

DREDF launches IDEA Rapid Response Network

Defending educational rights for children with disabilities

ONCE AGAIN, DREDF is leading a nationwide effort to protect the Individuals with Disabilities Education Act (IDEA) and the civil rights of children with disabilities. In April, DREDF launched the IDEA Rapid Response Network to represent parents and children with disabilities through the IDEA reauthorization process taking place in 2002.

Passed in 1975 as the Education for All Handicapped Children Act, IDEA is a key civil rights law that gives children with disabilities the federally protected right to a free and appropriate public education (FAPE) that meets their education and related service needs in the least restrictive environment (LRE). IDEA reauthorization discussions have been highly politicized, especially in the wake of the recent passage of the Leave No Child Behind (LNCB) law

**Special
Education**

and the establishment by the Bush administration in October 2001 of the President's Commission on Excellence in Special Education to make recommendations on policies for

improving the educational performance of students with disabilities. Their report came out in July 2002.

The President's Commission did not include representation for the stakeholders most knowledgeable about special education and children with disabilities:

- Educational scholars engaged in special education instructional research
- Parents—the people most knowledgeable about the needs of children with disabilities (only two parents were on the Commission)
- Representatives of the civil rights community
- Advocacy organizations for people with disabilities

Rapid Response Network

The sum and substance of IDEA—the most important piece of civil rights legislation for children with disabilities ever passed in the United States—will be dismantled unless a large, organized, and coordinated network of advocates and a highly developed political response system are ready and able to respond quickly and effectively to ill-advised amendments.

For the most part, parents are satisfied with the 1997 amendments to IDEA. Parents' main concern now is the failure to implement and enforce the law. DREDF launched the IDEA Rapid Response Network to represent children with disabilities and their families in addressing potentially damaging proposals even before they hit the streets. The RRN aligns its activities

[IDEA] continues on page 6



DREDF advocates with disability activists in Costa Rica.

Ricardo Pérez

"Si se puede" DREDF FORGES ALLIANCE WITH EL FORO IN COSTA RICA

TWO DREDF STAFF MEMBERS—Marilyn Golden and Silvia Yee—and a DREDF consulting attorney and Board member, Jenny Kern, spent a week in San José, Costa Rica in December 2001 to participate in a civil rights training workshop with a diverse group of over thirty Costa Rican participants. Funded by the State Department's Bureau of Educational and Cultural Affairs, the Workshop for the Social, Political, Economic and Cultural Strengthening of People with Disabilities was a joint project of DREDF and our new ally, Foro por los Derechos Humanos de las Personas con Discapacidad (Human Rights Forum for the Disabled, known as El Foro). This event marks a continuation of the work of the October 2000 International Disability Law and Policy Symposium held in Washington, D.C. and the beginning of an ongoing alliance with El Foro.

Dr. Federico Montero, Luis Fernando Astorga, and Oscar Rivera, along with Guadalupe Lobo, Yanira Pessoa, and Florizul Aguilar, stressed the human rights foundation of Costa Rica's five-year-old civil rights law for people with disabilities, and presented the legal and social position of disability advocacy groups.

An estimated 312,000 people with disabilities live in Costa Rica, and they have long been working to change deeply rooted discrimination there. In May 1996, the Legislative Assembly of Costa Rica approved Ley 7600 (Law 7600), or the "Equal Opportunity Law for People with Disabilities." The law opens by declaring civil rights for people with disabilities to be in the public interest, and the law lists the following goals:

- To eliminate all types of discrimination against people with disabilities
- To ensure equal opportunities and full participation in all arenas of life
- To establish legal foundations for the civil rights of people with disabilities

Yet while the disabled population and human

rights advocates have touted this legislation as progressive and even groundbreaking by Latin American standards, the past few years have seen little in the way of real progress. The DREDF workshop aimed to share with disability rights activists in Costa Rica some of the principles developed in the United States during the work to pass the ADA:

- History of the disability rights movement in the United States
- Strategies for implementation of civil rights laws
- Pertinent issues concerning gender and disability
- Citizens' participation in community organizing
- Principles and practices of the independent living movement
- Development techniques

Presidential candidates' debate

During the week-long training workshops, leaders of the disabled community were encouraged by a debate among nine presidential candidates. The candidates represented a range of views about disability—from charity-oriented perspectives to understanding the need to enforce existing legislation protecting the rights of the disabled—but the event itself added the subject of disability to the political map in Costa Rica. Held just two months before the Feb. 3 elections, the debate was the first-ever candidate forum geared specifically to the needs of this segment of the population.

Law 7600 in Costa Rica was bolstered by a convention adopted at the first plenary session of the Organization of American States held on June 7, 1999.

[El Foro] continues on page 7

DEAR FRIENDS:

We are proud of what the Disability Rights Education and Defense Fund has accomplished since it was founded 23 years ago. DREDF is a national organization that has advanced the civil rights of people with disabilities in every aspect of our lives. We have a dedicated staff of 20 people and a reputation for tenacious principles and integrity.

DREDF is part of a large and well-informed community of people who fight under the banner of civil rights for people with disabilities. We cannot let up in our efforts, especially now as recent U.S. Supreme Court decisions are whittling away at the ADA. We must continue to be vigilant as we guard our rights to education, transportation, employment, housing, public services, and participation in the electoral process. And we must continue to fight ignorance, hypocrisy, stigma, and prejudice.

Since 1979, DREDF has worked to craft and enact disability rights laws and to monitor their implementation. Currently, we are attempting to safeguard the Individuals with Disabilities Education Act (IDEA) so that it gets reauthorized in 2002 without being significantly weakened. Children with disabilities must be able to exercise their right to an education and a future.

We have also extended our human rights work to the international arena. Disability advocates from 17 countries have sought DREDF's assistance in the development of law and policy reform strategies. DREDF Director of Government Affairs Patrisha Wright attended the World Conference on Racism in South Africa as a board member of the Leadership Conference on Civil Rights. DREDF Senior Policy Advisor Mary Lou Breslin has been invited to speak before the Japanese Diet on the need for a broad disability rights law in that country, and to attend the 6th World Congress of Disabled Peoples' International to be held in Japan in October 2002.

Like most non-profit social justice agencies, DREDF spends too much of its energy in fundraising. Disability rights advocacy is very difficult to fund through foundation and corporate sources. This work does not fit under the traditional rubrics of institutional philanthropy.

So, as always, we turn to you, individuals who care about people with disabilities and about civil rights and social justice, for any help you can give. We could not have made the progress we have made without dedicated individuals, giving whatever they can—from \$10 to \$10,000.

Please help us today to continue the struggle for equality and dignity for people with disabilities by giving as generously as you can.

Best wishes,

Beverly D Bertaina

Beverly Bertaina, Chair and President, DREDF Board of Directors

DREDF spearheads California Accessible Voting Systems Project

DREDF HAS INAUGURATED the California Accessible Voting Systems Project to improve the usability of voting systems for people with disabilities throughout California.

The right to vote and to cast a private ballot is a central citizenship right in the United States. Long-standing problems in voting systems and procedures, however, led to national scrutiny and criticism of existing systems in Florida and elsewhere during the 2000 presidential election, when the accuracy and reliability of the voting process and the vote count itself came into question. Following the recount of the ballots cast in the presidential election in Florida and intervention in the election outcome by the courts, Congress began to consider legislation intended to ensure fairness in voting and uniform voting standards.

Some states, including California, also began to take independent action to reevaluate their election methods, including calling for replacing old-style paper punch-card ballots with alternative, more technology-based methods. California voters approved a \$200,000,000 bond measure during the March 2002 primary authorizing the issuance of state bonds to enable counties to purchase modern voting equipment and replace outdated punch-card systems. Florida has enacted sweeping legislation calling for access to all voting places.

The convergence of these reform movements offers the disability community locally and nationwide a unique opportunity to ensure that the rights and requirements of people with disabilities are included as an integral part of the voting system overhaul.

A number of obstacles contribute to low turnout of voters with disabilities, but a significant cause is inaccessible polling places and voting systems. The DREDF California Accessible Voting Systems Project is working to inform the disability community in California about this rapidly evolving area of accessibility and to encourage and support activities within local communities that will result in the purchase of accessible voting systems by county officials. Alameda County has taken the lead in California recently by approving the purchase of the most accessible touch screen equipment currently available. This system could be ready for use as early as the November 2002 election. This project is funded in part by the Disability Rights Advocates Fund at the San Francisco Foundation.

Special Projects

PRIVATE BAR HONORED

DREDF held its annual luncheon on May 30 at the San Francisco Sheraton Palace where members of the private bar who have given their time and expertise to disability rights causes were honored. The keynote speaker was Ralph F. Boyd, Jr., the Assistant U.S. Attorney General for Civil Rights.

Honorees included Brad Seligman of the Impact Fund, and the firms of Wilson Sonsini Goodrich & Rosati, and Orrick, Herrington & Sutcliffe, LLP. Over 300 people attended the luncheon. More than 100 organizations and individuals purchased tables or made donations to assist in the event's great success.

Annual Luncheon

DREDF contributors for fiscal year 2000-2001 (October 1, 2000 to September 30, 2001)

WE WOULD LIKE TO THANK THE FOLLOWING INDIVIDUALS AND ORGANIZATIONS FOR CONTRIBUTIONS THAT MAKE OUR WORK POSSIBLE.

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We apologize for any errors or omissions.

CDE and plaintiffs request state takeover of Ravenswood District

IN A NOVEMBER 1996 LAWSUIT, eight children with disabilities filed a class action complaint on behalf of all children with disabilities in the Ravenswood City School District (*Emma C. v. Delaine Eastin*) in East Palo Alto, California. East Palo Alto is almost entirely a minority community—70% of children in the district are Latino, about 25% are African-American, and the remainder are primarily Pacific Islanders.

The plaintiffs in *Emma C.*—represented by DREDF, the East Palo Alto Community Law Project (EPACLP), and Sagy Law Associates—alleged that Ravenswood barely had any system for the provision of special education services and that the California Department of Education (CDE) had failed to monitor Ravenswood’s special education program and to enforce the IDEA. The firm of Wilson Sonsini Goodrich & Rosati has recently become co-counsel in the suit. Previous DREDF newsletters have described the appalling failure of the Ravenswood administration to address its widespread violations of IDEA.

A CDE investigation in January 1998 affirmed that the alleged violations of law and denial of appropriate services to disabled students were correct. In August 1999, the three parties entered a settlement agreement that obligated the District to implement a comprehensive Ravenswood Corrective Action Plan (the “RCAP”) and to provide services to students who had been denied an appropriate education in the past.

In January 2000, Judge Thelton E. Henderson of the United States District Court approved the settlement agreement as a Consent Decree and approved the RCAP as an order of the Court.

But by April 2001, over a year after Court approval of the RCAP, the District had completed less than 33 percent of the corrective activities it had promised to complete. The plaintiffs asked Judge Henderson to find the District in contempt of court. The Judge made this finding in October, when he granted the six months of extra time for the District to take corrective action.

In the October 2001 ruling, after finding the school district in contempt of court, Judge Henderson gave the District until March 31, 2002 to accomplish specific tasks before he ruled on the receivership request, during which period a Court-appointed Monitor tracked the District’s progress. Recent monthly reports from the Court-appointed Monitor show that the District continues to fall short of its obligations to educate students with disabilities.

Most recently, the CDE and the plaintiffs have requested the drastic, though necessary, action of a state takeover of the Ravenswood City School District, putting the District into receivership. The request stems from the recalcitrance of the Superintendent and the Board of Trustees in the district to any meaningful efforts at reform of the special education system and to implement the consent decree they agreed to.

California State Senator John Vasconcellos met on



Ken Stein ©

Two of the original plaintiffs, Empris Carter [center] and Frank Lampkin [right], at a DREDF luncheon in 1997.

February 22, 2002 with leaders from the Latino community in East Palo Alto to discuss the challenges that they and their children face in the Ravenswood City School District. These leaders have worked as individuals and as members of Padres Unidos to reform Ravenswood and to ensure that their children receive the high quality education to which they are entitled in California.

DREDF attorney Diane Lipton, who has been working on this case since it was first filed in November 1996, reiterates DREDF’s commitment to the children of East Palo Alto. “No matter what it takes to ensure that the district provides a free appropriate public education to children with disabilities, we will keep working,” Lipton said. “Unfortunately, nothing can give back to the children the precious time that has been lost. That is the tragedy of this case. But if we succeed in bringing about major reform in East Palo Alto for both general and special education students, there is hope for present and future students, and it will have been worth the enormous litigation effort.”

ANSI: architecture and accessibility

DREDF POLICY ANALYST Marilyn Golden has served since 1997 on the American National Standards Institute (ANSI) A117 Committee that establishes the technical criteria for accessibility and usability of buildings and facilities for people with disabilities. These standards form the basis for model code adoption and become part of legal building requirements in many states.

Golden has been attending the current ANSI cycle of meetings. DREDF’s particular concern in this cycle is to work out standards for assembly areas such as stadiums, movie and drama theaters, and concert venues. The most complex of these spaces are stadium-style theaters that use stepped tiers. Such an arrangement presents obvious obstacles for people with disabilities.

In the early post-ADA period, wheelchair users were placed in the very front of the theater, where they have the worst viewing angles. A number of controversies and lawsuits ensued. DREDF is working to establish design standards that will make assembly areas accessible for everyone.

In addition, DREDF has worked closely with the Little People of America and other disability rights groups to lower the reach range where operable parts—such as elevator buttons, fuel pump controls, ATM controls, light switches, and vending machine input mechanisms—can be placed.

DREDF has consistently worked to improve the accessibility requirements in the ANSI standard and has played a significant role in coordinating the input of the entire disability community to obtain the needed improvements in access for people with many different types of disabilities.

FTA: status of transit accessibility

ON MARCH 13-14, 2002, the Federal Transit Administration (FTA), one of the modal administrations of the United States Department of Transportation (DOT), convened a national dialogue on transit accessibility for people with disabilities, and DREDF was invited to participate. Policy Analyst Marilyn Golden represented DREDF at these meetings in Washington, D.C. to discuss the status of transit accessibility around the country and ways to improve it.

FTA Administrator Jenna Dorn, DOT Secretary Norman Mineta, and the late Washington disability leader Justin Dart all spoke passionately about the importance of ensuring access to public transit for people with disabilities. Marilyn Golden and Patrisha Wright, DREDF’s Washington Director of Government Affairs, have met in the past with Secretary Mineta to stress the importance of DREDF’s participation in their policy work on the Americans with Disabilities Act.

Hawaii: physician-assisted suicide bill

IN 1999, DREDF took a position opposing the legalization of physician-assisted suicide and euthanasia. At that time, a bill was in the California Assembly to legalize physician-assisted suicide, and DREDF was part of a state coalition leading to that bill’s defeat. Since that time, DREDF has continued to work against the legalization of physician-assisted suicide in other states.

In early April 2002, DREDF Policy Analyst Marilyn Golden was invited to spend a week in Hawaii to work against a bill to legalize physician-assisted suicide in that state. Golden worked with several other organizations to oppose the bill. After a wild ride, the bill was defeated by one vote, but it may be considered again next year. DREDF will continue its participation in the coalition that opposes its passage.

DREDF hosts children’s mental health roundtable

IN 2001, DREDF received a grant from the California Endowment to bring together stakeholders, including parents, teachers, experts, consultants, legislators, agency representatives, advocates, and others, to address the widespread and well-documented crisis in California’s children’s mental health service delivery system. DREDF facilitated a March 2002 roundtable discussion that was well attended by representatives from the various stakeholder groups. DREDF is currently assisting with draft legislation to reform the system. The bill has been sent to the Assembly Committee on Health for an August 2002 hearing. Interested persons may contact Larisa Cummings, DREDF Staff Attorney at 510.644.2555.

Special
Education

Policy
Updates

Disability Law in California

Poppink Act

California Law

Update

The Poppink Act amendments to the California Fair Employment and Housing Act (FEHA), which took effect on January 1, 2001, made it clear that California's major employment nondiscrimination law contained a broader definition of "disability" than that contained in federal laws, including the Americans with Disabilities Act (ADA) of 1990. In particular, the Poppink Act clarified that FEHA covers impairments that are "limiting" (rather than "substantially limiting"), and that FEHA analyzes the extent of limitation without regard to "mitigating measures" such as medications, prosthetics, or other assistive devices.

There is, however, a current controversy over whether the FEHA definition of "disability" was broader than the federal definition prior to the Poppink Act. This controversy also raises the more general question of precisely how federal law should be referenced when interpreting California's FEHA—a question of critical importance in an era when the scope of federal disability rights laws is being increasingly narrowed by courts.

California Assembly Bill 677 becomes law

As of January 1, 2002, AB 677 amended California disability rights laws to clarify that the State of California itself and all of its agencies and departments are subject to a disability nondiscrimination mandate.

Since 1977, Section 11135 has contained a nondiscrimination mandate that applies to anyone receiving financial assistance from the state of California. However, prior to AB677, there was controversy as to whether the state itself was covered by this law.

This controversy became critically significant in the late 1990s, as the U.S. Supreme Court began to place restrictions on whether and how states can be sued under federal civil rights laws. In the face of such "state's rights" developments, strong state laws are an increasingly important resource for civil rights communities that want to ensure equal access to state programs.

Recognizing this, DREDF joined a coalition of civil rights organizations to advocate for the passage of AB677, which makes it clear that California must comply with the nondiscrimination requirements it imposes on state-funded entities. Additionally, AB677 changed the Section 11135 definition of "disability," which had previously mirrored the federal law definition. Under the revised definition, Section 11135 adopts the broader California definition of disability set out in the Poppink Act.

Davis et al. v. CHHS et al.: request for class certification

In December 2001, U.S. District Court Judge Sandra Armstrong ruled against the City of San Francisco and the State of California in their second request to dismiss the lawsuit brought against them by DREDF and other advocacy organizations, including Protection and Advocacy, Inc., the National Senior Citizens Law Center, and the AARP Foundation for Litigation, on behalf of plaintiffs who reside at Laguna Honda Hospital, the largest remaining public nursing facility in the United States.

U.S. District

Court

Following the December ruling, attorneys for the plaintiffs filed a motion for class certification. This certification would make it possible for counsel to represent the plaintiffs as a class of persons with disabilities and help to ensure appropriate injunctive relief for the thousands of people affected by defendants' practices. The lawsuit, originally filed in July 2000, challenges the city and state for failing to offer and provide home and community-based alternatives to institutionalization for people with disabilities.

With its 1,200 beds and many 30-bed open wards, Laguna Honda Hospital soaks up about 70% of the long-term care dollars expended in the City and County of San Francisco. Plaintiffs in Davis claim that the facility unnecessarily segregates and institutionalizes people with disabilities when they can be appropriately served in more humane settings in the community. The lawsuit states that long-term care policies and practices of the City and County of San Francisco and the State of California violate the June 1999 *Olmstead* decision, in which the United States Supreme Court held that states violate the ADA and discriminate against people with disabilities when they unnecessarily isolate people in nursing homes and prevent their access to community-based long-term care.

Attorneys for plaintiffs are currently engaged in settlement discussions with defendants, following a March 2002 settlement conference before U.S. District Court Magistrate Judge Edward Chen. The parties have agreed to suspend active litigation while settlement discussions proceed, with the help of a mediator.

Colmenares v. Braemar Country Club

DREDF is co-counsel, along with the Woodland Hills Law Offices of Joseph M. Lovretovich, in a vital California Supreme Court case that addresses the scope of the definition of "disability" under California's Fair Employment and Housing Act (FEHA). The case, *Colmenares v. Braemar Country Club*, is the first FEHA disability case that the state high court has heard in almost a decade.

California

Supreme Court

DREDF and Mr. Lovretovich represent Francisco Colmenares, who was a dedicated Braemar employee for over 25 years, starting as a laborer and soon gaining promotion to maintenance foreman. He was successful in his work notwithstanding a permanent back injury, until his last years of employment when he was reassigned to tasks that violated his physical restrictions, and then fired.

The lower courts refused to let the case go to trial, ruling that Mr. Colmenares was not "substantially limited," and was thus not entitled to FEHA protection. On appeal, Mr. Colmenares is arguing that FEHA has always had a broad definition of disability that covers "limiting impairments," and it should be interpreted consistently with its expansive text, regardless of the restrictive interpretations of the ADA disability definition recently endorsed by the U.S. Supreme Court.

The importance of the case is underscored by the fact that the California Attorney General, as well as a coalition of California disability community groups, filed "friend of the court" briefs on behalf of Mr. Colmenares. Briefing in the case was completed in April 2002, and the parties are awaiting notice from the high court as to the scheduling of oral arguments.

Walgreens blocks access to store aisles

A LAWSUIT was filed on May 22, 2002, alleging that Walgreen Co., one of the nation's largest drug store chains, discriminates against customers with mobility impairments, including persons who use wheelchairs. The suit was filed in Alameda County Superior Court by DREDF and the San Francisco law firm of Orrick, Herrington & Sutcliffe LLP, on behalf of Oakland resident Anne Finger.

The lawsuit, which is brought exclusively under California law, challenges Walgreens' longstanding and systemic practice of blocking access to its store aisles and retail goods. In many Walgreens stores, the aisles are routinely cluttered with large stacks of blue plastic storage bins and other types of cartons and boxes, even when Walgreens employees are not actively restocking shelves.

These portable barriers prevent Finger, a regular Walgreens customer, from seeing and reaching merchandise, which are necessary to her basic hygiene and health. Her complaints to Walgreens employees and managers have failed to correct the situation. "It's so frustrating to repeatedly point out a problem, and it never gets fixed," explains Finger. "Disability rights laws have been enormously important in opening up access. But it's so upsetting to see barriers like this and realize that the laws are being ignored." DREDF attorney Linda D. Kilb notes, "Failing to maintain accessible features such as clear aisle space is a significant impediment to access, and just as illegal as outright exclusion."

Santa Cruz Metro sued for failing to call stops

DREDF and the Denver, Colorado law firm of Fox & Robertson filed a lawsuit on April 16, 2002 in federal court in San Jose, California against the Santa Cruz Metropolitan Transit District (Santa Cruz Metro), the public, fixed route bus system in the Santa Cruz area. The lawsuit alleges longstanding violations of California and federal disability civil rights laws, including the Americans with Disabilities Act (ADA). Specifically, Santa Cruz Metro fails to call out stops and announce routes—actions that are critical to ensure access to public transportation for riders with vision impairments.

The suit was filed on behalf of Santa Cruz residents Deborah Lane and Joshua Loya, whose experiences demonstrate problems that lead to passengers ending up on the wrong bus line, or remaining on a bus past their intended destination, because drivers have failed to call stops. Ms. Lane explains, "I run the risk of missing appointments or getting stranded somewhere I'm not familiar with. That's especially frightening." Missed appointments and tardiness are also common. "Once, I ended up in the next town and had to wait for another bus to get back to the stop I wanted," notes Mr. Loya.

The lawsuit was filed after pre-litigation contact with Santa Cruz Metro failed to correct the problems, and it is directed at enforcing critical disability civil rights entitlements. "The laws were designed to ensure that people with disabilities can be full and active participants in society," says DREDF attorney Linda D. Kilb. "Accessible public transportation is essential to accomplish this purpose."

Supreme Court Setbacks

ON MARCH 14, 2002, DREDF Directing Attorney Arlene Mayerson gave the keynote address for a conference on “Disability in the New Millennium” at the University of California Boalt Law School in Berkeley. The following discussions are updated from Mayerson’s speech. The original speech can be found on the DREDF website: www.dredf.org.

Disability rights in the new millennium

“Disability in the new millennium . . . a topic that brings back memories of a great movement making profound changes in the world, a coalition working hard to pass the most comprehensive disability civil rights legislation ever enacted and a series of Supreme Court decisions that derailed our optimism and undermined our confidence that our best efforts could set things back on track. I can’t honestly underplay the disappointment, but I also truly believe that, despite the judicial setbacks, the Americans with Disabilities Act (ADA) has changed the American landscape and inserted disability into the national dialogue in a way that was unimaginable two decades ago.

Garrett: constitutionality and the 14th Amendment

“The Board of Trustees of the University of Alabama v. Garrett decision starkly demonstrates the problem the Supreme Court has applying disability to the discrimination-civil rights paradigm. In *Garrett*, the Court held that Congress lacked authority under the 14th Amendment to permit suits for money damages by people with disabilities against States for employment discrimination. I think the decision also leaves no doubt that the Court is hostile to the notion of both the discrimination underpinnings and the accommodation remedy in the ADA. The test the Court has established for valid 14th Amendment legislation is two-fold. First, did Congress establish a record of unconstitutional conduct when it enacted the statute? And second, is the legislative response proportionate to the problem presented? We failed both parts. The important thing to remember is that the recent cases require Congress to make a record of conduct that the Supreme Court believes is unconstitutional. It matters not that Congress considered the conduct violative of equal protection principles.

“While *Garrett* has limited practical effect because most State agencies can be sued under Section 504, the tenor of the *Garrett* decision is nasty and dismissive, striking a blow to the understanding of disability as a civil rights issue. [Note: DREDF co-counseled *Garrett* with Mike Gottesman and the Bazelon Center.]

DEFINITIONS OF DISABILITY

Sutton Trilogy: mitigating measures

“The definition of disability in the ADA incorporates the three-prong definition from Section 504:

- A physical or mental impairment that substantially limits one or more major life activities
- A record of such an impairment
- Being regarded as having such an impairment

“Prong one incorporates a functional approach that looks to the characteristics of the individual. The second and third prongs, ‘record of’ and ‘regarded as,’ incorporate the social relations approach, which looks to the conduct of the defendant. From this perspective, disability is attributed primarily to the negative reactions to an impairment rather than to the extent of the impairment itself.

“With the exception of the *Bragden* case, which found that a person with asymptomatic HIV infection is covered by the ADA, the Supreme Court disability definition cases reinforce traditional notions of disability, continually narrowing ADA coverage.

“The Court understands that the ‘truly disabled’ are covered by the law: the same people who have historically been relegated to a life of dependence. But the idea that someone can be ‘disabled’ because they are subjected to adverse treatment based on an impairment just doesn’t compute, no matter how absurd the consequences. For example, in the Sutton trilogy, the so-called “mitigating measures” cases, the Court held that a person’s limitation should be assessed with the use of whatever device or medication the person uses to mitigate the effects of the disability. So a person with diabetes who is not hired because of the diabetes cannot use the ADA to challenge this decision if the diabetes is under control through medication. If the same person fails to deal with the strict regimen required, and the diabetes goes out of control and causes symptoms, the person would be entitled to bring an ADA suit but may not be qualified for the job because of the symptoms. Catch 22? And after *Sutton*, a court held that our client who uses a prosthesis because of a congenital amputation is not disabled because he functions so well. But he was rejected by the employer because of the prosthesis. Go figure. [Note: DREDF wrote an amicus brief for the Sutton cases on behalf of members of Congress.]

Toyota v. Williams: what is a “substantial limitation”?

“In this case, a woman developed carpal tunnel syndrome, tendonitis, and other musculoskeletal impairments on the job. She was able to perform a modified duty job on the assembly line. When Toyota increased her job duties, she experienced pain and asked to be reasonably accommodated by being returned to her previous job, which she had successfully performed. Toyota refused and Williams brought her case under the ADA.

“This case presented the Court for the first time with the question of how ‘substantial’ is ‘substantially limiting.’ The Court stated that Congress intended the definition to ‘create a demanding standard for qualifying as disabled.’ Even though the plaintiff had severe vocational restrictions, she was not limited enough, because in a deposition she said that she still did some household chores. She also said that she restricts her activities with her children, her driving, and her leisure activities. But the Court expressed its view that those activities were not essential in most people’s lives and unlikely to be enough to qualify as a disability under the ADA.

[Note: DREDF wrote an amicus brief in this case on behalf of the National Council on Disability (NCD), an independent federal agency that makes recommendations to the President and Congress on issues that affect Americans with disabilities.]

RECENT CASES

Barnett and Chevron: narrowing the ADA

“Two recently decided cases seriously undercut the original conception of the ADA. In *U.S. Air v. Barnett*, the Court considered whether reassignment to a vacant position is a reasonable accommodation. The question before the Court was this: Must an employer reassign a disabled employee to a position that a more senior employee would have a right to under an employer-sponsored seniority plan? The Court held that seniority will be presumed to trump the ADA, but most importantly the Court opened up a new loophole for employers who can claim that an accommodation is “unreasonable” even if it does not cause an undue “hardship.” This was not intended—the only defense intended was “undue hardship.”

“The Court also decided *Eschazabal v. Chevron*, which determined whether employers can reject workers who are able to do the job but who pose a threat to themselves. The ADA says that an employer can reject an applicant who poses a direct threat to others. *Chevron*

argued that safety to the worker himself or herself is a job-related qualification standard because if a worker dies or gets injured on the job it is bad for morale and public relations, and it subjects the company to potential liability. Mr. Eschazabal and his amici argued that the ADA rejected paternalism as a major barrier for people with disabilities who have been excluded from all kinds of community activities ‘for their own good.’ The Court decided, again, for the employer. [Note: DREDF co-counseled a brief on behalf of the disability community.]

Supreme Court

LONG-TERM INTERESTS

“After *Williams*, my media line was that the Supreme Court had raised the bar but not closed the door. Others called for an immediate legislative response. We must consider realistic legislative scenarios.

“Do we go for a more limited but potentially sellable mitigating measures fix? This would restore the understanding of the Circuit Courts and the EEOC prior to *Sutton* that disability should be determined without regard to mitigating measures. That approach would restore coverage to people with diabetes, epilepsy, and other conditions that can be mitigated. But that would leave out people such as Ms. Williams, who has carpal tunnel syndrome. Or do we go for a more ambitious rewriting of the definition of disability that would address all of the definition problems?

“A piecemeal approach will not serve our long-term interests. So long as the term ‘disability’ is defined in medical-functional terms, it carries baggage that obscures the social relations approach and that reinforces the Court’s traditional views of disability. Rather, we need to turn the focus to the merits: Is the person qualified, is the accommodation an undue burden, is the modification requested a fundamental alteration?

“But in the real world, concepts are only as good as the votes they elicit, and votes are dependent on an army of people who devote themselves to the cause. We need to rally the troops! We have come a long way, but we need to recharge—we may have a big fight on our hands!”

SILVIA YEE AWARDED INTERNATIONAL FELLOWSHIP



Guadalupe Lobo

Costa Rican disabilities activists Martín Vegas, Luis Mora, and Silvia Yee (with Luis' service dog, Jared).

SILVIA YEE has begun work as the first DREDF International Law and Policy Fellow. Yee is a lawyer trained in Canada who first came to the United States to study musicology at the University of California, Berkeley. Her

humanities graduate studies, social policy interests, and understanding of different legal systems lend an inherent international and cross-disciplinary character to her work with DREDF.

As a Fellow with DREDF,

Yee is monitoring different national and international approaches to fighting disability discrimination. She also functions as a liaison between DREDF and other regional or international legislative efforts that may require non-governmental support (she participated in the training for El Foro in Costa Rica in December 2001—see “Si se puede”), and she is compiling and coordinating an electronic database of international disability discrimination laws. While Yee’s primary international focus is on developments that directly or indirectly concern national and international laws (that is, enactments that are enforceable at an official level), she is also researching how law is influenced by social policies

that address, or fail to address, disability concerns besides those of welfare, rehabilitation, or medical science. Nationally, Yee will be involved with DREDF’s ongoing litigation work in preserving civil rights for people with disabilities in the U.S.

A decade of growing international apprehension of disability as a human rights issue paved the way for the United Nations’ Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1993. The Standard Rules, in its turn, served as an inspiration and a practical blueprint for numerous domestic national disability anti-discrimination laws that have been enacted in the past decade. The Organization of American States enacted the first binding regional treaty on disability discrimination in 1999, and the Inter-

American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities officially entered into force on September 14, 2001.

The United Nations is currently taking its first steps towards drafting a legally binding Convention that will specifically address disability discrimination. These actions of distinct nations and organizations, separated in space and time, offer hope to people with disabilities in various nations and regions. Even more profound is their collective force as a harbinger of the real change that can be achieved when 600 million people with disabilities all over the world fight together for accessibility and inclusion.

International
Affairs

[IDEA] continued from front page

according to the particular issue by:

- Targeting specific states, communities within states, and members of Congress key to particular issues
- Countering arguments made by IDEA critics
- Offering alternatives to proposed amendments
- Providing parents with updates and alerts and coordinating with other civil rights organizations
- Collaborating with advocacy groups and networks

The Rapid Response Network has aggressively addressed proposed changes to IDEA that weaken, eliminate, or in any way compromise the civil rights of children with disabilities in the briefings that have been published in its first four months.

Response from parents to DREDF’s RRN has been astonishing. Within the first two days of the electronic announcement of the Network, DREDF received about 500 emails from parents who want to be involved. At press time, RRN subscriptions number over 1,800.

To receive email information about reauthorization activities and/or to participate in the Network, please send an email to preserveIDEA@dredf.org. Include your name, contact information (postal address, telephone number, and email) and whether you only want updates or would also like to participate in the Network.

Key issues: discipline and funding

Two primary issues have taken center stage in proposals to change the IDEA. “Discipline” has become a touchstone of special education controversy. Among the most serious proposals are those to permit cessation of services to children with disabilities and to expand the unilateral authority of school districts to remove children considered “disruptive” from regular school environments.

Full funding for IDEA is another hotly debated issue. The law’s original mandate specified increasing federal support until it covered 40% of the extra costs of educating students with disabilities, yet federal spending on special education has never exceeded about 12% of the total costs.

Proposals potentially most damaging to IDEA from a disability rights perspective present a blueprint to weaken this law by:

- Eliminating large numbers of children, particularly those with learning disabilities, from eligibility to receive special education services
- Emphasizing learning to live with rather than accommodating disability-related limitations
- Limiting the length and specificity of Individual Educational Plans (IEPs) and holding IEP reviews every three years, thus limiting any meaningful parent participation and undermining the IEP as a working document

The strength of IDEA lies in its focus on individualized planning for each student’s particular needs. DREDF advocates believe that IDEA cannot be a standardized one-size-fits-all educational program, which length and content limitations will surely promote.

Minority concerns

Administration critics of IDEA have repeatedly noted the over-identification of children from minority backgrounds, claiming that these children primarily face problems of literacy rather than of disability.

Yet minority children are also under-identified for special education services in large part because of an entrenched social ideology of lowered academic expectations for them. In addition, there is a correlation between socioeconomic status and disability: a higher incidence of disability exists in poor communities.

Focusing only on a narrow understanding of minority over-representation in special education offers IDEA critics a way to argue for elimination of a possibly large group of children from special education services without an initiative to ensure entitlement to other intervention services.

Current activity

At various public meetings over the first months of 2002, members of the Bush administration and leaders in the Department of Education were roundly critical of some of the key provisions of IDEA. Some administration statements have forcefully criticized the use of attorneys and advocates by parents, without looking at the circumstances (widespread non-compliance and non-implementation) that lead to the need for families to seek outside advocacy for their children’s educational needs. IDEA critics propose to

cap the fees such attorneys can receive from school districts when parents win their cases. Such a cap would signify a major departure from other civil rights laws and greatly reduce the availability of legal assistance to parents.

Political process

Before enactment of the IDEA federal protections, only one in five students with disabilities was educated in public classrooms in the United States. Others were excluded from public schools altogether, received inappropriate services, or were institutionalized. Today, almost six million children and young adults with disabilities qualify for educational interventions mandated by the IDEA.

Yet despite the documented gains of IDEA, students with disabilities continue to face obstacles to academic success. The law has not been adequately implemented or enforced. Critics of the law have misunderstood its requirements and the nature of the barriers in the special education service delivery system. Poor educational outcomes, disability rights advocates contend, are not caused by the law but by the failure to implement and enforce it.

However, Assistant Secretary of Education for the Office of Special Education and Rehabilitative Services (OSERS) Robert H. Pasternack has stated that he does not want to be a “cop” with respect to the states and IDEA enforcement. Enforcement of this law lacks “teeth” at the federal level, so compliance with current law or an amended IDEA rests largely with the discretion of states and local school districts.

Democrats in Congress are hoping to have a bill out and acted upon before the November elections, while the Republicans, thinking they will win a majority in both houses, are aiming to stretch out the process without a vote until after the elections. In either event, DREDF’s Rapid Response Network is working at full steam with other organizations and networks to preserve the hard-won educational rights for children with disabilities.

See opposite page: how to order DREDF’s IDEA T-shirt

Special
Education



Silvia Yee

Costa Rican children attend the Presidential debates.

The Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities builds on the “Panama Commitment to Persons with Disabilities in the American Hemisphere” and the “Protocol of San Salvador,”

which declares that “everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality.”

Still, much progress remains to be made. Despite a March 1998 decree issued subsequent to the approval of Law 7600 and intended to guarantee the accessibility of public transportation to people with disabilities and those with restricted movement, none of the 5000 buses in Costa Rica is accessible for a person with a mobility impairment. The law gave the Public Works and Transport Ministry seven years to complete necessary changes in the bus system, but with less than two years to go, the process has yet to begin.

El Foro, with the help of the Center for Justice and International Law (CEJIL), a human rights law firm in Washington, D.C., recently took this case to the Inter-American Human Rights Commission. The case accuses the Costa Rican government of violating the rights of its disabled population by not guaranteeing citizens access to basic services such as public transportation. El Foro had already exhausted domestic channels available to plaintiffs when, in January 2001, the High Court in Costa Rica ruled that the 1998 decree’s time limit had not yet expired, and therefore no allegations of violations of human rights could be heard. The Washington, D.C.-based Commission has accepted the case and referred it to the Inter-American Human Rights Court in San José.

The workshop in December cemented a transnational alliance founded on respect for every individual and the common desire to work together to achieve equality for people with disabilities in Costa Rica and around the world. With its focus on establishing a sound legal status for disability rights organizations and ensuring that disability is recognized as a human and civil rights issue rather than only a matter of welfare

or rehabilitation, the workshop trained its participants in specific, street-wise organizing and advocacy strategies.

DREDF has received funding from the Bureau of Educational and Cultural Affairs to conduct a second workshop focused on issues that affect women with disabilities in Costa Rica, which will take place this fall.



Silvia Yee

Federico Montero speaks at the workshop.

Wear a bright IDEA and support DREDF!

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PHILANTHROPIC DOLLARS DIFFICULT TO FIND FOR DISABILITY RIGHTS ADVOCACY

WHILE virtually all national legal organizations dedicated to advancing civil rights for minorities, women, gays and lesbians, and most other disenfranchised groups have received substantial support from leading national philanthropic and corporate foundations, disability rights has yet to receive the same level of commitment. While this observation is based in part on the experience of DREDF and our colleagues in the field over the past twenty years, it is also supported with grant data published by The Foundation Center.

Very few private foundations or corporations have consistently funded national programs in cross-disability civil rights law and policy. In fact, not enough attention has been paid to the dearth of private funding for the field as a whole.

The Foundation Center publishes two databases that include information about the nation’s largest 10,000 foundations, and approximately 150,000 grants awarded by the top 1,200 funders during the most recent three years that have been reported. This data reveals some critical trends.

Disability civil rights grants represent about 2% of the total support provided to traditional, primarily medically based, disability causes. For example, a grant search by subject yields 162 grants made during the reporting period that are categorized as “civil rights, disabled” as compared with the category “disabled” in which 7,445 grants appear. The latter category encompasses primarily traditional charitable, rehabilitative, or medical services provided according to disability or diagnostic type such as Cerebral Palsy or Muscular Dystrophy, and programs such as the Special Olympics.

The 162 grants noted in the “civil rights, disabled” category represent approximately 3% of the total of 4,940 grants awarded in all civil rights areas, including advocacy, minorities, race/intergroup rela-

tions, women, voter education, immigrants, and sexual minorities. The numbers indicate that disability rights is being given short shrift.

According to the data collected by the Foundation Center, only 83 foundations support disability civil rights programs. (Others might fund disability rights, but they report their funding in a different category or are not included in these databases.) The majority of these are community foundations whose focus is a particular geographic area. A notable exception is the Soros Foundation, which funds important, leading-edge international disability rights reform projects.

Very few of the organizations that receive funding from the approximately 83 foundations that support disability rights focus on national law and policy reform. Programs carried out by the few grantees that do receive support in the “civil rights, disabled” category are very important, often critical to local communities, but they don’t necessarily address the broader, national law reform issues.

Furthermore, some of the very few larger, national grants that are reported in the civil rights category have gone to worthy efforts such as paying for a statue of President Franklin D. Roosevelt seated in his wheelchair that now greets visitors to the Roosevelt Memorial. Important as this achievement is as a statement of empowerment and recognition for the disability community, it does not advance a civil rights agenda based in law.

Corporate and foundation funding is crucial for the kind of cutting edge policy and legal work that disability rights agencies such as DREDF do. In light of the enormity of the challenges we face and the few people doing the work, it is especially important during this period of widespread financial distress to increase funding for social justice work.

Disability

Funding



Tom Olin

DREDF CO- FOUNDER MARY LOU BRESLIN HONORED

Mary Lou Breslin accepts the prestigious Henry B. Betts award.

MARY LOU BRESLIN, a co-founder of DREDF and a highly passionate, respected, and effective advocate on behalf of people with disabilities in the U.S. and around the world for more than 25 years, was selected by a national jury to receive the prestigious Henry B. Betts Award. The presentation of a \$50,000 cash award was made to Breslin at the American Association of People with Disabilities (AAPD) Leadership Gala on February 27, 2002 in Washington, D.C.

Breslin's pioneering efforts to promote disability civil rights began in the 1970s when she organized and trained thousands of people with disabilities about the new federal disability rights law, Section 504 of the 1973 Rehabilitation Act. With the clear purpose of improving the quality of life for people with disabilities through civil rights law and policy reform, in 1979 she co-founded DREDF, the nation's first cross-disability civil rights law and policy center, and she has sustained DREDF ever since.

Breslin's blend of experience in the disability movement is also reflected in cutting edge scholarship, primarily at the University of California at Berkeley. She inspired the acquisition of original historical materials about the disability movement, and scores of oral histories, by the University of California's Bancroft Library and Regional Oral History Office. She has gone on to develop and teach new courses in the Disability Studies Program using this groundbreaking research collection.

Much of her success on behalf of DREDF as well as the entire disability rights movement, according to her colleagues, has to do with Breslin's ability to rally, organize, and inspire other advocates—not just those in the disability community, but also in the broader civil rights community. "She has all the qualities of the general and all the qualities of the soldier," explains Arlene B. Mayerson, Directing Attorney for DREDF. "She blazes the trail and maintains it; and she can persuade through forceful advocacy or quiet diplomacy."

The Prince Charitable Trusts and the Rehabilitation Institute of Chicago established the Henry B. Betts Award in 1989, to annually honor, acknowledge, and support the work of one individual who has, during the course of his or her career, made extraordinary contributions to the quality of life of people with disabilities. The award is named in honor of Henry B. Betts, M.D., a pioneering leader in the field of rehabilitation medicine who started his career with the Institute in 1964.

Breslin's accomplishments have inspired advocacy and coalition building that have had a dramatic, positive impact on the disability community in the United States and internationally. It was because of her leadership and advocacy that DREDF, for over a decade, was able to lay the groundwork for the 1990 passage of the landmark Americans with Disabilities Act (ADA).

"AAPD is honored to collaborate with the Rehabilitation Institute of Chicago on the presentation of this highly distinguished award to recognize a pioneer who has helped to redefine the disability experience in America," says Andrew J. Imparato, President and CEO of AAPD.

"At the heart of Mary Lou Breslin's accomplishments is her tenacious belief that change in law and policy will enhance opportunities for people with disabilities," explains Susan O'Hara, Senior Policy Advisory in the Regional Oral History Office of The Bancroft Library. "She brings to her work a ferocious will to make things happen, a mighty ability to bring people together, inspire them, and enable them to believe in their own power to effect change."

Mary Lou Breslin exemplifies the leadership qualities and vision of Dr. Betts and of previous recipients of the Henry B. Betts Award. Previous recipients include luminaries like Judith E. Heumann, who went on to be the Assistant Secretary of the Office of Special Education and Rehabilitative Services at the U. S. Department of Education; Lex Frieden, who President Bush has nominated to chair the National Council on Disability (NCD); and Marca Bristo, appointed by President Clinton to chair NCD.

Betts

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ADA hotline continues

SUPPORT FROM the Christopher Reeve Foundation will enable DREDF to continue to respond to questions and inquiries about civil rights matters from the disability community nationwide, despite the loss last fall of funding from the Department of Justice. From 1991 to 2001, the DOJ funded a DREDF toll-free "hotline" because it saw an overwhelming need for accurate information about the scope and requirements of the ADA.

DREDF's ADA Hotline has responded to over 105,000 inquiries. Although funding from DOJ has ceased, the volume of calls and the need for information has not stopped and DREDF will continue to solicit funding to support the Hotline. The Hotline number is 800.348.4ADA.

In addition to calls about the ADA, DREDF staff members answer questions about other federal and state disability civil rights laws and provide extensive referral to other agencies.

Special

Projects

ADA Title III Compliance Package [includes "Open for Business" Video & "Access Equals Opportunity" Brochures]

► Open For Business

An award-winning film that shows the disability and business communities working together in one small town to remove architectural barriers, as required by the ADA.

► Access Equals Opportunity

Seven brochures in a question and answer format addressing ADA Title III compliance.

Package Price: \$179.00.

Price for Disability Organizations: \$129.00.

ADA: An Implementation Guide [The Bluebook]

DREDF's Implementation Guide offers a detailed, thorough analysis of all the law's provisions, encompassing ADA legislative history, the statute, and regulations.

Price: \$100.00. Price for Disability Organizations: \$75.00.

DREDF ADA Materials Available

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