is involved, such as a public hospital, the P&A advocate could seek civil rights damages under section 1983,[202] where there was a direct causal link between some official conduct and a constitutional deprivation of a child's rights.[203] Thus, an advocate would be able to bring an action against the directors of school boards, the Department of Health and Human Services, the mental hospital and its doctors, or even the JCAH, all of whom may be liable for the denial of a minimally adequate education if the denial is without good faith.[204]

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199. *See infra* notes 228-32 and accompanying text.

200. A suspect class is a group of individuals who have been subjected to purposeful unequal treatment or relegated to a position of political powerlessness as to command extraordinary protection. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). The mentally retarded are considered an inherently suspect class who should be more protected. *Fialkowski*, 405 F. Supp. at 959. *But see* City of Cleburne v. Cleburne Living Center Inc., 473 U.S. 432 (1985) (stating that the mentally retarded are a quasi-suspect class).

201. In an equal protection claim, the state law must disadvantage a suspect class for the strict scrutiny test to apply. For example, state action must impinge on the child's exercise of a fundamental constitutional right or liberty interest that is protected by the constitution in order to bring a suit. *Id.* Even though equal protection arguments exceed the scope of this note, it is mentioned as an alternative claim that an advocate could pursue.

202. 42 U.S.C. § 1983 (1982); Parratt v. Taylor, 451 U.S. 527 (1981) (section 1983 action based on official conduct that deprives a person of constitutional rights). These civil rights actions are outside the scope of this note, but are examples of the various claims that a P&A advocate could pursue.

203. *Parratt*, 451 U.S. at 535.

204. Fialkowski v. Shapp, 405 F. Supp. 946, 956 (E.D. Pa. 1975). In *Fialkowski*, The Secretary of Education was found personally responsible because he had full authority to correct the alleged violations committed by school districts. Therefore, the court held the Secretary of Education liable. *Id.* at 959. If monetary relief is sought, however, the personal involvement requirement is more stringent. *Id.* at 956. Few damage actions have been brought in these types of cases due to the costs and improbability of success in addition to the fact that compensation is based on the child's economic status. Thus, neither counsel nor parents may want to expend the time, money, and effort in bringing an action. However, damage actions can be won. Rosenberg (pt. 1), *supra* note 5, at 71-72.

VII. Arguments Against an Institutionalized Child's Right to Counsel and How the Act's Proposed Expansion to Institutionalized Children Mitigates These Problems

Two main concerns arise in expanding the P&A Act. First, since the suggested expansion provides separate counsel for the institutionalized child, slight interference with the parent-child relationship may occur because someone other than the parent will be making decisions affecting the child's health and disposition. Thus, usurpation of the parent's traditional role of decision-making and inherent discretion over the child's care is feared.[205] Second, since the specific extension of the P&A Act to children may require more governmental funding, the unavailability of financial resources is a possible argument against the proposed amendment to the P&A Act.[206] However, both of these problems can be mitigated and should, therefore, not be an excuse for not providing protection and advocacy services to institutionalized children.[207]

Both parents and courts may be hesitant to allow the daily availability of protection and advocacy services because the child's interests and needs may be adverse to the parents' and hospital's interests and decisions.[208] Parental discretion is viewed as an inherent right that is deeply rooted in history,[209] but courts will interfere with the parent-child relationship under the

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205. "Authority of parents cannot be usurped. It is dangerous to step in between a child and his parents." Telephone interview with Natalie Reatig, Alcohol, Drug Abuse, and Mental Health Administration (Nov. 1987) (regarding the extension of protection and advocacy services under the P&A Act to children). *See also* Parham v. J.R., 442 U.S. 584, 602-04 (1979) (The Court was concerned with the government superseding parental authority and the parental decisions regarding their child's health by providing a child with counsel in a commitment proceeding.). *But cf.* Simet, *Power, Uncertainty, and Choice: The Voluntary Commitment of Children*, Parham v. J.R., 20 U.W. ONT. L. REV. 141, 144-45 (1982) (criticizing Chief Justice Burger's justification of parental discretion and avoidance of state intrusion in *Parham*). "Due to the social importance of the family, most legislation regulating family life aims to minimize state intrusion and preserve family integrity." Butz, *supra* note 24, at 1218-19 & n.24.

206. National Mental Health Association, Severely Emotionally Disturbed Children: Improving Services Under Education of the Handicapped Act (P.L. 94-142) 11, Meeting Report of Sept. 1986 [hereinafter Meeting Report] (regarding the high rate of teacher burnout and turnover, as well as the lack of funding for the SED population). The institutions for SED children will be "hard-pressed for money." Interview, *supra* note 197. *See also* Note, *supra* note 1, at 1285 (stating that the requirement of counsel will incur additional expenses and lengthen hearings).

207. However, the cost alone should not be the basis for denying the individual's important procedural protections. *Id.* at n.124. *See infra* notes 208-32 and accompanying text (discussion of resolving the problems).

208. *See infra* notes 209-10 & 215 and accompanying text.

209. *See* Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 394-96 (1970) (regarding the history and nature of inherent parental rights). However, these rights should not be discarded unless the parents cannot or do not discharge their reciprocal duties toward the child. *Id.* at 396. *But cf.* Guggenheim, *The Right to be Represented but not Heard:*

common law parens patriae doctrine when the child's physical or mental health may be jeopardized.[210] In these situations, the court's aim in stepping into the parental role is not to punish the parent, but rather to nurture and protect the child.[211] Thus, in certain circumstances, the courts have deemed that providing counsel is not only just, but is required by law for the child's welfare.[212]

The argument that providing a child with counsel will automatically usurp a strong parent-child relationship fails to consider the fact that the family autonomy may have already been disrupted.[213] The parent-child relationship is strained when the parents decide to surrender custody of their child to a mental institution, albeit with good or bad intentions. Furthermore, the issues and rights of a child in an institution do not involve the routine childrearing decisions normally expected within the context of an ongoing family relationship.[214] Therefore, a skilled advocate who represents the child should not threaten the parents' authority; instead, the advocate would attempt to work with the parents to ensure that the child is receiving proper care and to ensure that the child's rights are not being violated.

When a parent does not have the child's best interests at heart,[215] an advocate would ensure that the child's interests were properly represented. If parents are truly acting in the child's best interest, measures taken to protect their child will not be protested. However, even if parents permit an

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Reflections on Legal Representation for Children, 59 N.Y.U. L. REV. 76, 109-17 (1984) (arguments against state interference).

210. Dobson, *supra* note 209, at 393. Parens patriae is the state's power to be a guardian to persons under legal disability. Parens patriae is justified only for the concern over the child's welfare. *Id.* Parham v. J.R., 442 U.S. 584, 603 (1979) (The state may have constitutional control over parental discretion.).

211. Dobson, *supra* note 209, at 393. However, incidental punishment may be "inevitable and even just if one agrees with studies which place the blame for all that has gone wrong with our children on the failure of the natural home to foster and perfect the young." *Id.* at 393-94.

212. *In re* Gault, 387 U.S. 1 (1966); Kent v. United States, 383 U.S. 541 (1966). For a discussion of these cases, see *supra* notes 50-60 and accompanying text.

213. *Parham*, 442 U.S. at 631 (Brennan, J., concurring in part, dissenting in part); *The Supreme Court, 1978 Term*, *supra* note 51, at 93-94 (also stating that in past state family intervention, no family disruption is shown).

214. *Parham*, 442 U.S. at 631 (Brennan, J., concurring in part, dissenting in part) (Institutionalization is a break in family autonomy when the parent surrenders custody to the institution, thus the child is in greater need of counsel.). Justice Brennan felt that "a child who has been ousted from his family has even greater need for an independent advocate" because of the child's right to be free from wrongful incarceration, physical intrusion, and stigmitization. *Id.*

215. *See supra* notes 104, 120-21, 213 and accompanying text. "It ignores reality to assume blindly that parents act in their children's best interests" in making decisions regarding their children's hospitalization. Parham v. J.R., 442 U.S. 584, 632 (1979) (Brennan, J., concurring in part, dissenting in part).

advocate's representation to engender anger and hostility toward their child, the incidental interference with the parent-child relationship should not prevent the child from receiving the necessary protections provided by an advocate.[216] Since inpatient treatment in a mental hospital is "the most drastic mode of mental health care,"[217] the government should closely scrutinize the parents' decision to hospitalize their children.[218] When the parents are providing adequate supervision, active advocacy is not needed. Thus, the parents should not have a problem supporting the protection and advocacy services. However, if the parents fail to protect the child's rights and fail to meet the child's needs, usurpation of the parents' authority would be necessary to preserve the child's due process rights.

The implementation of protection and advocacy services for institutionalized children could adequately protect children's constitutional rights and interests. Furthermore, these services could be implemented without unnecessarily interfering with parental authority and without undercutting any legitimate interests of the state and patient that are being served by the child's hospitalization. Providing children with P&A services would eliminate the problems associated with formalized factual hearings or adversarial proceedings. These problems include significant intrusion into the parent-child relationship, exacerbating whatever tensions already exist, and causing the subsequent return of the child to the home to be more difficult.[219] Instead, the guidelines would provide advocacy services to reassure the child that counsel is available on a daily basis, to ensure proper care by the hospital, and to safeguard against violations of the child's rights. Furthermore, the advocate would act independently in the child's best interest rather than being in the middle of a power struggle between the child and the hospital or parents.[220] In contrast to potentially harmful adversarial proceedings, the proposed extension of the P&A Act would provide therapeutic advocacy because children would have an opportunity to express their views and take an active part in their rehabilitation.[221]

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216. *See* Simet, *supra* note 205, at 151.

217. *Id.* at 150.

218. Morris, *The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment*, 60 TULANE L. REV. 927, 947 (1986) (stating that Justice Brennan in *Parham* cited numerous studies of inappropriate attempts by parents to institutionalize their children, who were not in need of such drastic treatment).

219. *Parham*, 442 U.S. at 610 (The Court expressed its concern that an adversary confrontation would distress the parents and have a negative impact on a disturbed child.).

220. Power struggles between the child's counsel and the parents and/or the hospital may have a detrimental impact on the hospital's ordered treatment. *See* Ellis, *supra* note 6, at 890.

221. The knowledge that someone on the "outside" is concerned about the child's well-being may be one of the most valuable things an advocate can give a child-client. *Id. See also* Simet, *supra* note 205, at 151 (stating that children who do not express their views are likely to feel alienated both from their parents and the hospital that is rendering treatment).

The child's right to counsel, adequate education, and treatment are all needs that would be met by the proposed amendment and guidelines. However, the expansion of a government program is usually accompanied by financial concerns and limited federal dollars.[222] This concern is dealt with through several avenues,[223] but most specifically through the P&A Act.[224]

Courts have held that the lack of funding is an insufficient basis for denying children their rights,[225] because constitutional rights must be afforded despite the greater expenses involved.[226] Therefore, the implications of denying children their rights by inadequate due process must be strongly considered when using the insufficiency of funding as an excuse. Children's interests need to be given timely attention and priority due to the children's

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222. The major problem with the implementation of The Handicapped Children Act is the inadequacy of resources on both the state and local level. Federal appropriations have consistently been far below authorized levels. National Mental Health Association, *supra* note 206, at 3. *See also* Rosenberg (pt. 2), *infra* note 223, at 145. (Federal dollars for community-based services for minors were approximately $20 million a year between 1972 and 1980. Today, there is no federal policy on adolescent mental health care.).

223. Medicaid has a program entitled Early Periodic Screening, Diagnosis, and Treatment (EPSDT) that places an affirmative obligation on the state government to ensure that eligible children under the Medicaid statute actually receive the services they need. Rosenberg & Yohalem, *Litigation on Behalf of Mentally Disabled Children: Targets of Opportunity* (pt. 2), 10 MENTAL & PHYSICAL DISABILITY L. REP. 145, 149 (1986). Currently, the program has been limited to the screening and diagnostic aspects of the program. *Id.* However, EPSDT and AFDC (Aid to Families with Dependent Children) programs should help provide funds through Medicaid benefits to implement advocacy programs for eligible mentally ill children in institutions to ensure children receive the services they need. *Id.* at 149. If an active attorney is employed, fewer children are committed and those who are committed only stay the necessary amount of time, thus less money is required for hospitalization. Note, *supra* note 1, at 1285.

Also, school boards may be required to provide protections to ensure that an adequate education is being provided to institutionalized children. The Supreme Court in Irving Indep. School Dist. v. Tatro, 466 U.S. 923 (1984), held that The Handicapped Children Act's "related services" provision included all supportive services needed by a handicapped child (SED children included). The NMHA believes that in order to ensure that education is properly achieved, advocacy services are needed to represent the needs of children and their families. *See* Meeting Report, *supra* note 206, at 9, 11.

224. *See supra* note 165 and accompanying text.

225. The unavailability of funds, staff, or facilities does not justify default in implementing suitable treatment. Wyatt v. Stickney, 344 F. Supp. 373, 377 (M.D. Ala. 1972). As to a child's right to a publicly supported education, lack of funding is inexcusable. Mills v. Board of Educ., 348 F. Supp. 866, 881 (D.D.C. 1972) (also stating that a child has a right to counsel at hearings). *See* Simet, *supra* note 205, at 147 (stating that "[n]othing in the due process clause suggests, for example, that if it is inconvenient or costly for the state to protect individual rights, then the state may dispense with such protection in order to more efficiently deprive citizens of their rights.").

226. *See Mills*, 348 F. Supp. at 876 (stating that if there are not enough funds, then the money should be equally distributed so as not to exclude or bear more heavily upon the "exceptional child."). *But see* Fialkowski v. Shapp, 405 F. Supp. 946, 958 (E.D. Pa. 1975) (stating that equal educational opportunities are not measurable in terms of equal financial expenditures).

vulnerable ages.[227] Preventative measures are most essential and effective when they are taken in the earliest years of life—the most critical stages of development, which, if neglected, may result in irreversible damage.[228] If a child is unnecessarily stigmatized, institutionalized, denied adequate education, or treated improperly, the child's physical and mental health is threatened.[229] These setbacks may then cause future hospitalization, criminal conduct, and academic failure.[230] In the end, the government will very likely expend far more money on the individual than if the preventative measures would have been taken initially.[231]

Child advocacy services through the P&A Act are crucial in ensuring that a child's interests and rights are protected. Funding must be a priority in government programs because any of the expenditures made are a wise and essential investment in a child's future. According to a report by the Joint Commission on the Mental Health of Children regarding advocacy services to mentally ill children:

> The program we recommend is not a cheap one, nor would any program be that is commensurate with the need. But if we choose now not to meet the cost, we shall eventually pay a far higher price, reckoned not only in economic loss, but in human misery. We cannot refuse to mount the effort. If we are true to our heritage, we must recognize that we are confronted not merely with the needs of children, but with their inalienable rights.[232]

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227. One of the goals of the National Mental Health Association and the Special Education Coalition for the SED children is that a federal priority be established and federal resources committed to ensure appropriate education as well as other related services for SED children for prevention and early intervention programs. National Mental Health Association, Meeting the Needs of Children With Serious Emotional Disturbances Through Education for Handicapped Children Act (PL 94-142): Recommended Goals for Action 4 (Dec. 1987). "Our children's mental and emotional health is deserving of our highest priority." Position Paper, *supra* note 16, at 4.

228. *See* CRISIS IN CHILD MENTAL HEALTH: CHALLENGE FOR THE 70'S, REPORT OF THE JOINT COMMISSION ON MENTAL HEALTH OF CHILDREN 2 (1970) (CHILD MENTAL HEALTH).

229. *Id.*

230. Failure to provide proper resources to a child with mental disorders will result in a generation unable to "make it" and increased numbers destined for juvenile court, reformatories, jails, welfare institutions, and the back wards of state mental hospitals. *Id.* at 12.

231. Vast expenditures, both human and monetary, must be made in order to assist children when they need services, because in the long run the costs will multiply in terms of mental illness and human malfunctioning, both of which lead to underproductivity. See *id.* at 1-3, 8, 12. "We believe it is in the interest of the economy to concentrate resources on the new generation and thus eliminate problems that later exact a high price." *Id.* at 14.

232. *Id.*

VIII. CONCLUSION

Since the institutionalized child has liberty interests at stake both before and after being placed in an institution, due process is required throughout the child's confinement by the fourteenth amendment of the United States Constitution. The existing remedies protecting the institutionalized child's interests are inadequate; thus, increased procedures are necessary to avoid the deprivation of the child's needs and constitutional rights. Therefore, the institutionalized child should be provided with a right to counsel, which would best be implemented through P&A programs under the P&A Act.

By establishing and requiring an amendment explicitly including children, with clear guidelines in the P&A Act for the protection and advocacy services to children, the NIMH would ensure that the funding and technical assistance they give to state P&A systems are also extended to institutionalized children. Thus, the due process requirements to protect the liberty interests of the confined mentally ill children would be met. Furthermore, the government would be advancing its interests in the rehabilitation of mentally ill youth and possibly in the prevention of future hospitalization and criminal activity. The P&A program for institutionalized children would not be merely another program dealing with the recurring symptoms of social disorder. Instead, the protection and advocacy of institutionalized children would prevent many scars, thereby cutting at the roots that grow into a multitude of social problems.

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