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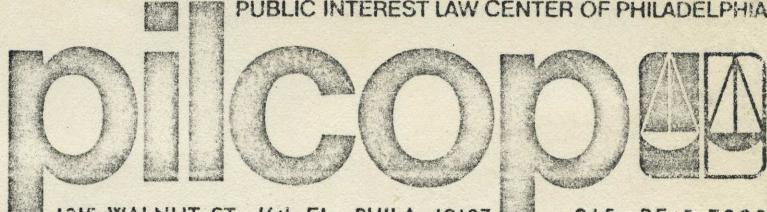
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May 4, 1979

*This has been  
sent.*

Edward G. Biester, Esquire  
Attorney General of the  
Commonwealth of Pennsylvania  
The Capitol  
Harrisburg, Pennsylvania

Dear General Biester:

Elias and I appreciated very much our meeting of Wednesday, the 18th. The time was short but the quality of your attention and engagement was a rare pleasure. We look forward to rejoining conversation as soon as you find it possible.

On the Pennhurst matter, your clients and our clients seem now to be on a course of collision and extended and unhappy enforcement and contempt proceedings. Even more, it seems to my clients, as it does to me, that the course presently being taken by the Administration will surrender an opportunity — whether knowingly and self-consciously or not is the question I wished to raise with you — for the Administration to redirect the state's, and indeed to lead in redirecting the nation's, service system for retarded people, to the benefit of retarded people, of the state's fisc and of the Administration itself.

The present situation, as we see it, is defined by these facts: The District Court's Order, which the Court of Appeals has refused to stay, requires the creation of an effective community service system to replace Pennhurst, expeditiously. The Budget submitted by the Governor to Legislature projects 3997 people in community living arrangements in 1979-80 and the very same number five years hence in 1983-84 (p.698). It projects 7050 people in retardation institutions in 1979-80 and five years later only 400 less(p. 702.) The projections, and the budget request which accompanies them, will not accommodate implementation of the Pennhurst Order. During the past month, the Commonwealth's Pennhurst Dispersal Program (which called for moving 250 people to community living on a schedule whose deadlines were never met

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and constantly receding, a program which the Court formally rejected as inadequate, but nonetheless the only program the Commonwealth had that even tended toward implementation) has been formally abandoned.

Whether the latter facts arise because of a misconstruction of the Order by defendants, reading their duty only from Paragraph 5 ("to co-operate with the Master") and overlooking the duties imposed by the first four paragraphs of the Order, or because of a considered determination to resist the Orders or because the Administration has not yet resolved its position, as we hope, we do not know.

We do know that the Administration took office widely perceived in the retardation and the other disability communities as an administration committed to disabled people, yet its first four actions affecting the disabled were:

(1) to announce the termination of Title XX funding for pre-school programs for disabled children in Philadelphia and else where, a decision reversed after widespread objections from parents, providers, and near 40 legislators;

(2) to file in the United States Supreme Court an amicus brief in the first 504 case to reach the Court for its plenary consideration, taking a position directly opposed to that taken by disabled people and their organizations and which would vitiate the civil rights act for disabled people;

(3) to file the appeal from the first implementation order in Pennhurst and seek a stay of a provision specifically tailored to protect Pennhurst residents during the interim before their move;

(4) the announcement, to the Senate Appropriations Committee, that the state will appeal the basic Pennhurst order to the Supreme Court, should it lose in the Court of Appeals.

We talked when we met about the practical merits of the Pennhurst order and particularly about the special necessity for the severely and profoundly retarded of small-scale, community based services. It is a central consideration - the central one, of course, on the record of the nine week

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Pennhurst trial. I would like to explore it further with you when we meet again. Meantime, I attach the testimony of four trial witnesses, one of the empirical works addressing the question, and three of the attachments to the Court of Appeals amicus brief of the National Association of Retarded Citizens, Epilepsy Foundation of America and National United Cerebral Palsy.

The district court's finding in this regard is not a sport. It is the finding not only of four federal courts but also of nearly a dozen Common Pleas judges in nearly as many counties of Pennsylvania who have denied petitions to commit severely and profoundly retarded people to institutions and instead have ordered that services be provided to them in the community. Joyce Z., 123 Pitt. L.J. 181, 4 D. & C. 2d 596 (1975), enclosed, is typical, and the first, of those cases. It reflects the long-standing experience and near unanimous professional opinion. It has been the basis of my clients' highest priority objectives for more than a decade.

The comments Eli and I made about cost were not merely contextual, to the \$140 million meeting you left to talk to us. The cost experience here, the cost experience in other states (in Michigan for example, where 80% of the 800 people in Macomb-Oakland Counties community residential and day programs are severely or profoundly retarded and multiply handicapped) and the Master's cost projections for community services for the Pennhurst class all consistently show community services to cost about 2/3 the cost of institutional non-services.

Furthermore, community services can be qualified for Title XIX federal cost sharing (at a 55% rate) with no greater difficulty than qualifying institutional expenditures. Thus, for example, the state now bears 100% of the costs of the CLA - \$31 million this year, \$9 million in the Southeastern Region. Were they qualified for Title XIX, \$16 million would be returned by the feds, \$5 million in the 5 counties. Even if only two-thirds of the CLA's were qualified, it would yield \$10 million state-wide. The state dollars thus freed could be used to expand community services, to support implementing the Pennhurst order and also extending community services elsewhere in the state. Thus, not only are there long run cost advantages to community services, but in the short run the mechanism exists both to float the "bulge" expenses of conversion (the lag in personnel savings at the institution and so on) and to federalize a significant part of the cost of effective services to retarded people.

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Even, and we would say, especially, in the current fiscal situation, proceeding to implement makes great sense, for this matter presents one of the very few opportunities where an advance in human service policy is consistent with, and even eases, current fiscal necessities.

Thus, our purpose in talking with you was, and is, to ask that you not appeal the Pennhurst case further (even in the absence of a stay, an appeal as a practical matter grinds implementation to a virtual halt) and that you proceed instead to implementation in Pennhurst and to extend community services across the state. (The recommendations of the last Governor's Management Review Panel, enclosed, reach the point solely on policy grounds, even without regard to consideration of the law and its values.)

Prompted by Peter Hearn's comment in his introduction of you in Philadelphia Monday a week ago, that you are that rare lawyer possessed of a sense of history, I enclose our brief to the Appeals Court particularly for pages 12 - 16, which relate how it is we came to have these institutions in the first place. What Ramsey Clark said that night of Benjamin Rush and prisons is more certainly true of retardation institutions, "we can't reform the beasts, they must be abolished".

We would like very much to work with you to overcome this historical mistake which continues still to defeat the capabilities of retarded people for life and growth and some considerable joy, and to supply instead the conditions necessary for them to live as fully as they are able.

Please tell us when we may meet again.

Very truly yours,

*Tom*

Thomas K. Gilhool

TKG:sc

cc: