November 2017

Protecting the Rights of the Mentally Disabled in Administrative Proceedings

Robert T. Drapkin
PROTECTING THE RIGHTS OF THE MENTALLY DISABLED IN ADMINISTRATIVE PROCEEDINGS

THE RIGHT TO LEGAL REPRESENTATION

ROBERT T. DRAPKIN*

Mental illness is measured by the presence or lack of characteristics common to normally functioning individuals. Such characteristics include an adequate perception of reality, an ability to control one's own behavior, productivity, an ability to control oneself, self-esteem, an ability to have affectionate relationships, and self knowledge.1 The characteristics are what enable us as individuals to carry out day to day activities and to deal with everyday life. The fewer characteristics a person possesses the more severe the mental disability, and thus, the lesser capacity to carry out the simplest day to day tasks. In response to the difficulties encountered by mentally disabled individuals, the government introduced Home Relief (HR)2, Social Security Disability Insurance (SSDI),3 and Supplemental Security Income (SSI)4 public benefit programs. Despite the government's initiative, however, it seems that eligible individuals are not receiving benefits. It is asserted that the process by which benefits are obtained is difficult and complex, thus making the application process undesirable. In order to

---

* Robert T. Drapkin is a practicing attorney in New York City.
1 RITA L. ATKINSON, ET AL., INTRODUCTION TO PSYCHOLOGY 618 (11th ed. 1993).
2 42 U.S.C.A § 1382 (West Supp. 1997); see also Peter Kihss, City Studies Home Relief Recipients, N.Y. TIMES, July 25, 1982, at 36 (describing Home Relief as "a catchall category of welfare in which costs are shared equally by the state and city, with no contribution from the Federal Government. Most recipients are employable childless adults . . .").
facilitate the availability of public benefits, mentally ill individuals should be assigned guardians ad litem.\(^5\)

Since the earliest days of the common law, the legal rights of those unable to protect themselves in judicial proceedings have been protected by guardians ad litem.\(^6\) Today, in all American jurisdictions, those who are unable to function in modern, sophisticated, judicial settings are protected.\(^7\) Despite the absence of formal adversarial confrontations in administrative adjudication, and some informality in the proceedings, the growing complexity of the law and of society mandates that protections be extended to recipients and applicants for benefits. Consider, by way of example, the following typical, but not actual, cases:

1. A retiree, functionally illiterate in English, applies for Social Security benefits but is stymied by the difficulties of obtaining a foreign birth certificate.
2. An elderly recipient of food stamps receives notice she must recertify. She sets the notice aside, and forgets where she puts it.
3. An elderly Alzheimer’s patient lives alone in a public housing project. Her granddaughter moves in ostensibly

---

\(^5\) “A guardian ad litem is a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs.” BLACK’S LAW DICTIONARY 706 (6th ed. 1990).

\(^6\) Bracton, writing in the mid-thirteenth century, notes the provision of tutors and curators—offices derived from Roman law and corresponding roughly to guardians of persons and property, respectively. For a litigant “insane or of unsound mind, so that he knows not how to understand, or has no understanding at all, for such men are not far removed from brute beasts, which lack reason.” 4 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 308 (Woodbine ed. & Thorne trans., 1977). Edward Coke, a late eighteen century commentator, wrote: “Also there was a time when idiots, madmen, and such as were deaf and dumbe naturally, were disabled to sue, because they wanted reason and understanding (tales enim non multum disant a brutis). But at this day they all may sue; for the suit must be in their name, but it shall be followed by others.” 1 COKE, INSTITUTES OF THE LAWS OF ENGLAND 135.

In the case of infants, guardians ad litem had their roots in equity. In the case of incompetent adults, guardians ad litem had their roots in the ancient legal writ de custodia admittendo. COKE, supra at 88b n.16. A writ de custodia admittendo is a “writ for admitting a guardian.” BLACK’S LAW DICTIONARY 412 (6th ed. 1990).

to help her, but instead misappropriates her Social Security checks to buy drugs. She supplements what she steals from her grandmother with earnings from prostitution. Notice is sent that an administrative hearing will determine whether the tenancy should be terminated on the grounds of chronic rent delinquency and on the grounds that the elderly tenant permitted drug use and prostitution in her apartment. The old lady defaults.

This article posits two new ideas. First, that guardians ad litem are required for mentally disabled individuals in administrative, as well as judicial proceedings. Second, because no statute expressly provides for guardians ad litem, the Constitution must.

I. DUE PROCESS\textsuperscript{8} REQUIREMENTS IN ADMINISTRATIVE PROCEEDINGS—A FEW FUNDAMENTALS

By the turn of the century, administrative procedures were subject to Due Process.\textsuperscript{9} In \textit{Yamataya v. Fisher},\textsuperscript{10} a case involving administrative deportation proceedings, the Supreme Court stated:

\[\text{[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.}\textsuperscript{11}\]

The landmark case \textit{Goldberg v. Kelly}\textsuperscript{12} established governmental benefits as “property” within the ambit of Due

---

\textsuperscript{8} The Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI (emphasis added). As the Sixth Amendment is applicable in criminal proceedings only, this article shall, despite some superficial resemblance of issues to those under the right to counsel cases, proceed under Fifth Amendment Due Process analysis only.

\textsuperscript{9} The Fifth Amendment, applicable to actions by the federal government, states, in relevant part, “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. V. The applicability of Due Process was extended to the states by the reconstruction era’s Fourteenth Amendment.

\textsuperscript{10} 189 U.S. 86 (1903).

\textsuperscript{11} Id. at 100.

\textsuperscript{12} 397 U.S. 254 (1970).
Process. The question presented was whether welfare recipients were entitled to evidentiary hearings before an impartial decision-maker prior to a termination of benefits. Analogizing property law and property rights such as franchises, professional licenses, farm subsidies, airline routes, and television channels, which did not fall within traditional common-law concepts of property, the court stated, "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" The court continued, "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights." The decision suggests that statutory public benefits were a species of property protected by due process from unwarranted governmental deprivation by due process.

The next issue the court addressed was the extent to which the recipient of public benefits must be afforded procedural due process. The Court determined that the applicable standard of review was to examine the extent to which an individual would be "'condemned to suffer grievous loss.'" Grievous loss is generally determined by holding evidentiary hearings prior to terminating benefits. Often, individuals left destitute because of wrongful termination are deemed to have suffered a grievous loss.

The Court noted the tension between the government's interest in providing welfare as a means of preventing social malaise and securing individual liberties, and the "countervailing governmental interests in conserving fiscal and administrative resources." The Court discounted the
government’s interest, noting that the increased costs involved in providing pre-termination hearings regarding welfare termination could be minimized by “skillful use of personnel and facilities.”

The Goldberg Court held that disabled individuals, like all individuals are entitled to due process and must be afforded an opportunity to be heard “‘at a meaningful time and in a meaningful manner.’” The hearing “must be tailored to the capacities and circumstances of those who are to be heard.” The unfortunate downside is that “[t]he prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have.” In response to the special needs of the disabled, voluntary representation was established. It is asserted, however, that the right to representation is not sufficient protection, and that disabled individuals need to be assigned counsel in order to adequately protect their interests.

The rule of Goldberg v. Kelly was refined and limited by the Supreme Court’s subsequent ruling in Mathews v. Eldridge. The Court held that a disabled individual whose SSDI benefits were being terminated was not entitled, as a matter of due process, to a pre-termination evidentiary hearing of the type required by Goldberg. The Court delineated a tripartite test to determine the necessary procedures by which an administrative agency could effect the termination of benefits.

The following factors are considered:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function

20 Id. at 266.
21 Id. at 267 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
22 Id. at 268–69. It is a thesis central to this article that at a certain level of disability, where mentally ill persons are unable to meet the demands of complex bureaucracies, unable to gather documents, meet deadlines, or attend hearings, only notice to responsible third parties such as guardians ad litem can be meaningful.
23 See id. at 269 n.16 (quoting Wedemeyer & Moore, The American Welfare System, 54 CAL. L. REV. 326, 342 (1966)).
24 See id. at 270.
involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.26

In this instance, the Court found that due process did not require a pre-termination evidentiary hearing—eligibility for Disability Insurance benefits was not based on financial need, and the recipient had other resources available, such as income from other family members, insurance, pension, or savings.27 The Court focused on the first of the factors stated in its test, holding that "[t]he potential deprivation here is generally likely to be less than in Goldberg..."28

While the courts have found due process violations where mentally ill persons have been deprived of statutory public benefits, and have ordered new administrative hearings regarding the deprivation of property,29 they have declined to appoint representation during such hearings. However, courts have ordered that mentally ill prisoners, probationers, and parolees be provided with representation in some types of administrative disciplinary hearings prior to a proposed administrative deprivation of liberty.30 To provide mentally ill individuals with representation in only those limited circumstances is inconsistent with the notion of due process. If they are entitled to representation to protect their liberty interests, they should also be entitled to representation to protect their property interests in statutory entitlements.

26 Id. at 335; see also, e.g., American-Arab Anti-Discrimination v. Reno, 70 F.3d 1045, 1061 (9th Cir. 1995); Padilla-Agustin v. INS, 21 F.3d 970, 974 (9th Cir. 1994); Valmonte v. Bane, 18 F.3d 992, 1003 (2d Cir. 1993) (citing the Mathews v. Eldridge test).
28 Id. at 341.
29 See, e.g., Parker v. Califano, 644 F.2d 1199, 1203 (6th Cir. 1981) (holding that Due Process requires that administrative res judicata could not be raised against a claimant who belatedly raised an issue of mental illness); Shrader v. Harris, 631 F.2d 297, 302 (4th Cir. 1980) (holding that denial of benefits to one unable to prosecute a claim due to mental disability constituted a violation of due process); see also infra Section III.
30 See infra Section III. See, e.g., Vitek v. Jones, 445 U.S. 480, 496–97 (1980) (holding that counsel should be provided to prisoners suffering from mental disease when the state seeks to treat them as mentally ill).
II. SOCIAL SECURITY TERMINATION CASES

The leading case in this area is Shrader v. Harris. Shrader, a Vietnam veteran, filed several times for SSDI based on a service-related disability, and was denied each time. Each time, he failed to follow the statutory appeals process. The appeals process entitled the applicant to reconsideration of the claim and an administrative hearing. Rather, the veteran filed anew each time, alleging the same disability and onset date. He was unrepresented.

On his fourth attempt to qualify for benefits, a decade after his first application and denial, he alleged a psychiatric disability. The alleged onset of the psychiatric disability predated the first application. He filed for reconsideration of his denial this time, and the reconsideration was also denied. Subsequently, he filed for a hearing before an Administrative Law Judge (ALJ). The ALJ dismissed the request for a hearing, citing that res judicata applied to the previous applications, and that Shrader was barred from re-litigating the issues he had previously raised.

The court of appeals held that due process considerations overrode the doctrine of administrative res judicata. The court phrased the issue:

[W]hen mental illness precluded a pro se claimant from understanding how to obtain an evidentiary hearing after ex parte denial of his application for benefits, does the summary dismissal on res judicata grounds of his motion for a hearing with respect to a subsequent application deprive that claimant of property without due process of law?

The court progressed sequentially through the tripartite Mathews v. Eldridge analysis. First, it held that the private interest involved was significant. If the administrative decision were permitted to stand, it would deprive Shrader of all Social Security benefits. Second, it held that the risk of an erroneous deprivation of benefits would be high if the ex parte decision were to stand, as he would be denied a de novo evidentiary hearing on the issue of whether his "mental condition

31 631 F.2d 297 (4th Cir. 1980)
32 Id. at 301.
33 See id.
34 See id.
prevented him from understanding the administrative process for appealing his prior claims and the consequences of his failure to pursue this process during the course of his pro se applications." Third, the court held that the government's burden during the hearing would be slight. The government would be prevented from raising the issue of administrative res judicata only where the claimant raised issues of mental disability to pursue his claim during the period when the bar became effective. If the claim was made without holding an evidentiary hearing on the issue of the disability, and if a disability was found, then an evidentiary hearing would be held on the merits of the claim. Thus, for the first time, a court decided that the denial of benefits to one unable to prosecute a claim due to mental disability constituted a violation of Due Process.

Without citing Shrader, the Sixth Circuit independently reached the same conclusion in Parker v. Califano. In Parker, the court also held that Due Process required that administrative res judicata could not be raised against a claimant who belatedly raised an issue of mental illness.

Other circuit courts of appeal have decided cases in accordance with Shrader and Parker. No court of appeals has

---

35 Id. at 302-03.
36 See id. at 302.
37 See id.
38 644 F.2d 1199 (6th Cir. 1981).
39 See id. at 1203. The court defined the issue and held as follows:

The claim presented here by Parker alleges, in effect, that it is a denial of due process for a claimant to be precluded from litigating her claim for benefits because of a failure to proceed in a timely fashion from one administrative stage to the next when the claimant did not receive meaningful notice and the opportunity to be heard. The alleged defect in notification does not concern the content of the standard notices, which were admittedly mailed and received, but relates to the ability of the claimant to understand and act upon them. Parker's contention is that, because she did not have the mental ability to understand and comply with the notice of further administrative procedures, she did not receive meaningful notice and an opportunity to be heard .... We think Parker presents a colorable argument that she failed to understand and act upon the notice she received because of her mental condition, and that a denial of benefits based upon this failure is a denial of due process.

Id. at 1203.

40 See, e.g., Evans v. Chater, 110 F.3d 1480 (9th Cir. 1997) (rejecting the plaintiff's due process claim because his mental condition did not impede his ability
failed to recognize the doctrine. The issue has not been before the Supreme Court.

Many circuit cases involve situations where an administrative decision is reopened on constitutional grounds after many years have passed, after the claimant has already suffered a deprivation, and after he has obtained representation or his mental condition has improved.

III. MENTALLY ILL PRISONERS AND THE RIGHT TO ASSIGNED REPRESENTATION

In the previous section, we investigated the violation of due process that occurs when a mentally ill person is deprived of statutory benefits without representation. In this section, we investigate the solution. Specifically, the issue is whether assigned representation is a viable remedy for a due process violation.

Prisoners, probationers, and parolees are not generally entitled to either retained or appointed representation during administrative disciplinary hearings for violation of prison regulations, subject to some exceptions. For example, in Gagnon v. Scarpelli, the United States Supreme Court ruled:

Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request

to pursue appropriate administrative remedies); Cottrell v. Sullivan, 987 F.2d 342 (6th Cir. 1992) (rejecting plaintiff's claim because the procedure by which his claim for benefits was denied was not constitutionally defective); Lewellen v. Sullivan, 949 F.2d 1015 (8th Cir. 1991) (recognizing the existence of the doctrine, but holding it inapplicable under the facts of the case); Young v. Bowen, 858 F.2d 951 (4th Cir. 1988) (holding that the appellant's mental condition rendered her incapable of pursuing her claims for benefits through a full administrative appeal, and that refusal to re-open those claims based upon procedural res judicata was a violation of due process); Elchediak v. Heckler, 750 F.2d 892 (11th Cir. 1985) (holding that claimant presented a colorable constitutional claim since he was precluded from litigating the denial of disability benefits because mental illness prevented him from proceeding administratively, in a timely fashion); Penner v. Schweiker, 701 F.2d 256 (3d Cir. 1983) (holding that a failure to provide the claimant with adequate notice of his right to request a hearing regarding the denial of disability insurance benefits constituted a due process violation).

See United States v. Gouveia, 467 U.S. 180, 192 (1984) (holding that respondents were not constitutionally entitled to appointed counsel); Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) (refusing to entitle inmates to retained or appointed counsel in disciplinary hearings).

counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.43

The Court has long shown special consideration for the right to legal assistance for prisoners with disabilities. In Johnson v. Avery,44 the Court invalidated Tennessee prison regulations prohibiting a prisoner from helping another prepare a writ of habeas corpus.45 The Court, reasoning that such a rule would prevent many from filing the writ, held:

There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that.... Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited.46

In Wolff v. McDonnell,47 the Court held that assigned counsel was not constitutionally required for all incarcerated prisoners (as opposed to probationers and parolees) facing disciplinary proceedings that could result in loss of good time credit.48 The Court held that the appointment of counsel for disciplinary proceedings would cast an adversarial shadow upon the proceedings,49 effectively negating the very purpose of the proceeding. The court went on to discuss the significant burden

43 Id. at 790–91 (emphasis added).
45 See id. at 487.
46 Id.
48 See id. at 570.
49 See id.
of providing counsel to all qualified inmates. Because of the large number of hearings conducted, the court would encounter practical problems in finding enough attorneys to represent qualified individuals at the proceedings.

But regarding those under a disability, the court stated:

Where an illiterate inmate is involved, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff.

Coming closer to grips with the issue at hand, the Supreme Court has repeatedly held that when a mentally ill prisoner decompensates under the stresses of imprisonment and the prison contemplates taking steps to provide appropriate psychiatric assistance to control the situation against the prisoner’s will, the prisoner is entitled to representation at the subsequent administrative hearing.

In *Vitek v. Jones*, the prisoner faced transfer to a mental hospital after an administrative hearing. Finding a deprivation of liberty in the transfer that exceeded the prisoner’s imposed sentence because conditions of his confinement would be changed, the Court “recognized that prisoners who are illiterate and uneducated have a greater need for assistance in exercising their rights.” The court also recognized that “[a] prisoner thought to be suffering from a mental disease or defect requiring involuntary treatment probably has an even greater

---

50 See id. (anticipating delays and the inability to supply enough attorneys).
51 See id.
52 Id.
55 See id. at 484.
56 See id. at 488.
57 Id. at 496.
need for legal assistance, for such a prisoner is more likely to be unable to understand or exercise his rights." Under those very limited circumstances, the court held that it would be appropriate to provide indigent prisoners with counsel.59

Likewise, in Washington v. Harper,60 the State of Washington sought to involuntarily administer psychotropic medication to a psychotic prisoner with a history of violent assaults who was confined to a hospital administered by the prison system. The prison's administrative policy called for an administrative hearing prior to the administration of any medication.61 The prisoner was entitled to prior notice of the hearing, notice of his tentative diagnosis, the factual basis for the diagnosis, and the factual basis for the prison believing that involuntary medication was necessary.62 While rejecting the prisoner's contention that Due Process required provision of an attorney at the hearing,63 the Court held: "Given the nature of the [essentially medical] decision to be made, we conclude that the provision of an independent lay adviser who understands the psychiatric issues involved is sufficient protection."64

Using the Social Security termination cases in Section II and the cases regarding mentally ill prisoners in Section III, the general rule is that the deprivation of public benefits owed to a mentally ill prisoner without legal assistance in the administrative process is constitutionally defective. Furthermore, Due Process requires the appointment of competent legal assistance once the prisoner's disability is recognized by the administrative agency. If mentally ill prisoners are entitled to legal representation in administrative proceedings, there can be no basis in logic or in law to deprive other mentally ill individuals, who are not in prison, of this favored treatment. It is incongruous that prisoners receive better treatment than the free population, and this disparity should cease.

58 Id. at 496-97.
59 See id.
61 See id. at 215.
62 See id. at 216.
63 See id. at 236.
64 Id.
The general proposition is that the right to counsel does not attach as a concomitant of due process when property rather than liberty interests are at stake.\footnote{The pre-eminent generalization that emerges from the Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation. \textit{See} Lassiter v. Department of Soc. Servs., 452 U.S. 18, 26–27 (1981). \textit{Lassiter} asked whether due process required appointed counsel for indigents in cases involving judicial termination of their parental rights. Although the Court did not require the appointment under the specific facts of the case, it left the door open for future cases, stating:

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the \textit{Eldridge} factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. . . . We therefore adopt the standard found appropriate in \textit{Gagnon v. Scarpelli}, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. \textit{Id.} at 31–32. The \textit{Lassiter} decision was recently acknowledged in \textit{M.L.B. v. S.L.J.}, 519 U.S. 102 (1996) "While the \textit{Lassiter} Court declined to recognize an automatic right to appointed counsel, it said that an appointment would be due when warranted by the character and difficulty of the case." \textit{Id.} at 117.} If exception to the general rule that prisoners, probationers, and parolees are not entitled to assigned counsel lies in the presence of mental disability, an analogous exception can be made for those facing civil administrative proceedings. The line of prisoners cases previously discussed present anomalies because the need for prison discipline negates the right to assigned representation generally associated with loss of liberty. The prisoners' mental illness as an exception to the exception effectively restores the right. By analogy, an individual with a mental illness engaged in administrative proceedings regarding public benefits, is an exception to the rule that no right to assigned representation exists when property interests are at issue.

In conclusion, there is no due process right to assigned representation in civil administrative proceedings except in the presence of mental illness. There are two distinctions between \textit{Vitek} and \textit{Harper} on the one hand, and the case of a mentally ill person denied or terminated from public benefits on the other. First, Vitek and Harper were prisoners, not free persons. Second, they were deprived of liberty, not property. Since prisoners are not entitled to assigned representation regarding
deprivation of liberty unless special circumstances exist such as illiteracy, unusually complex issues, or mental illness, the free population should likewise be entitled to representation under similar circumstances.

IV. NOT COUNSEL, BUT GUARDIAN AD LITEM

The cases cited in Section III concern the right to counsel, not to a guardian ad litem. While there are important similarities between the two offices (e.g., both are personal representatives) there are distinctions that are just as significant.

To fully appreciate the function of a guardian ad litem, we must first consider the usual division of labor between attorney and client. The Model Code of Professional Responsibility states:

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client.66

Thus, the conventional wisdom is that the client determines the direction and goal of the litigation "within the bounds of the law,"67 while the attorney determines how to achieve them. The scheme breaks down if the client is unable to provide the litigation its needed direction, determine the goals of the litigation, or understand the bounds of the law. Consequently, if there is no general guardian to look to, the situation calls for the appointment of a guardian ad litem.

Black’s Law Dictionary defines guardian ad litem as “a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian

66 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1983).
ad litem exists only in that specific litigation in which the appointment occurs.\footnote{68} A guardian ad litem's primary objective is to protect the best interests of the party represented.\footnote{69}

Other jurisdictions following this rule include Alaska,\footnote{70} Massachusetts,\footnote{71} Mississippi,\footnote{72} Nebraska,\footnote{73} and West Virginia.\footnote{74} Among the federal courts, the Eleventh Circuit Court of Appeals concurs with this rule.\footnote{75}

\footnote{68} BLACK'S LAW DICTIONARY 706 (6th ed. 1990) (citation omitted).
\footnote{69} See generally McKay v. Owens, 937 P.2d 1222, 1231–32 (Idaho 1997) (stating that a guardian ad litem functions as an agent or arm of the court and is entitled to quasi-judicial immunity); In re Lisa G., 504 A.2d 1, 3–4 (N.H. 1986) (stating that a court has the authority to appoint a guardian ad litem in “children in need of services” cases, and that defense counsel should request appointment of such if counsel believes that the child is unable to act in his or her best interest); David S. v. Laura S., 507 N.W.2d 94, 99 (Wis. 1993) (holding that a guardian ad litem acts as an advocate for the best interests of a child, and implements whatever a prudent attorney would recommend to a competent adult client); Wiederholt v. Fischer, 485 N.W.2d 442, 446 (Wis. Ct. App. 1992) (holding that a guardian ad litem's duty is to represent the concept of the best interest of the child, and not necessarily the child per se).
\footnote{70} See Carter v. Brodrick, 816 P.2d 202, 205 (Alaska 1991) (“The court shall require a guardian ad litem when, in the opinion of the court, representation of the minor's best interests, to be distinguished from preferences, would serve the welfare of the minor.”) (citation omitted).
\footnote{71} See Guardianship of a Mentally Ill Person, 489 N.E.2d 1005, 1008 (Mass. 1986) (“Generally speaking in all cases where a court appoints a guardian ad litem he acts for the ward and determines what should be done for the best interest and welfare of the ward.”) (citation omitted).
\footnote{72} See Copiah County Dep't of Human Servs. v. Linda D., 658 So. 2d 1378, 1382 (Miss. 1995) (“The guardian ad litem is the one primarily charged with and looked to for protection of the children's interest when judicial proceedings arise.”).
\footnote{73} See State v. C.M., 431 N.W.2d 611 (Neb. 1988). The court stated:

Generally speaking, a guardian ad litem appears to be an individual who steps into the position of the minor and, after considering the alternatives, asserts the right of the minor as the guardian ad litem sees fit . . . . A guardian ad litem is to determine the best interests of the minor without necessary reference to the wishes of the minor.

\textit{Id.} at 612–13 (quoting Orr. v. Knowles, 337 N.W.2d 699, 701–03 (Neb. 1983)).
\footnote{74} See In re Jeffrey R.L, 435 S.E.2d 162, 175 (W. Va. 1993) (“The [guardian] A[d] L[item] does not necessarily represent a child's desires but should formulate an independent position regarding relevant issues.”).
\footnote{75} See Planned Parenthood Ass'n. v. Miller, 934 F.2d 1462 (11th Cir. 1991). The court stated:

A guardian ad litem is appointed “to protect the interests of the minor” in a particular matter before the court. In most litigation that is conducted by a guardian ad litem on a minor’s behalf, the guardian ad litem, as a part of his duties, must determine whether it is in the minor’s best interest to continue, settle, or dismiss the litigation . . . . In a minor’s action against a tortfeasor, for example, the guardian ad litem may determine that it is in
Other jurisdictions stress a more active role for the court, and subordinate the role of the guardian ad litem to an officer of the court who answers to the court rather than to the ward. Sometimes, the same court will stress first the role of the guardian ad litem, and secondarily that of the the court.76 Other courts stress the duty of the guardian ad litem to the court rather than the ward.77

the best interests of the minor to settle; he then is able to compromise the claim, provided he obtains the court's permission.

Id. at 1480 (citation omitted).

76 See id. at 1480–81 (discussing the determination powers of the guardian ad litem and how these determinations are subject to judicial approval) (citing Saliba v. Saliba, 42 S.E.2d 748, 752 (Ga. 1947).

77 See Kahre v. Kahre, 916 P.2d 1355 (Okla. 1995). The court held:

In custody matters the guardian ad litem has almost universally been seen as owing his primary duty to the court that appointed him, not strictly to the child client. . . . [T]he guardian ad litem fills a void for the court. Without the guardian ad litem, the trial court has no practical means to ensure that it receives the information it needs to secure the best interests of the child are served until after the information has been filtered through the adversarial attitudes of the warring parents. The guardian ad litem makes his own investigation as the trial court's agent. The wishes of the minor child are one factor to be considered, but the guardian ad litem's obligation remains the same as that of the trial court: the child's best interests, although the child's wishes may be otherwise.

Id. at 1362 (citations omitted).

It should be noted that the child in Kahre, although vitally interested in the outcome, was not a party to the dispute between the parents. Thus, the role of the court and of the guardian ad litem were identical—to determine the best interests of the child in a custody dispute. It is doubtful that the practical result, regardless of the language used, would be the same if the ward was an adverse party and the judge's role was not to protect his interests, but to decree them. Additionally, note Kollsman, A Div. Of Sequa Corp. v. Cohen, 996 F.2d 702, 706 (4th Cir. 1993) ("It is well recognized that the guardian ad litem serves essentially as an officer of the court. He is there not only to manage the litigation for the incompetent but also to assist the court in performing its duty to jealously protect the incompetent's interests.") (citations omitted). A more extreme form of this view was stated in Dacanay v. Mendoza, 573 F.2d 1075 (9th Cir. 1978), where the court stated:

It is an ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interests. The guardian ad litem is but an officer of the court. . . . [E]very step in the proceeding occurs under the aegis of the court. . . . The duties of a guardian ad litem are essentially ministerial. While he may negotiate a proposed compromise to be referred to the court, he cannot render such a compromise effective merely by giving his consent.

Id. at 1079 (citations omitted).

Yet a few years later the same circuit held: 'As this case illustrates, the appointment of a guardian ad litem is more than a mere formalism. A guardian ad litem is authorized to act on behalf of his [not the court's] ward and may make all
In almost all cases involving termination from public benefits, the best interest of the disabled individual is clear regardless of whether he or she is considered the ward of the guardian or of the administrative agency considering the claim. The guardian ad litem has sweeping powers. Those powers include representing the interests of the ward and determining what interests require protection.

V. IMPACT ON THE DISABLED

We now turn to the tripartite analysis of *Mathews v. Eldridge*. The "private interest that will be affected by the official action." will vary depending on the program and the extent of the benefits denied. Some programs are lifelines that are crucial to the recipients' well being. For example, disability benefits, public assistance and veterans' benefits provide cash for vital needs, and have an ancillary component of providing for medical care. Food stamps provide for most individuals' nutritional needs. Public housing and section 8 subsidies provide for shelter. Other programs, usually local in scope,
touch on less vital areas. The denial or loss of most nationally distributed benefits can devastate the mentally ill.

A study of homeless individuals staying at shelters in Boston and Cambridge, Massachusetts, found that 91% of those interviewed suffered from some form of diagnosable mental illness, including 46% with major mental illnesses such as schizophrenia and other major affective disorders. Another 29% were diagnosed as alcoholics; another 21% had severe personality disorders. Of the 9% who were free of mental illness, many were children of shelter guests, or had only recently arrived in Boston and were expecting to begin work shortly.81

The study revealed that only 3% of the sample was receiving disability benefits. Another 12% received general relief, and 3% received Aid to Families with Dependent Children (AFDC). Another 4% received Social Security retirement benefits, while only 6% of those interviewed were employed. Of gravest concern is that only 1% of the homeless individuals received Medicare, and only 20% received Medicaid. Seventy-two percent had no medical insurance at all.82

This study is consistent with the findings from other studies. One study conducted in Philadelphia found that 84% of shelter residents were mentally ill.83 Others studies of homeless adults, conducted in Los Angeles, reported that 75% of male subjects and 90% of female subjects were psychiatrically disabled,84 while only 25% received public assistance of any kind.85 It is clear that treatment levels are low.86

The percentage figures regarding mentally ill homeless individuals are spread across a large base. The 1990 census counted 228,621 homeless individuals in shelters and street

---

81 See Ellen L. Bassuk et al., Is Homelessness a Mental Health Problem?, 141:12 AM. J. PSYCHIATRY 1546, 1547 (1984).
82 See id. at 1548 (detailing the breakdown of the 22% of the total shelter guests who were receiving financial assistance).
86 See Bassuk, supra note 81, at 1548. Four percent of the homeless individuals had private insurance, and the remaining 1% received benefits from the Veterans Administration. See id.
According to most reports, this is an undercount, given that many shelters are unlicensed, and because many homeless people prefer to stay at street locations that are not visible. Police also encourage the relocation of homeless individuals from visible to less visible locations. A 1987 Urban Institute study estimated the number of homeless individuals to be somewhere between 500,000 and 600,000.88

VI. PROBABILITY OF WRONGFUL DENIAL

It is anticipated that whenever a practitioner acts according to the note's thesis, he will receive a report by a qualified professional stating that the subject of the report suffers from severe mental disability.

The impact of wrongful denial of benefits to mentally ill persons is significant. Given a serious mental illness, the probability that the denial will be unjustifiable is also high. Largely fact-specific to a given case, the probability of wrongful denial of benefits is directly proportional to the level of disability suffered by the claimant.

The studies cited in Section V bespeak the difficulties that mentally ill persons face in obtaining entitlements. As one commentator stated:

Though they may be entitled to income assistance of some kind (SSI, Welfare, VA), the procedures for obtaining it are beyond the reach of the majority of the homeless.... Gathering the necessary documents can be time consuming, the process arduous and confusing, and the outcome often negative.... Experienced caseworkers who accompany homeless persons through the bureaucratic mazes and help them manage the money when it arrives, are in short supply.89

87 See Alice S. Baum & Donald W. Burnes, A Nation in Denial: The Truth About Homelessness 123 (1993) (discussing the inaccuracies of counting the homeless).
88 See id. at 120–22.
In one study, researchers randomly divided SSI-eligible, mentally ill clients of community mental health centers into two groups. Members of the first group received assistance from individuals experienced in delivering mental health services and trained in the substantive and procedural aspects of applying for SSI. Members of the second group received assistance from case managers at the community health centers. Members of the latter group were only one-half as likely as members of the former group to receive SSI benefits. Members of the first group had their applications for SSI submitted more quickly, and in turn, received their benefits more quickly.

Termination of disability benefits is a related problem. Although mentally ill persons only constituted 11% of those receiving disability benefits in the early 1980s, one third of individuals terminated from disability benefits were mentally ill. Many mentally ill individuals who were terminated from disability benefits were rendered homeless. At one point, 40% of those housed in the New York City shelter system had been denied or terminated from disability benefits. One study of mentally ill SSI recipients found that the more severely ill an SSI recipient, the more likely the recipient was to be dropped from the roles.

---

91 See id.
92 See id. at 434.
93 See id. at 436.
94 See JOEL BLAU, THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES 57 (1992) (noting the disadvantages that the mentally disabled suffer when attempting to secure an appeal against a termination of benefits).
95 See Ellen L. Bassuk, The Homelessness Problem, 251 SCI. AM. 40, 41 (July 1984) (inferring that the loss of benefits has lead to homelessness); Robert J. Rubinson, Government Benefits: Social Security Disability, 1987 ANN. SURV. AM. L. 195, 198 (1988) (noting that the loss of housing is one of the hardships that result from the loss of disability benefits).
97 See Steven P. Segal & Namkee g. Choi, Factors Affecting SSI Support for Sheltered Care Residents With Serious Mental Illness, 42 HOSP. & COMMUNITY PSYCHIATRY 1132, 1137 (1991) ("Severe symptomatology and a longer period of time spent in psychiatric hospitals predict[] a shorter period of time on SSI.").
The problem is likely to be exacerbated by welfare reform. The New York City Department of Social Services planned to place disabled mothers of small children into workfare slots. These women had been classified as unemployable by city doctors. The social services agencies responsible for providing the workfare slots accepted only 36% of those referred. The New York City Human Resources Administration, under federal investigation for its disobedience of the law requiring city workers to allow needy persons to apply for public assistance without delay, first stated that it would discontinue the local policy of requiring applicants to make two trips to the office, whereby applicants were permitted to register their names and addresses on the first visit, but were forced to return to actually file the application. Unfortunately, in an abrupt reversal, the agency re-implemented its two-day filing process. After concerned advocacy groups filed a federal suit, the agency admitted it improperly denied access to food stamps and Medicaid, and promised to reform the application process.

The agency did not consider the disproportionate impact such a policy would have on disoriented individuals who most likely cannot remember to organize two trips to accomplish what could have been done in one. Whether intentional or not, the policy further disadvantages mentally disabled persons by burdening their ability to fully participate in programs designed to help them.

A recent study based on a survey of providers of services for the homeless reported a huge increase in the numbers of mentally ill persons assisted. Between January 1995 and April

---

98 See id.
100 See Rachel L. Swarns, Of Ill Mothers, 36% Are Held Able to Work, N.Y. TIMES, June 9, 1998, at B5.
1999, the period covered by the study and coinciding with New York State's implementation of its version of welfare reform, 84% of the emergency shelter providers surveyed reported increases in the numbers of mentally ill persons seeking services. Similar increases were reported by 66% of providers of all types of homeless services. Of the emergency shelter providers surveyed, 57% reported an increase in the numbers of developmentally disabled persons seeking shelter. Of the food pantries surveyed, 68% reported increases in the numbers of mentally disabled persons assisted. The study faulted unnecessarily onerous procedures for obtaining work exemptions for a significant part of the lack of access to social services. Ignoring evidence provided by treating physicians, disabled people were denied work exemptions on the basis of cursory examinations performed by agency physicians. Upon denial of the work exemption, the disabled person would have 10 days to produce medical evidence challenging a work assignment. The difficulty in obtaining both appointments and medical records from public hospitals is simply not considered by the local district.

Administrative hearings regarding the benefits of mentally disabled persons are apt to be inherently complex. Statutory provisions mandate that government programs provide "reasonable accommodation" to the needs of mentally ill clients. The issue of determining the extent of those accommodations adds another layer of complexity to a hearing that a disabled person may not be able to handle in the first place.

VII. BURDEN ON AGENCY

Many Americans suffer from diagnosable mental illness. Many, unable to support themselves, are dependent upon public

106 See id. at 5, 41, 51.
107 See id. at 49.
108 See id. at 5, 41, 51, 55.
109 See id. at 52.
110 See id. at 63.
111 See infra Section VIII (discussing how the courts have interpreted the statutory requirement of reasonable accommodation with respect to disabled individuals' access to housing).
112 See, e.g., Southern California Psychiatric Society Observes Mental Illness Awareness Week, October 3–9 1999, PR NEWswire, Sept. 20, 1999, available in
protecting the rights of the mentally disabled 339

benefits. A large number, but not all, would require the type of legal assistance contemplated here.

First, severe mental illness constitutes only a fraction of the population. Those who are cared for by their families and those connected to a social service agency (which could serve as advocate), and those still able to fend for themselves despite illness, would not turn to an agency for assistance. Thus, the burden on the agency to provide guardians would not be overwhelmingly weighty.

Second, the agency needs to be efficient in recognizing and responding to requests for aid. Clearly, there are sufficient resources to account for speedy identification and appointment of an appropriate guardian ad litem.

Third, identifying the needs of the mentally disabled must be addressed. Asking an individual about his specific needs is the easiest way to identify someone in need of assistance. Beyond that, application forms should routinely contain questions regarding physicians consulted and medications taken.

The signs of severe mental illness are not difficult to spot. For example, a confused thought process, where both the process and content of thought are disordered, might be an indication of schizophrenia. Alternating between "depression and normal mood and between extreme elation and normal mood indicates possible bi-polar disorder." Any reasonably intelligent person can be taught to ask someone to draw a clock face, or to perform serial sevens. While these simple observations and tests

LEXIS, News Library, News Group File, All (noting a National Institute of Mental Health estimate that 28.1% of the population over age 18 will be the victim of "a mental disorder or substance abuse disorder in any one year").

The fact that the popular press has reported on the existence of a "Mental Health Awareness Week," highlights the scope of mental illness in our society.


See ATKINSON ET AL., supra note 1, at 648-51. Other indicators of schizophrenia are disturbances of perception, irrational emotional responses, withdrawal from reality, unusual motor activity, and a general decreased ability to perform day to day tasks. See id.

Id.

Id.

Counting backward by sevens from one hundred is a common test of cognitive ability. See Kenneth Rockwood et al., Comprehensive Geriatric Assessment, 103 POST GRADUATE MED. 247 (1998), available in LEXIS (indicating the test's importance to determine cognitive function); NPR All Things Considered (NPR
would be conducted by lay people and would not produce a
definitive diagnosis, they would serve as preliminary screening
devices to identify those in need of further consideration. The
subsequent screening could be performed by individuals with
training in clinical social work or psychiatric nursing experience.
The purpose of testing is to determine functional disability, not
differential diagnosis. For example, severe cognitive deficits
alone qualify an individual for the relief advocated here.
Therefore, the ultimate determination of the underlying deficit
categorized as schizophrenia or dementia is irrelevant.117

Fourth, there needs to be a mechanism for providing
assistance. Once identified as an individual in need, he or she
should be provided with representation immediately following
the initial application stage. The representative, as a guardian
ad litem, may be in-house agency personnel118 or an outside legal
or social services agency. Guardians ad litem need not be
lawyers or even supervised by lawyers. At a minimum, they
need to understand agency rules and regulations, and the
difficulties of working with disabled individuals. Guardians
need resources such as time, money, access to agency files, and
the power to obtain supporting documents, such as medical,
financial, and birth records when mentally ill people are
incapable of providing such information themselves. If an
administrative law judge is presiding over the matter at a quasi-
judicial hearing, time constraints may necessitate subpoena
power.119 Following the common law applicable to the powers
accorded guardians ad litem in a judicial setting, the guardians

117 It would make a difference to one offering treatment. Schizophrenia may be
treatable with psychotropics; dementia is not. See Joshua Rolnick, A Neuroscientist
Says No to Drugs, CHRON. OF HIGHER EDUC., Dec. 4, 1998, at A10 (discussing the
controversy surrounding psychotropics); Interview with Harold Pincus, Psychiatrist,
on Morning Edition (NPR radio broadcast, Feb. 18, 1998) (concluding use of
psychotropic drugs is increasing).
represented at his administrative hearing by a nurse from another prison run by
the same Department of Corrections which sought to involuntarily administer
psychotropic medication. See id.
119 Social Security ALJ's, among other administrative officers, may issue
subpoenas, but have no contempt power. See 42 U.S.C. § 405(d) (1994) (giving Social
Security Administrative Law Judges subpoena power). The power is enforceable
only in district court, and only by the Commissioner of Social Security. See 42
ad litem may have to substitute their judgment for that of the mentally ill person on matters related to their responsibilities.

Under the pressure of litigation over many of the issues raised here, the New York City Housing Authority (NYCHA) recently issued remedial regulations. For the most part, the regulations provide adequate solutions. In brief, they provide for identification of a potentially mentally ill person facing quasi-judicial administrative terminations by the Housing Authority staff at the project where the person lives. They are to refer the matter to NYCHA's in-house social services department, which may in turn refer the matter to an outside "professional consultant." Following the issued report, the project management is to take "reasonable corrective action." Only then can the matter be referred to a quasi-judicial hearing officer for further proceedings upon the appointment of a Law Guardian.

The regulations do not deal with the applications process, or with any adverse action taken without a quasi-judicial hearing. Yet, at least one administrative agency has already taken the lead to promulgate regulations providing mentally ill

---

120 See Blatch v. Franco, 97 NO. CIV. 97-3918, 1998 U.S. Dist. LEXIS 7717 (S.D.N.Y. May 26, 1998) (discussing the rights of individuals with mental disabilities to secure guardians ad litem in tenancy termination hearings and eviction proceedings commenced by the NYCHA).

121 N.Y. City Housing Auth., GM-3630 (Apr. 29, 1999) (reprinted in the Appendix).

122 It is of particular interest that someone may be identified as potentially in need of assistance "from the personal knowledge of any Authority staff familiar with the tenant . . . ." Id. (emphasis added).

123 Presumably, a psychologist holding a Ph. D. or a psychiatrist holding an M.D. "The Professional Consultant . . . must [evaluate the situation] and submit a report to the Borough Social Services Administrator." Id.

124 "Reasonable corrective action may include arranging for financial management, cleaning and/or housekeeping services, communication with family members or community based social workers, identification and request for the intervention of community based case management services." Id.

125 "If the Social Services report recommends the appointment of a guardian, OSTA shall then forward the case to the Law Department for the purpose of obtaining a guardian." Id.

126 For example, NYCHA tenants must annually re-certify their subsidized rent by submitting documents relating to their income and that of their household members. Failure to do so leads to the loss of the subsidy and to the NYCHA charging an unsubsidized rent. The regulations do not cover such eventualities.
people with a voice and an advocate in some administrative proceedings.

VIII. RELATED STATUTORY CONSIDERATIONS

Federal statutes and regulations promulgated thereunder prohibit the denial of full participation in any benefit program administered by state or local government by reason of disability. These regulations do not govern benefit programs administered by the federal government.\(^{127}\) Mental impairments are included in the statutory definition of disability.\(^{128}\) Section 504 of the Rehabilitation Act of 1973\(^{129}\) extends like provisions to disabled people receiving benefits under federally-funded programs, regardless of whether the government administers the program or not. The Fair Housing Amendments Act mandates that most landlords—including public housing authorities—make "reasonable accommodation" to the needs of disabled tenants.\(^{130}\)

Given such seemingly thorough statutory coverage, coupled with the rule that a court will interpret the Constitution only when all attempts to reach a decision by other means fail,\(^{131}\) this article's focus on Due Process may seem misplaced. Federally administered programs such as those administered by the Social Security and Veterans' Administrations, however, are not covered by statute. Thus, the argument here fills a gap in statutory coverage. Given the rule that statutes be construed consistently with the Constitution,\(^{132}\) this note's argument informs any discussion of statutory rights and responsibilities.


\(^{128}\) See 28 C.F.R. § 35.104 ("Disability means with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.").


\(^{131}\) See, e.g., Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968) (addressing fair selection process for applicants to public housing); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (discussing fair selection process for applicants for state liquor license).

\(^{132}\) See Califano v. Yamasaki, 42 U.S. 682 (1979) ("[I]f a construction of the statute is fairly possible by which a serious doubt of constitutionality may be avoided, a court should adopt that construction."); see also Arizonians for Official English v. Arizona, 117 S. Ct. 1055 at 1074 (1997).
"Reasonable accommodations" due mentally ill persons go beyond the mere decision-making process used to determine eligibility for the standard benefits. Such benefits include special, although reasonable, accommodations that are necessary to ensure the equal right to enjoy those benefits. Determining the boundaries of the "reasonable accommodations" doctrine is not an easy task, and requires fine judgment. Such cases are inherently difficult, and representation of mentally ill people is especially needed in this area.

The statutes, identical in their anti-discriminatory effect, are supposed to be broadly construed. Often, however, they are not so interpreted. For example, in determining whether a requested accommodation is "reasonable," some courts, rather than using the balancing test of Mathews v. Eldridge, have instead considered only whether the accommodation would "substantially" modify or fundamentally alter a program. As one court articulated, in widely paraphrased form, "reasonable accommodation does not impose an undue financial or administrative burden, or fundamentally undermine a statutory or regulatory scheme." This standard is apparently without regard to the impact to the disabled individual. Other courts

---

133 See, e.g., Shapiro v. Cadman Towers, 51 F.3d 328 (2d Cir. 1995). We believe that in enacting the anti-discrimination provisions of the FHAA, Congress relied on the standard of reasonable accommodation developed under section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. §794. . . . The legislative history of section 42 U.S.C. §3604(f) plainly indicates that its drafters intended to draw on case law developed under section 504, a provision also specifically directed at eradication discrimination against handicapped individuals. Id. at 334; see also, e.g., Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597, 603 (4th Cir. 1997); Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1101 (3d Cir. 1996); U.S. v. California Mobile Home Park Management Co., 29 F.3d 1413, 1416–17 (9th Cir. 1994); Smith and Lee Associates, Inc. v. City of Taylor, 13 F.3d 920, 930 (6th Cir. 1993).


136 Hovsons, Inc., 89 F.3d. at 1105; accord Bryant Woods Inn, Inc., 124 F.3d at 604; Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175 (5th Cir. 1996); see also, e.g., Erdman v. City of Fort Atkinson, 84 F.3d 960, 962 (7th Cir. 1996). A constitutional challenge faces no such obstacle. Consider a statutory scheme mandating racial discrimination. Any constitutional challenge to it would seek precisely to undermine such statute.

137 Some courts have balanced the needs of the parties seeking and resisting
have held that once a plaintiff establishes discriminatory impact, the defendant only needs to show that the discriminatory distinction is rationally related to a legitimate government purpose.\textsuperscript{138} Still, others have held:

Where plaintiff seeks a judgment which would require defendant to take affirmative action to correct a Title VIII violation, plaintiff must make a greater showing of discriminatory effect. On the other hand, if plaintiff seeks a judgment merely enjoining defendant from further interference with the exercise of plaintiff's Title VIII rights, a lesser showing of discriminatory effect would suffice.\textsuperscript{139}

No similar obstacle lies in the path to Due Process.

CONCLUSIONS

Mentally ill persons and others similarly disabled who are incapable of adequately negotiating administrative processes are entitled to representation by guardians ad litem. This right exists regardless of whether the individual is facing a quasi-judicial evidentiary hearing or less formal proceedings, regardless of whether the proceedings are in the initial phases or on administrative appeal. The scope of the argument herein contemplates all programs where the right of participation may produce a significant impact on the beneficiary.

An individual is still entitled to a fair selection process for benefits which are not statutory entitlements.\textsuperscript{140} The necessity of a fair selection process provides the underpinning of the proposition that both mentally impaired applicants and recipients of public benefits are entitled to representation.

Another factor that may determine whether a constitutional right to assigned representation exists in administrative proceedings is whether the benefit under consideration is need-
based. This is the distinction that *Mathews v. Eldridge* held determinative of the right to a pre-termination evidentiary hearing.\(^{141}\) Will a future case declare this the fulcrum upon which is balanced a seemingly unrelated right? Is the special impact on a mentally ill person of the denial of participation in a non-need-based program so slight?

Once the problem of treatment for mentally ill persons in the maw of bureaucracy is identified as constitutional, we must address the question of an appropriate remedy. I see no alternative to the provision of a personal guardian ad litem. This is the historical answer, given thousands of years in Western Civilization, and pre-dating the common law. Retroactive reinstatement of benefits will serve only those who later fall into sympathetic hands. The remedy should be directly connected to the deficiency to be remedied. Given that the deficits of the mentally ill are deficits of memory, of logic, of judgment—*personal* deficits—only a *person* can make the situation whole. Neither extension of deadlines, nor more detailed and confusing notices, will assist those who are fundamentally disoriented. With the foregoing discussion in mind, let us revisit the hypothetical applications and recipients posited at the beginning of this article, and see what a guardian ad litem could do for each.

1. A guardian ad litem could negotiate the process of obtaining a foreign birth certificate for the illiterate applicant for Social Security.

2. A guardian ad litem could receive third party notification of the elderly ward’s failure to recertify food stamps and recertify for her, obtaining and submitting the needed information as her recognized representative in this matter.

3. A harder case, but not impossible. A guardian ad litem could appear at the administrative hearing for the elderly Alzheimer patient whose tenancy is endangered by her drug-abusing granddaughter, argue the absence of intentionality in the situation, and arrange for alternatives to eviction under the “reasonable accommodation” clause of Section 504. Relocation to a

\(^{141}\) *See supra* notes 25–28 and accompanying text.
smaller apartment where, due to lack of space and privacy, the granddaughter could not comfortably conduct her prostitutional activities, would prove effective. The guardian could also arrange for representative payment of the ward's Social Security benefits, and thereby solve her problem of chronic rent delinquency.

And much human misery is averted.
APPENDIX

April 29, 1999
GM-3630

TO: Distribution C
FROM: JoAnna Aniello, Assistant Deputy General Manager for Operations
SUBJECT: TERMINATION OF TENANCY: MENTALLY INCAPACITATED TENANT

I. PURPOSE

This General Management (GM) Directive expands upon existing NYCHA practice regarding required notifications and procedures staff must follow when terminating the tenancy of a tenant who may be mentally incapacitated. It addresses procedures to follow when it appears to the Housing Manager that reasonable efforts to solve the problem, as detailed in the NYCHA Management Manual, Chapter VII, Section II. A., have been unsuccessful.

II. DEFINITION OF MENTAL INCAPACITY

For the purposes of this GM, a tenant may be mentally incapacitated if it appears from a review of a tenant's file, or from the personal knowledge of any Authority staff familiar with the tenant, such as the Housing Manager, a Housing Assistant or a social services worker, that as a result of mental disease or defect, the tenant:

- may be unable to provide for his/her needs and is likely to suffer harm or cause harm to others;
- is hospitalized for a serious psychiatric or psychological disorder; or
- has exhibited seriously confused or disordered thinking that may render him/her incapable of understanding the termination of tenancy hearing process and defending against the charges.

III. HOUSING MANAGER'S REFERRAL

When considering termination of tenancy and a tenant exhibits behavior consistent with the above definition, the Manager shall:
A. Submit a Management Referral for NYCHA Social Services, NYCHA 040.450, to the Borough Social Service Administrator, that requests a written evaluation of mental capacity as well as a proposal for possible corrective action, if feasible. The referral must indicate that the tenancy will be subject to termination. The Housing Manager must not forward the case to the Operations Services Department’s Tenancy Administration Division (OSTA) until after (s)he receives a report from Social Services. The report must indicate whether the tenant appears capable of understanding the termination of tenancy hearing process and responding to the charges, or whether a guardian or other representative is required.

B. Enter the details of the referral, the receipt of the evaluation and the date, if sent, that the case was sent to OSTA for termination into the Termination of Tenancy Log.

C. Follow up with the Borough Social Services Administrator after thirty (30) calendar days of the referral if no report has been received.

D. When Social Services has completed its evaluation and informs the Housing Manager that corrective action is not feasible, the Housing Manager may submit the termination case to OSTA in accordance with all current procedures. When forwarding the case to OSTA the Housing Manager shall:

1. Indicate on the Transmittal to OSTA, NYCHA 040.276, that the tenant was referred to NYCHA Social Services for an evaluation of mental capacity. Include the results of the referral and the recommendation, if applicable, to appoint a Guardian or other representative to assist the Tenant with the administrative hearing and other termination procedures.

2. Attach a copies of the most recent Management Referral for NYCHA Social Services, the corresponding Social Services report and the Professional Consultant’s evaluation, if applicable.
3. Attach copies of all applicable documents contained in the tenant folder, including prior social service referrals and social services evaluations.

4. In the Interview Record, NYCHA Form 040.006, detail the reasons the case was submitted to Social Services, i.e., describe the tenant's behavior and all relevant information known about the tenant.

E. If the problem for which the Housing Manager made the referral persists up to twelve (12) months after documented Social Services intervention and the Housing Manager determines that it is in the best interest of the Authority to terminate the tenancy, no further evaluation by the Social Services Division is needed before submitting the case to OSTA. The steps outlined in Section D shall be followed when forwarding the case to OSTA for termination. The Housing Manager must also notify the Borough Social Services Division that the case has been forwarded to OSTA for termination.

IV. BOROUGH SOCIAL SERVICE DIVISION

The following details the procedure to follow when the Borough Social Service Division receives a referral from a Housing Manager that a tenant may be mentally incapacitated and is at risk of termination.

A. Immediately upon receipt of a pending termination case of a tenant who may be mentally incapacitated, the Borough Social Services supervisory staff assigns the case to staff who shall, within twenty (20) calendar days of being assigned:

1. Take appropriate steps needed to determine whether or not the tenant is mentally incapacitated as defined in Section II. If social services staff believes a psychiatric evaluation and determination of mental capacity is required, they must notify the Borough Social Services Administrator, who shall refer the matter to a Professional Consultant retained by the Housing Authority. The Professional Consultant must complete the evaluation and submit a report to the Borough Social Services Administrator within 30 days. The
report must indicate whether the appointment of a guardian or other representative is necessary if proceedings to terminate the tenancy would be commenced within the next 180 days. If the report indicates that the tenant is incompetent and unlikely to benefit from corrective action, no further action shall be taken by social services staff.

2. If the Professional Consultant's evaluation indicates that the tenant is competent, the social services staff worker shall submit a proposal detailing corrective action that might assist in resolving the tenancy problems. Reasonable corrective action may include arranging for financial management, cleaning and/or housekeeping services, communication with family members or community-based social workers, identification and request for the intervention of community-based case management services.

B. The Borough Social Services Administrator reviews the evaluation and the Professional Consultant's report, and reports the findings to the Housing Manager. If reasonable corrective action is not feasible and termination must proceed, the Borough Social Services Administrator must notify the Housing Manager so that the file can be forwarded to OSTA. When forwarding the Professional Consultant's report to the Housing Manager, the Borough Social Services Administrator shall attach a cover memo addressed to the Assistant Director of OSTA that must indicate whether or not the referred tenant appears to be mentally incapacitated in accordance with the definition specified in Section II, and whether the appointment of a guardian or other representative is recommended by the Professional Consultant.

V. TENANCY ADMINISTRATION DIVISION (OSTA)

OSTA staff must screen cases to determine whether the tenant has been evaluated for mental capacity.

A. If the Social Services report recommends the appointment of a guardian, OSTA shall then forward the case to the Law Department for the purpose of obtaining a guardian. OSTA
shall maintain a log of all cases forwarded to the Law Department for the purpose of obtaining a guardian. OSTA shall follow-up with the Law Department if a guardian has not been obtained within 45 days of the referral to the Law Department. As soon as the Law Department notifies OSTA that a guardian has been appointed, OSTA shall forward the case for termination to the Law Department’s Tenant Administrative Hearings Division (TAHD) or the Anti-Narcotic Strike Force as appropriate.

B. In the event a termination case is received by OSTA in which the tenant appears to be mentally incapacitated as defined in Section II, or in which a referral was made to Social Services but there is no report on mental capacity or record of intervention, the proceeding to terminate the tenancy shall cease. OSTA shall make a referral to Social Services for an evaluation of mental capacity and return the file to the Housing Manager. Social Services shall determine the appropriateness of a psychological evaluation, and if required, forward the request for an evaluation to the Professional Consultant in accordance with the procedures detailed in Section IV. A. and IV.B. above.

VI. TAHD/ANTI-NARCOTIC STRIKE FORCE & OFFICE OF THE IMPARTIAL HEARING OFFICER

If at any time during the administrative hearing, either the TAHD/Anti-Narcotic attorney or the Hearing Officer has reason to suspect that the tenant may be mentally incapacitated, and there has been no social service evaluation of the tenant’s condition, the hearing must be stayed, and the Law Department/Hearing Office shall notify OSTA, detailing the reasons for which the hearing was stayed, i.e., a description of the tenant’s behavior at the hearing and any other pertinent information known about the tenant. OSTA will make a Social Services referral, notify the Housing Manager, and follow up with Social Services within 30 days if no report is received.

If a tenant or his/her representative seeks to re-open the default at an administrative hearing on the ground of mental incapacity, the tenant shall make an application to the Hearing Officer. If the Hearing Officer grants the application, the case is referred to
the tenant's housing development, to be referred for NYCHA Social Services by the Housing Manager and processed in accordance with the procedures detailed in Section IV.