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Health and Welfare

Health and Welfare; rights of the mentally retarded

N.R.S. §§433A.410, 435.330 (repealed); §§433.—, 435.— - 435.— (new); §§433A.420, 433A.430, 435.007, 435.077, 435.081, 435.350, 435.360, 435.484 (amended).

SB 259 (Committee on Human Resources and Facilities); STATS 1981, Ch 460

SB 260 (Committee on Human Resources and Facilities); STATS 1981, Ch 663

Chapters 460 and 663 were enacted in an apparent response to an increased awareness of the rights of mentally ill¹ and mentally retarded persons.² Chapter 460 classifies existing rights as either personal rights³ or rights concerning care, treatment,⁴ and training.⁵ Chapter 663 enacts procedures for voluntary and involuntary admission⁶ and supplements the requirements of existing law concerning the discharge of a client⁷ from a mental retardation center⁸ (hereinafter referred to as a center). In addition, Chapter 460 provides a procedure for review if a client objects to a transfer to another facility.⁹

Admission to Mental Retardation Center

Under prior law, the Administrator of the Mental Hygiene and Mental Retardation Division (hereinafter referred to as the Administrator) worked with the district court to establish procedures for commitment¹⁰ to a center.¹¹ Chapter 663 creates specific procedures for

1. See N.R.S. §433.164 (definition of mentally ill).

2. See *id.* §433.204 (definition of mentally retarded person). See generally P. Wald, *Basic Personal and Civil Rights*, in THE MENTALLY RETARDED CITIZEN AND THE LAW, THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, 3 (1976), P. Strauss, *Due Process in Civil Commitment and Elsewhere*, in THE MENTALLY RETARDED CITIZEN AND THE LAW, THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, 443 (1976), D. Chambers, *The Principle of the Least Restrictive Alternative: The Constitutional Issues*, in THE MENTALLY RETARDED CITIZEN AND THE LAW, THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, 486 (1976), S. Heit, *From Rights to Realities*, Office of Human Development Services, PRESIDENT'S COMMITTEE ON MENTAL RETARDATION (DHHS Publication No. (OHDS) 80-21026).

3. See N.R.S. §433.—.

4. See *id.* §433.224 (definition of treatment).

5. See *id.* §§433.484, 433.214 (definition of training).

6. See generally *id.* §§435.—-435.—.

7. See N.R.S. §433.044 (definition of client).

8. See *id.* §§433.184 (definition of mental retardation center), 435.—.

9. See *id.* §§433.484 3, 433A.420, 433A.430.

10. See S. BRACKEL & R. ROCK, *ABF THE MENTALLY DISABLED AND THE LAW*, 34, 35, 62

both voluntary and involuntary admission that must be followed before a person¹² classified as mentally retarded¹³ is admitted to a center.¹⁴ The person must be in need of institutional training and treatment,¹⁵ space must be available for the person,¹⁶ the facility must have an appropriate program for training and treatment of the person,¹⁷ and there must be written evidence that there is no less restrictive alternative available to treat the person in the community.¹⁸

With the enactment of Chapter 663 a mentally retarded person may apply to a center for voluntary admission.¹⁹ A parent,²⁰ guardian,²¹ or other responsible person also may submit an application for voluntary admission on behalf of a mentally retarded person, but if the person or other responsible party on the person's behalf objects to the admission the procedure for involuntary admission must be followed.²²

The due process clause of the Fourteenth Amendment of the United States Constitution requires that a person involuntarily admitted to a center must be provided with notice and an opportunity to defend against admission.²³ Recent federal district court decisions have imposed additional requirements, but these requirements have not been mandated by the United States Supreme Court.²⁴ Chapter 663 provides that proceedings for involuntary admission are commenced by petitioning the district court where the person resides.²⁵ A petition must be accompanied by certification which states that a physician²⁶ or certified psychologist²⁷ with experience in diagnosing mental retardation has examined the person within the last thirty days and concluded

(2d ed. 1971) [hereinafter cited as ABF STUDY] (terminology employed in criminal proceedings like "commitment" should be amended to be less stigmatizing to the person receiving treatment).

11. See STATUTES OF NEVADA 1975, c. 745, §168, at 1625 (enacting N.R.S. §435.330); N.R.S. §433.184 (definition of mental retardation center).

12. See N.R.S. §435.007 4 (definition of person).

13. See *id.* §433.174 (definition of mental retardation).

14. See *id.* §435.— 2 (each application for admission must be on a form approved by the division and the Attorney General). See generally *id.* §§435.—435.—.

15. *Id.* §§435.081 1(a), 435.— 1(a).

16. *Id.* §§435.081 1(b), 435.— 1(b).

17. *Id.* §§435.081 1(c), 435.— 1(b).

18. See *id.* §§435.081 1(d), 435.— 1(c).

19. See *id.* §435.— 1.

20. See *id.* §435.007 3 (parent is defined by Chapter 663 as the parent of a person who has not attained the age of 18 years).

21. See *id.* §159.017 (definition of guardian).

22. See *id.* §§435.— 1, 2, 435.—.

23. See *Simon v. Craft*, 182 U.S. 427, 436 (1901).

24. See generally *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968), *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), *Romero v. Schauer*, 386 F. Supp. 851 (D. Colo. 1974); see also D. Wexler, *Mental Health Law: Entering the Eighties*, 9 Human Rights 24 (1980).

25. See N.R.S. §435.—.

26. See *id.* §630.014 (definition of physician).

27. See *id.* §641.020 (definition of certified psychologist).

that the person is a clear and present danger²⁸ to him or herself or to others and is in need of institutional training and treatment.²⁹ Once the petition is filed at the district court, Chapter 663 requires that the clerk of the court determine whether the center proposed for the person's admission has the appropriate space and programs available for the person.³⁰ If space and programs are available, the clerk of the court will set a time and place for a hearing on the petition to be held within seven calendar days after the petition was filed and give notice to the petitioner, the person who is the subject of the petition, and if known, the person's attorney, and the administrative officer³¹ of the center proposed to receive the person.³²

In addition, Chapter 663 allows the court, after the petition has been filed, to have the person alleged to be mentally retarded examined by a physician or certified psychologist experienced in recognizing mental retardation or to be evaluated by the center proposed for the person's admission.³³ The purpose of the examination or evaluation is to determine whether the person is mentally retarded and needs institutional training and treatment.³⁴ Furthermore, Chapter 663 allows the person subject to the petition to stay at home before and after the examination, and the person can also be accompanied to the place of examination by one or more friends or relatives.³⁵

With the enactment of Chapter 663, the person alleged to be mentally retarded is entitled to counsel at any court appearance pertaining to involuntary admission to a center.³⁶ If counsel has not been retained, Chapter 663 requires that the court advise the person and the person's guardian or closest living relative of the right to representation.³⁷ If the person fails or refuses to hire an attorney the court must

28. See *O'Connor v. Donaldson*, 422 U.S. 563, 576 (cannot constitutionally confine a mentally ill person unless there is a finding that the person is dangerous and not capable of surviving in freedom alone or with others who are responsible and willing to assist). See *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972) *vacated and remanded for more specific order*, 414 U.S. 743, *order on remand*, 379 F. Supp. 376 (1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (1976) (dangerousness is based upon a finding of a recent overt act, attempt, or threat to do substantial harm to oneself or another). *But see* United States Ex. Rel. Mathew v. Nelson, 461 F. Supp. 707, 711 (N.D. Ill. 1978). See generally Comment, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562 (1976).

29. See N.R.S. §435.—.

30. See *id.* §435.— 1.

31. See *id.* §433.014 (definition of administrative officer).

32. See *id.* §435.— 2.

33. See *id.* §435.— 1.

34. See *id.*

35. See *id.* §435.— 2.

36. See *id.* §435.— 1 (allows any relative or friend to retain counsel on the person's behalf). *Accord*, *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968), *Romero v. Schauer*, 386 F. Supp. 851, 858 (D. Colo. 1974).

37. See *id.* §435.— 2.

appoint counsel.³⁸ At involuntary admission proceedings, all relevant evidence³⁹ must be heard and considered, including the certificate that accompanies the petition and testimony of the persons who conducted court order examinations or evaluations after the petition was filed.⁴⁰ The person alleged to be mentally retarded must be present at the hearing⁴¹ and has the right to testify⁴² and present witnesses, including independent evaluations or expert testimony.⁴³ If it is found that the person is a clear and present danger to him or herself or others and all other grounds for involuntary admission are present⁴⁴ the court is required to issue a certificate of eligibility for involuntary admission.⁴⁵ Once a certificate of eligibility has been issued it is effective for twelve months,⁴⁶ provided the client has not been discharged earlier.⁴⁷ At the end of twelve months the administrative officer⁴⁸ of the division facility may renew the certificate for an additional period⁴⁹ by petitioning the court for renewal stating the specific reason why further treatment is required.⁵⁰

Other Circumstances Justifying Admission

Chapter 663 further requires that when requested by the court a mentally retarded person may be accepted at a division facility for an emergency evaluation.⁵¹ The person, however, may not be retained for more than ten days.⁵² Chapter 663 also permits a court to require that a mentally retarded person be accepted at a division facility if the parent or guardian of the person is suddenly disabled or dies, however, this admission cannot last longer than forty-five days, during which time the Mental Hygiene and Mental Retardation Division of the Department of Natural Resources (hereinafter referred to as the Division)

38. *See id.* §435.— 3, 4 (any counsel appointed is entitled to fair and reasonable compensation charged against the person. If the person is indigent a public defender must be appointed and compensation must be charged against the county where the person resides).

39. *See id.* §48.015 (definition of relevant evidence).

40. *See id.* §435.— 1.

41. *See id.* §435.— 2 (person not required to be present if the physician or certified psychologist who signed certificate or examined the person pursuant to a court order testifies the person is unable to be present because of severe disability).

42. *See id.*

43. *See id.* §435.— 3 (any experts must be paid for by the person).

44. *See text accompanying notes 12-18 supra.*

45. *See* N.R.S. §435.— 1.

46. *See id.* §435.— 2.

47. *See id.* *See also id.* §435.— (any discharge must be pursuant to this section).

48. *See id.* §433.014 (definition of administrative officer).

49. *See id.* §435.— 2 (period cannot exceed twelve months and certificate can be renewed more than once).

50. *See id.*

51. *See id.* §435.081 2.

52. *See id.*

must make recommendations for placement or treatment of the person before the expiration of the forty-five day period.⁵³ If there is not a less restrictive alternative, the person may be admitted to the facility using the appropriate admission procedure.⁵⁴

Chapter 663 also allows an administrative officer to accept a person for evaluation and diagnosis without admission when the person's parent or guardian believes that the person is mentally retarded.⁵⁵ Moreover, existing law provides that a child may be received, cared for, and examined at a center if ordered to do so by a juvenile court having jurisdiction of the minor.⁵⁶ Chapter 663 reduces the time a child can be held at a facility without admission⁵⁷ from ninety days to ten working days.⁵⁸ The Administrator must report the results of the examination to the juvenile court and may detain the child an additional seven days⁵⁹ awaiting court disposition of the child.⁶⁰ Chapter 663 also provides that in the above circumstances any person received for evaluation may be admitted into the center only by voluntary or involuntary admission procedures if after the evaluation it is discovered the person qualifies for admission.⁶¹

Discharge and Transfer

Existing law allows the Administrator to discharge a mentally retarded person when it would be in the best interest of the person.⁶² Chapter 663 supplements existing law by providing that the administrative officer must discharge the client if the person is no longer in need of the services offered at the center.⁶³ Before any discharge, however, a written notice must be given to the client and his or her representative at least ten days before discharge.⁶⁴ If the person was involuntarily admitted, notice must also be given to the district court that issued the certificate for involuntary admission.⁶⁵ Prior law stated that no mentally retarded client could be detained after reaching eight-

53. *See id.* §435.081 3.

54. *See id.* (voluntary or involuntary procedures).

55. *See id.* §435.081 5.

56. *See id.* §435.081 4.

57. *Compare* N.R.S. §435.081 4 with STATUTES OF NEVADA 1977, c. 277, §1, at 477 (amending N.R.S. §435.081 4) (changed "commitment" to "admission"). *See also* ABF STUDY, 34, 35, 62, note 9 *supra*.

58. *Compare* N.R.S. §435.081 4 with STATUTES OF NEVADA 1977, c. 277, §1, at 477.

59. *Compare* N.R.S. §435.081 4 with STATUTES OF NEVADA 1977, c. 277, §1, at 477 (changed from 15 days to 7 days).

60. *See* N.R.S. §435.081 4.

61. *See id.* §435.081 1, 6; see text accompanying notes 12-18 *supra*.

62. *See id.* §435.077 2, 3.

63. *See id.* §435.— 1.

64. *See id.* §435.— 2.

65. *See id.* §435.— 3.

een years of age unless the client volunteered to remain at the center or the Division started involuntary commitment⁶⁶ proceedings.⁶⁷ Chapter 663 provides that if the person was voluntarily admitted, the person can be discharged if there is a written request by the parent or guardian or by the person if eighteen years old or older.⁶⁸ If the Administrator believes, however, that the discharge is not in the person's best interest the Administrator can initiate involuntary admission proceedings, but the person must be discharged pending the outcome of the proceeding.⁶⁹

Furthermore, prior law did not have a provision for review if the client objected to a transfer to another facility.⁷⁰ Chapter 460 requires that the client must consent to any transfer unless conditions concerning care, treatment, or training warrant the transfer.⁷¹ If the client objects to the transfer the Administrator must enter the objection and a written justification for the transfer in the clients's record and promptly forward notice to the Administrator and the Mental Hygiene and Mental Retardation Advisory Board.⁷² The Board may then investigate the objection and attempt to resolve the dispute in a manner that best safeguards the client's rights.⁷³

Conclusion

In summary, Chapter 460 separates rights that are personal and rights that are concerned with care, treatment, and training.⁷⁴ Chapter 460 also provides a procedure of review to be used when a client objects to a transfer to another facility.⁷⁵ Chapter 663 creates procedures for voluntary and involuntary admission and discharge.⁷⁶ Additionally, Chapter 663 declares under what circumstances a person may be received by a division facility.⁷⁷

66. See ABF STUDY at 34, 35, 62, note 9 *supra*.

67. See STATUTES OF NEVADA 1977, c. 33, §1, at 103 (amending N.R.S. §435.360 1).

68. See N.R.S. §435.081 7.

69. See *id.*

70. See STATUTES OF NEVADA 1975, c. 745, §100, at 1609 (enacting N.R.S. §433A.430), STATUTES OF NEVADA 1975, c. 745, §108, at 1611 (enacting N.R.S. §433A.410), STATUTES OF NEVADA 1975, c. 745, §109, at 1611 (enacting N.R.S. §433A.420), STATUTES OF NEVADA 1975, c. 745, §149, at 1619 (amending N.R.S. §435.077).

71. See N.R.S. §§433.484 3 (applies to transfers within the state), 433A.420 (applies to the transfer of mentally ill persons to United States Veteran's Administration hospitals or other facilities of the United States Government), 433A.430 (applies to the transfer of mentally ill persons to facilities outside the state).

72. See *id.* §§433.484 3, 433A.420, 433A.430 1.

73. See *id.* §433.534 2, 3.

74. See *id.* §§433.484, 433.—.

75. See *id.* §§433.484 3, 433A.420, 433A.430 1.

76. See *id.* §§435.—, 435.077. See generally *id.* §§435.—435.—.

77. See *id.* §435.—.