CLAWS AND WINGS:
AN ORAL HISTORY EXPLORATION OF DISABILITY IN DELAWARE 1917-2017

Transcription of video recorded July 20, 2017
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Interviewee: Brian Hartman (Referred to hereafter as BH), Project Director, Disabilities Law Program, Community Legal Aid Society
Topics included: Legal Advocacy Assistance, Delaware Law, ADA
Run time: 37:48

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BH: My name is Brian Hartman, and I'm the Project Director with the Disabilities Law Program. The Disabilities Law Program is part of the Community Legal Aid Society, Inc., which is a nonprofit in Delaware that's been in existence for over 50 years.

When I was in college, it was late '60s, early '70s, and I was a political science major, 'cause that was... The times were very eventful in that period. You know, you had the draft, you had people marching for civil rights, and so I was interested in political science, and so I started off as a political science major, and then I got interested in psychology, and actually ended up with a double major in polysci and psychology, and then I went to law school.

I was interested in doing, say, mental health work. And some of the work I did in law school was analyzing some Delaware laws dealing with people with disabilities. I remember doing a paper on sterilization at the time, because I thought it was funny that Delaware in the '70s still had a law that authorized sterilization of people with disabilities and the only standard was procreation was deemed inadvisable. We also had a three-time losers statute at the time so if you were a three-time felon you could be sterilized. And this stuff just looked like it was from the '30s and it was still in the books.

So when I came... When I was in my second year of law school I actually volunteered for Community Legal Aid Society and did some briefs and some work on behalf of individuals with poverty-based impairments. In other words, they didn't have a lot of money.

And then when I came out of law school, I applied for a position at CLASI as, as an attorney and they had actually submitted a grant application for a mental health attorney to work at what then was the Delaware State Hospital, is now Delaware Psychiatric Center, it's a mental hospital.

And we didn't get the grant but they hired me anyway, and I was doing domestic relations, and I was doing juvenile delinquency work. And the juvenile delinquency work I found very rewarding because a lot of those kids had disabilities, they really did. And so, I was raising insanity and incompetence to stand trial, and trying to get them services. That was the main thing. And so that exposed me to the service delivery system, or lack thereof, for kids with disabilities.

KB: So how long have you worked in this field?

BH: Over 40 years.

KB: And did you grow up in Delaware?

BH: No, I grew up in Chicago. And like many transplants, my dad worked for DuPont, got transferred to Delaware when I was about 13, so I went to high school here, went to college here at the University of Delaware, and then Villanova Law School, so I was fairly local for the last 50 years or so. And as an anecdote, when I told my teachers in Illinois that I was moving to Delaware they asked me what state that was in.

KB: M-hm, "And what will you do in Delaware?" That's what they said to me when I came. [BH:

Okay.] Well, so what are some of the boards and commissions you've served on that have impact on the lives of people with disabilities?

BH: Well, I'm in the process of retiring so I just did a list recently of all the boards and committees that I'll be leaving and asking other people to, to take my place on. And there's about 18 or 19 of them. The three most significant councils that I work with currently in the last couple years have been the Developmental Disabilities Council, the State Council for Persons with Disabilities, and the Governor's Advisory Council for Exceptional Citizens. Those are three state agencies and they're very active councils legislatively and in the regulatory context, policy context, so most of my work has been with them.

I also serve on Human Rights Committee for the Division of Developmental Disabilities Services where we review rights complaints and restricted plans. I serve on two committees dealing with death reviews. So if someone in residential services within the Department of Health and Social Services dies and there's some question raised, then I review those, those deaths. I serve on the Victim's Compensation Assistance Program Advisory Council – the VCAP – it's, it's actually a somewhat little-known program for victims of violent crimes. If you're a victim of a violent crime, you can apply for funding to, say, change your locks, or to relocate. In many cases, these are victims of domestic violence, and get mental health counseling and so forth. And there's a bunch of others, I don't know if you want me to keep going down the list or not.

KB: Maybe, are they all… You're doing it as a staff lawyer for the state doing these?

BH: Well, I don't work for the state, I work for a nonprofit, but I serve on these committees as an appointee, sometimes by the governor, and in other cases just as a volunteer. But typically they look to me for legal expertise, that is the main thing that I can bring to the table.

KB: Tell me more about your nonprofit.

BH: The Community Legal Aid Society? Okay, it's been around for over 50 years. It started off as a poverty-based program and has expanded over the years to add different projects, such as the Disabilities Law Project, which started around 1977. We also have an immigration program, we have an elderlaw program, we have a fair housing program, and then we still, and we have a medical legal partnership program, which is relatively new.

What they have found is that people with legal problems, that the legal problems often exacerbate or are linked to health problems. For example, if you're, if you get evicted, well, you may not have access to a place to live and your health's gonna deteriorate. If you've got a landlord who's not taking care of the premises and you have asthma, that, that asthma may be exacerbated by the conditions of your apartment. And so, medical professionals will refer cases to us and we'll handle those cases in our MLP program.

KB: So what are, what do you feel are some of the most significant laws that have been passed through your efforts?

BH: Okay, well what I thought I could do since we're dealing with a 40-year period is go through maybe 3 laws in each decade if you don't mind. I would need to look at some of my reference materials as we go on because my memory isn't that great for 40 years ago.

But, let's, let's go back. I think the first bill that I became involved with was in 1980. And at the federal level there were some initiatives primarily spearheaded by Ted Kennedy to change our fair-housing laws and to make it illegal to discriminate based on disability in housing, 'cause it wasn't against the law. You could turn somebody down for housing because they had a disability. So, the state Human Relations Commission and WILMAPCO, which was another regional planning group, asked me if I would help prepare state legislation. Which I did. And so I drafted the bill that was enacted that for the first time in Delaware banned housing discrimination based on disability. And that was sort of an eye-opener because it was my first major bill and I saw the impact, and I was an experienced litigator and I saw what you could do through litigation, and this was a lot quicker and you were affecting a lot of people. So, over the years I have chosen to focus on legislative advocacy and not just the traditional litigation that most attorneys are involved in. Because you get a fair amount of bang for your buck, if you will, in Delaware.

So the second bill I would like to highlight in the 1980s was a special ed bill. So when Ronald Reagan was the president, he was, his administration was suggesting that we block-grant special education. And that we reduce a lot of the procedural protections in the current law, which is very prescriptive. And so we were afraid that we would be left with a combination of little funding and very few standards to protect special ed students.

And so I drafted some legislation to put a mini-IDEA (Individuals with Disabilities Education Act) in the state code. And it took us a couple years to get that through. There was a fair amount of opposition. But we did get it through in around 1983, I think it was. And that still exists in, in the code. So it would define what is a free appropriate public education. It’s been changed a little bit over the years since then.

What the hearing process would be, for example, before the bill, if you had a dispute with the school district, your first hearing was with the school district and they would choose the hearing officer, which didn’t seem quite fair. And most, most parents didn't see it as a viable process, so we came up with a system with a panel, where you have an attorney, an educator, and a layperson who is screened and nominated by the Governor’s Advisory Council for Exceptional Citizens. And so it’s, it’s a more cosmopolitan group as decision-makers. So that, that law has been modified a little bit over time as the federal law has changed, but it’s still, still in effect.

Third bill in the 1980s would be...I’d need to look at my notes. Let me take a peek at my little list here. Oh, employment!

As I mentioned earlier, there was no law in the books in the ’80s that said you couldn’t discriminate in housing based on disability. Well, there was also no law that said you couldn’t discriminate based on disability in employment. The ADA had not been passed yet – this is the ’80s. The ADA was passed in 1990. And we wanted to change that.

So, I drafted legislation to add disability – back then they called it “handicap” – to the anti-discrimination code. And we had several months of negotiations trying to hone a bill that would be unobjectionable to the Chambers of Commerce and employer groups, so there were a bunch of attorneys on the other side who would represent employers and the Chamber of Commerce and so forth. And we, we eventually reached a compromise.

For example, they wanted the bill to only apply to huge employers who had a 100 or more employees, and we got that down to 15. And then later on, within the last two years now we’ve just changed that, down to, like, 4 or 5, so it’s compatible with the rest of the protected classes. But that was huge. So in the ’80s the two really major achievements that I could highlight would be the housing discrimination law and the employment discrimination law.

Now if you go up to the ’90s, we continue to engage in legislative advocacy. One of the bills affected families with individuals with mental illness and with intellectual disabilities. So what the law dealt – the current law, as it existed then, imposed financial liability on parents and children for the cost of care of an individual who was getting residential services. So if someone were in the Stockley Center, which is a residential program for people with intellectual disabilities, or they were in Delaware Psychiatric

Center, the bills there could be a $100,000, $200,000, and your adult child, they go into that setting and the parent is on the hook for the money. Or their adult child could be on the hook for the money. Which, it was terrible. People would get these huge bills and it would make them very anxious, and so NAMI – which was National Alliance for Mental Illness back then – was really spearheading this and asked me to prepare the legislation, which I did. And we got it through. So that parents are responsible for request of care of minor children, but not adult children, and children are not responsible for the cost of their parents, irrespective of age. So that affected – and it also wiped out any existing liability that they might have – because people had been getting bills for hundreds of thousands of dollars. So that was one of the first bills we worked on in the '90s.

There's a couple others I would like to highlight. Mental Health Patients' Bill of Rights. So we have – we had a honed-down Bill of Rights for people in the Psychiatric Center, Delaware Psychiatric Center, and it also applied to our Stockley Center. And I was on a commission that reviewed mental health laws as a part of that commission, we prepared a lot of legislation to upgrade the rights and the services available to people with disabilities. And we modified the Bill of Rights, which is very lengthy, to be more protective of the patients.

And I recall one particular aspect of the Bill was, was very important: it dealt with discharge planning. Because, anecdotally, the hospital would sort of dump people without an adequate discharge plan. They'd be on the street, they would get in trouble with the law, they'd be homeless. And the Attorney General at that time, Charlie Oberly, asked that we include provisions in here to beef up the sections dealing with discharge planning. So we have a very lengthy section in there about pre-discharge planning and, and you have to identify all their social, financial and so forth needs, and have to identify how those needs, needs are gonna be met when the person leaves the institution. And you're supposed to have post-discharge providers involved in the pre-discharge planning. So it was a very logical approach, and that's still in the law today in order to shore up the discharge planning process to make sure that people just aren't discharged to the streets.

KB: Was that around the time of – when I lived in Pennsylvania, Elwyn Institute dumped everybody and they were all over the place.

BH: Well, I don't know what time period you're referring to. It could have been... [KB: Would have been actually in the late '70s...] No no, this is later, this was in the '90s. So, the…that was 1995-96, that time period I'm referring to.

Then there was another special ed bill that I was asked to prepare in the '90s. Under the IDEA, there's two main parts, one is Part B and one is Part C. Part B is for kids generally from age, the third birthday on, and then you have Part C covers if it's a toddler, so kids from birth with disabilities up through age 2. And that program is actually operated by our Department of Health and Social Services, not the Department of Education. But we had no enabling law on it, so you said the federal. So I was asked to draft that particular legislation.

We did that, and it's a nice bill and whenever I'm drafting the bills I always try to put a liberal spin on it, if you will, and one, one aspect in particular I think has been helpful over the years: we put in the state law that the plan, the individualized plan that's developed under this Part C, will be considered the primary plan for that child for purposes of all other state contractors and so forth. So, the Medicaid-managed care organizations should defer to that plan. If that plan identifies some assistive technology or some physical therapy or speech therapy as critical for that child, the managed care organization administering the Medicaid fund shouldn't second-guess that. And that's been helpful to invoke over the years.

So that was the '90s, so now we go into the first decade of the 2000s. And can highlight Attendant Services. So, people are moving more into the community around this period of time. You had

Olmstead Decision. We don't have the resources in the community, and the infrastructure set up. And so I was asked to prepare what is known as the Attendant Services Bill which set up a state program to provide home health-types of assistance to individuals living in the community, and because there were problems with restrictions in the Nurse Practice Act about what they could do, we put in the bill they were exempt, they were only regulated by the Department of Health and Social Services. And it covered both people with mental health profiles and also physical profile needs, and it covers a broad array of services, from taking you to the store, companionship, to helping you in the bathroom. And that bill is still in effect. And there's a state-funded program, and it's been expanded into a Medicaid-funded program as well. So now hundreds of people who get Attendant Services in the state consistent with the standards in the legislation.

Second bill in the 2000s would be the special ed context – this is 2003. So one of the committees I'm on is the State Council for Persons with Disabilities Brain Injury Committee. And we were looking at the special ed system to determine how kids with TBI classifications are doing. Because there is a separate classification in federal law for TBI. [KB: What's TBI?] TBI is Traumatic Brain Injury. So it would be something like a head – it's a head injury, basically.

So you have a bunch of different classifications in the special ed system: you have learning disabilities, you have autism, and TBI was a separate, distinct category. And we found that Delaware was identifying zero kids with TBI. And so why is this? I mean they gotta be out there. And it's because there was no funding for it. There, there was an anomaly in the code so that they couldn't fund them under TBI. They would put them under orthopedic impairment or some other category where there was actually funding.

But then we had no numbers; we couldn't figure out where the kids were with TBI and we couldn't evaluate their programming and so forth, so I drafted a law to set up a separate unit count – funding – for the kids with TBI and then we've monitored the numbers every year since then. So it's been going up. And, so it's given... And those kids also automatically get summer programming as a matter of right. So it's important that they be identified under that category and not lumped under an inappropriate category or less appropriate category, like learning disabilities. So there are advantages to the parent, too, of having that classification be apt and appropriate.

Third bill in the early 2000s would be the Nurse Practice Act changes. As I mentioned earlier, one of the problems with moving people into the community from facilities is their ability to get community-based services. And if you have very restrictive Nurse Practice standards, for example that might say someone cannot administer a medication to you – they cannot put it in your mouth. Because that's the practice of nursing. Well then, that undermines the ability of people to live in the community. And so, I drafted some legislation that basically says that a competent individual can delegate tasks they could ordinarily do but for a functional limitation. So if I have eye-hand coordination problems, or I can't move my hands very well, but if I could I could take the pill and put it in my mouth, well then somebody else could put the pill in my mouth. So it was a very simple concept, and we got that through. And that's been huge, because that, that really gave us a broad exemption, if you will, on a practical level from some of the restrictions in the Nurse Practice Act. And that bill is still in effect today.

So if we go up in years now to, say, 2010 on, I thought I would highlight three more bills.

One deals with voting and polling place access. So, if you go back in time, we've, we've historically not provided accessible voting places for people with mobility and other physical impairments. And I'd be happy to go back and share some of the history in Delaware of that. But what we were experiencing is we would – Disabilities Law Program staff will go out during elections and we have a checklist that was developed by the U.S. Department of Justice on accessibility, and then we would compile the results and send them on to the election commissioner and we would typically find, and still find, that a certain percentage have barriers to voting for people with disabilities. And then not really much would happen.

And so we drafted a bill that authorizes the State Council for Persons with Disabilities or any voter to refer a matter, a complaint, if you will, a concern, to the Department of Elections and then they are required to send it to the Architecture Accessibility Board for an evaluation of that site. And then they are required to defer to the findings of the Architecture Accessibility Board. And so that has been somewhat effective. We've gotten great cooperation out of the Architecture Accessibility Board. They typically – we typically refer cases that we know are very problematic. And they have corroborated our concerns. Problem is we're still finding that the Department of Elections is not necessarily deferring to the findings, and they keep using the same places over and over again. So we continue to follow up on that.

Apart from voting: fair housing. This is something we got through last year. As I mentioned, back in 1980, we had changed the law so you couldn't discriminate based on disability in housing. Some states, several states, also have laws that bar discrimination based on your source of income. So that, a landlord can't say "I want wage income – you know I'm not gonna count your Social Security because I think that's kinda variable and who knows what the government will do." And we have over 200,000 people in Delaware who are on Social Security, retirement disability, or SSI. And there were reports from the Department of Health and Social Services and from others that landlords were discriminating on this basis, that they would not accept the veterans' benefits or count that as income when they were determining your eligibility for a rental.

So we drafted legislation to add source of income as a protected class. We got that through, but we had to take out vouchers. Some states include, like, Section 8 vouchers or federally-subsidized vouchers in their legislation, and that was a compromise we had to – just to get the bill through. There was just an outcry from the landlords, because there's this aversion, if you will, there's a stigma to having Section 8 people who are – they viewed as a different class of citizen, if you will, in, in their rental properties. So we did get the bill through but it does exempt, it does not count a voucher, for example, as being included in source of income.

Disability prevention is something we also get involved in. For example, I drafted the law years ago that requires minors to wear a helmet while riding a bike up through age 18 instead of 16. And I think we were only the second state to do that; I think California was the first. And we were also involved in legislation a couple years ago involving school sports and identification of concussions, making sure kids got screened and were cleared for return to play if they had an ostensible concussion on the field.

But that left the youth sports leagues without comparable protections. So you have a lot of Babe Ruth leagues and youth sports in the summer, and so we drafted legislation and in concert with Nemours and A.I. DuPont Hospital for Children. Got that through last year so that coaches are required to take some training so hat they can identify...putting in a provision that if there's, if the kid has an ostensible head injury, they're dizzy, they've fallen to the ground, whatever, that the kid gets screened. And can't return to play without doctor's clearance.

So I could go on and on, but those are… I tried to give you three bills from each decade.

KB: So tell me about ADA. You've seen before and after. What difference has it made that you've noticed?

BH: Well, it's made a huge difference. It's been in effect for 25 years now. You didn't see curb cuts years ago, if you were walking around the city of Wilmington and New Castle County, for example, in the '70s and '80s, you typically didn't see curb cuts. So that's very visible. And I think you also see many more individuals with disabilities in the workplace. You just didn't see that as much years ago, in part because of barriers. They may not be able to climb the stairs and so you just wouldn't get hired. And I think there's more awareness and I think that the current generation that's grown up with the ADA is more accepting of people with disabilities. Like in special ed: years ago they were all in special schools, they were sort of out of the mainstream, and with the IDEA, and the ADA, both, promoted kids being educated in integrated settings, and so there's more familiarity and the kids with disabilities are more familiar with – made friends with peers that, that, were…did not have disabilities. So there's been lots of changes and they've been positive.

KB: What will still need to change or be passed to continue making progress?

BH: Well, we had a bill that was introduced last year that we weren't able to get through dealing with parking. There are many parking lots where they're noncompliant with ADA standards, either in terms of the number of spaces they're supposed to have for the parking lot size – there's a formula to the ADA. Or the striping is wrong or the signs are wrong or they don't have a proper access aisle for the van accessible spot. And so we're trying to figure out good ways to enforce this and what we came up with was a permitting process, so that if a parking lot is going to be resurfaced or modified in some way that they would get a permit, just like you do when you're gonna build a deck, or do some other minor modifications of a dwelling.

And we negotiated at great length with Chambers of Commerce and, and business groups who were adamantly opposed to this and the local governments were also generally opposed to this. And we made compromises, we said that you wouldn't actually have to even send an inspector out if the person doing the work sent you a photo and you could tell from the photo it was compliant. We made a number of concessions and they still wouldn't budge, so...

KB: They were afraid of the money, or they were afraid of change?

BH: Well, the counties I think were concerned – what, what they expressed was this would increase their, their burden in terms of enforcement. That they would have to send somebody out to actually check these places, and they don't have enough staff to do it now. To me it just means a permit for a deck is more important than a permit for parking for somebody with disabilities. So we'll probably reintroduce that. We considered reintroducing it this year, but there just was not enough support in the legislature for it.

KB: What commitees do you approach when you go over there?

BH: Well it depends on the bill. There's different committees that have jurisdiction over different contexts. So there's a Judiciary Committee, and there's the Health and Social Services Committee and so forth, and the House and Senate have different committees. So they assign it to a committee. It's assigned by when the bill is introduced, the leadership assigns it to a particular committee.

KB: And when you retire, how do you want your legacy to be carried on?

BH: Well, I, I wouldn't call it a legacy. I think the Community Legal Aid Society, as I mentioned, has been around for a long time, PNA's been around since '77, we've got good staff. The person who's going to be taking my place, Laura Waterland, is a very experienced attorney, and has been involved in some of the legislative work as well in recent years, so I'm, I'm optimistic and confident that the PNA will continue to be a very viable advocate for people with disabilities.

KB: So if somebody was going to write your biography or talk about you in the future, what would you hope they would say about you as a person in this field?

BH: Well, that I was a groundbreaker. I came in at a time when you didn't have a lot of these basic laws in place. And so my role has been to try and create an infrastructure that other attorneys could then use. Once you’ve got a law, then you can enforce it. We didn’t have laws!

So the mandate for the people following me is you gotta enforce these, use them. Too often, people take things for granted and they don’t realize how hard it was to get this stuff in place. So use it. Otherwise it’s not helping anybody. So hopefully people will view me as a groundbreaker and someone who set up the infrastructure that future litigators and advocates can use.