

NCPLS



ACCESS

Publications Class Action Lawsuit Certified/DOC Publication Policy Revised

By: NCPLS Staff Attorney Dawn Ducoste

On October 26, 2007, NCPLS filed a federal class action lawsuit against the North Carolina Department of Correction for unreasonably denying North Carolina Prisoners access to incoming publications in violation of their First Amendment right to receive publications through the mail and their Fourteenth Amendment right to due process. The lawsuit seeks injunctive and declaratory relief. This lawsuit was consolidated with another North Carolina prisoner publications case, *Urbanik v. Beck, et al.*, (5:06-CT-3135-FL)(EDNC 2007), and certified as a class action by the District Court on May 30, 2008 as *Urbanik v. Stanley*, No. 5:06-CT-3135-FL. All North Carolina prisoners are automatically members of the lawsuit class.

Throughout the state inmates have been denied, without explanation, hundreds of magazines and books which do not appear to violate DOC regulations. Problems also include inconsistent publication rejections, inmates being denied the opportunity to appeal, lengthy delays of the Publication Review Committee (PRC), magazines not being rejected on an issue-by-issue basis, and magazines not being forwarded as requested. Over the past several months, NCPLS and DOC officials have been in the process of negotiating new DOC publication policies to address these problems. On May 12, 2008, Director of Prisons, Mr. Boyd Bennett, approved several revisions to the Inmate Publication Policy Chapter D, Section .0100. A summary of the major changes in the policy is described below.

Although NCPLS is pleased with the new policy, at this point, we plan to continue the litigation. Given the large number of prison units, there will inevi-

tably be some units that are faster about getting into compliance than others. It is important to us that we monitor the implementation of these changes over time and receive input from our clients regarding the effectiveness of the new procedures. NCPLS will continue this litigation until such time that we believe our clients are receiving all publications and procedures to which they are entitled under the Constitution.

book can be appealed to the Publication Review Committee for a fresh review.

2. All inmates will be given a copy of their Disapproval and Appeal/Waiver Forms.

Under the old policy, inmates were not given a copy of their appeal form and often had no way to prove that they had appealed a publication rejection.

3. A new prohibition on written depictions of sexually explicit publications is limited to written depictions of sex acts involving children, animals, or violence. Although not official policy, in the past, sexually explicit prose has been routinely rejected. Under the new policy, prohibited sexually explicit material is defined as "pictorial



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Summary of Major Changes in the Revised DOC Publication Policy D.0100 that went into effect 5/12/08

- 1. The Master List of Disapproved Publications will only include publication that were disapproved during the previous twelve (12) months.** Under the old policy, once a book was on the List of Disapproved Publications, it was on the list forever. Under the new policy, after twelve months, a disapproved book is automatically removed from the list. If the book is again ordered and rejected at the unit level, the

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ACCESS is a publication of North Carolina Prisoner Legal Services, Inc. Established in 1978, NCPLS is a non-profit, public service organization.

NCPLS serves a population of more than 38,600 prisoners and 14,000 pretrial detainees (with about 250,000 annual admissions), providing information, advice, and representation in all State and federal courts to ensure humane conditions of confinement and to challenge illegal convictions and sentences.

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Articles, ideas
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NCPLS SUPPORTS THE “4All” EFFORT OF THE NORTH CAROLINA BAR ASSOCIATION

As reported in the March 2008 issue of *NCPLS Access*, North Carolina Bar Association President Janet Ward Black initiated the “4All Campaign” as the theme of her presidency. This takes its name from the portion of the Pledge of Allegiance that declares that we are “one nation ... with liberty and justice *for all*.” The purpose of this campaign was to help fulfill that promise by helping to provide equal access to justice to all persons, without regard to their status or financial standing.

One feature of the 4All Campaign was a state-wide public service day held on Friday April 4, 2008. This day, designated “4/ 4/ 4All” allowed people across the state to call into service centers where volunteer lawyers would provide general legal information about a range of topics. This project was an outstanding success. Over 700 attorneys volunteered to assist with this project and, more than 7000 calls were answered by the conclusion of the 12 hour work day.

In addition to 4/4/4All, President Black had asked NCBA Sections and Committees to consider independent projects to further support the 4All effort. NCPLS,

in conjunction with the NCBA Professionalism Committee and with the support of other non-profit groups, sponsored a walk-in legal information clinic targeted to the legal needs of ex-offenders and groups who assisted ex-offenders with re-entry issues. This clinic was held on Saturday April 5, 2008 from 10:00 a.m. through 2:00 p.m. A number of attorneys and para-

legals participated in this clinic, including members of both the NCPLS staff and the NCBA Professionalism Committee. Judge Linda Stephens, of the North Carolina Court of Appeals and member of the Professionalism Committee, was present to lend her support by greeting incoming clients. In addition, there were law student volunteers from the law schools at UNC, N.C. Central and Campbell University.

Because of the outstanding support for this project, NCPLS is planning to hold similar clinics on at least a quarterly basis, about every three months. **The next clinic is currently scheduled for Saturday July 12, 2008, from 10:00 a.m. to 12 noon.** The project coordinators, NCPLS Staff Attorneys Ken Butler and April Giancola, also hope to eventually work with groups in other cities to set up similar clinics.



NCPLS Continues Work on Lost Jail Credit

As we reported in the June 2007 edition of *NCPLS Access*, NCPLS receives thousands of requests from inmates each year to obtain sentence reduction credits from time spent in jail on a charge for which they were ultimately convicted (jail credit). Our Jail Credit Team consists of four full-time paralegals, working under the supervision of a senior staff attorney, whose sole job is to investigate claims by inmates that they are entitled to additional jail credit.

The work of our Jail Credit Team has always been an extremely successful area

of our practice. Not only is it a benefit to our clients, by preventing them from serving more time that they should on a given sentence, but it also benefits the taxpayers of North Carolina by saving the State the costs of excessive and erroneous incarceration. During the past six months, the Jail Credit Team found 12,189 days of jail credit that was due inmates in the Department of Correction. This credit, which amounts to over 33 years of freedom for our clients, also resulted in a saving to the State of \$871,757.28 (given an average daily cost of incarceration of \$71.52).

FREE LEGAL INFORMATION CLINIC

Sponsored by North Carolina Prisoner Legal Services, Inc.,



***SATURDAY JULY 12, 2008
10:00 AM -12:00 PM***

***North Carolina Prisoner Legal Services
1110 Wake Forest Road
Raleigh, NC
919-856-2200***

(Route 1 and 3 CAT Bus Lines)

Free legal consultations about civil legal matters governed by N.C. law will be offered at this clinic for people who have been formerly incarcerated or, for organizations that serve the formerly incarcerated community. Volunteers will be available to provide general information about legal issues or refer you to an agency or organization that can provide the information you need. The volunteers cannot offer to represent you but, if you are eligible, you may be referred to one of the legal or social service agencies in the Raleigh area to seek additional assistance and/or representation.

Please bring all of the documents concerning your legal problem to the Clinic

For additional information and assistance, please visit www.lawhelp.org/nc.

PUBLICATIONS CLASS ACTION LAWSUIT VERIFIED/DOC PUBLICATION POLICY REVISED (CONTINUED)

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depictions of sex acts involving any person of any age, or written depictions of sex acts involving violence, sadomasochism, sex with animals, or sex with any person who is under age 18.”

4. **Inmates will be notified within seven (7) working days of the arrival of a publication at the facility if the publication is disapproved.** Under the old policy, inmates were to be notified within 10 days.
5. **Once a publication is appealed to the PRC, inmates can expect to receive a decision from the PRC within forty-five (45) days.** Under the old policy, no outer time limit was provided.
6. **There is a new disapproval notification form that requires officials to state the specific page number(s) of the objec-**

tionable material as well as the applicable policy section in D.0109 that is violated. In the past, inmates were often given no specific reason for their publication’s rejection other than it “violates policy at D.0109.”

7. **The Publication Review Committee must complete its review of disapproved publications within 7 days of receiving the publication.** Under old policy, no time limit was given.
8. **Facility Superintendents must notify inmates of the Publication Review Committee’s decision within 7 days of receiving that decision.** Under old policy, they had 10 days to notify inmates.
9. **The posted Master List of Disapproved Publications will be updated no less than every thirty (30) days.**
10. **Inmates now have the ability**

forward their publications, at the inmate’s expense, to an alternate address if the publication is disapproved by the PRC. In the past, PRC disapproved publications were usually destroyed.

11. **The Disapproval and Appeal Waiver Form has been revamped for better clarification.**
12. **Publishers will no longer be permitted to opt out of receiving future notifications that their publication has been disapproved by the NC DOC.**
13. **If a publisher appeals, they must be notified of the outcome of the appeal within 15 days.** Under old policy, they were notified within 30 days.
14. **Language prohibiting inmates who are bilingual from purchasing publications not in English has been removed.**

NCPLS STAFF IN ACTION

Staff Attorney **Michael Avery** recently settled a claim of excessive force against an inmate for \$3,500.00. This involved an inmate who was kicked by a correctional officer, aggravating a previously existing injury. This matter was settled by negotiation with the DOC, and did not require filing a lawsuit.

Staff Attorney **Beth McNeill** was appointed by the U.S. District Court to represent a state inmate who had filed a *pro se* petition for habeas corpus. The issue was whether the defendant had received ineffective assistance of counsel for not entering a written notice of appeal on his behalf following entry of a guilty plea. The trial court did give oral notice in court, but the state Superior Court judge refused to enter the appellate entries. In a motion for summary judgment, Ms. McNeill argued that trial counsel was ineffective for not entering written notice of appeal when the Judge refused to accept oral notice. The motion was successful and the District Court ordered that the

State grant him a belated appeal in 90 days or the Court would issue a writ releasing the defendant. The State appealed and NCPLS has been appointed to represent the defendant in the Fourth Circuit Court of Appeals.

Ms. McNeill also filed a state motion for appropriate relief in a case where the lead investigator made an improper remark to a member of the jury, who was also a law enforcement officer. Following an evidentiary hearing on this issue, the Superior Court denied relief. Ms. McNeill submitted a petition for *certiorari* review to the North Carolina Court of Appeals, who granted the defendant a new trial in January of 2008.

On June 4, 2008, Staff Attorney **Michele Luecking-Sunman** presented an oral argument before the North Carolina Industrial Commission in a state tort claim action. The case, which Ms. Luecking-Sunman tried before a deputy commissioner, involved an inmate who was beaten

and stabbed by two inmate-assailants who had been allowed into our client’s cell. Counsel for the State argued that our client had not closed his cell door and that it was therefore his fault the assailants gained entry. Ms. Luecking-Sunman presented arguments that referenced the testimony at the hearing, namely that our client and a witness both testified that the door was in fact closed and locked and that the only way for it to have been opened was from the control booth. We hope to learn the decision of the Commission soon.

Staff Attorney **April Giancola** was recently named as one of the five inaugural scholars for the N.C. Bar Association’s Pathways to Inclusion Leadership Academy. Pathways to Inclusion, is a project of the NCBA Diversity Task Force, and is designed to provide leadership training to selected attorneys from diverse backgrounds who aspire to develop skills necessary to serve

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NCPLS STAFF IN ACTION

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both state and local organizations and underserved communities.

On March 28-29, 2008, NCPLS Interim Executive Director **Phil Griffin**, along with Staff Attorneys **Sarah Blair**, **Dawn Ducoste**, and **Dekhasta Rozier**, attended a conference in Washington, D.C., at the George Washington School of Law, entitled "Prison Litigation: A Workshop for Plaintiffs' Attorneys." This conference brought together a number of noted practitioners, advocates and scholars in the area of prisoner rights law. Some of the topics discussed were the Prison Litigation Reform Act (PLRA), including ways to both deal with its barriers and efforts to reform the PLRA; the Prison Rape Elimination Act (PREA); the Second Chance Act of 2007; and the use of experts in litigation. This also served as a valuable way for NCPLS to network with other programs and individuals from around the nation who are engaged in work similar to our program.

Staff Attorney **Sarah Blair** is completing a one-year term as Chair of the Forensics Taskforce for the Criminal Defense Sec-

tion of the North Carolina Academy of Trial Lawyers.

Staff Attorney **Hoang Lam** currently has two cases before the North Carolina Court of Appeals. In one case, the defendant was convicted at trial for trafficking offenses and was unsuccessful on appeal. The appellate counsel did not argue on appeal the issue of whether the trial court had denied the defendant's constitutional right to represent himself. NCPLS filed a motion for appropriate relief in the superior court. Although the court denied the motion, we successfully sought an issuance of the writ for certiorari from the Court of Appeals, which will review the case again.

In the second case, the Department of Correction recorded a habitual felon sentence as consecutive, even though the trial judge ordered it to be concurrent at sentencing. The Court of Appeals agreed to review the case and will decide whether the trial judge had erred in failing to order the Department of Correction to record the sentence as concurrent.

Mr. Lam is also involved with a motion for appropriate relief out of Robeson

County alleging that law enforcement officers involved in the arrest and search of the defendant were not truthful in their application for a warrant. These claims are supported, in part, by the federal prosecution of several Robeson County deputies in "Operation Tarnished Badge" which has resulted in criminal convictions for several officers.

Staff Attorney **Ravi Manne** and **Paul Green** recently filed a federal habeas corpus petition on behalf of a defendant convicted of first-degree murder. The claim raised was that the defendant received ineffective assistance of counsel due to a conflict of interest where defendant's trial counsel had previously represented one of the State's witnesses. Trial counsel had interviewed this witness and obtained a statement favorable to the defendant. After the State called the witness to testify at trial, defense counsel unsuccessfully sought to cross-examine the witness and elicit the favorable statement from him. Counsel did not withdraw from the representation or ask to take the stand as a witness in order to bring out the favorable statement.

Prison Rumors and the 2007-2008 Legislative Session

In previous editions of *NCPLS Access*, we have reported on the existence of various rumors concerning changes in North Carolina's sentencing laws. Rarely a week goes by that we do not receive inquiries about the following subjects:

- Whether inmates who were sentenced under the Fair Sentencing Act (FSA), for crimes occurring before October 1, 1994, will be re-sentenced under the Structured Sentencing Act (SSA)?
- Whether there have been changes concerning sentences for "non-violent" offenders, which will result in early release?
- Whether felony parole, which applies to FSA sentences will be made to apply to SSA sentences as well?

There are hundreds of bills introduced every year in the General Assembly. Some issues may have more than one bill introduced to address them. In order for a bill to become law, it must be passed by both the Senate and House of Representatives, ratified, and signed by the Governor. **While there have been bills introduced to address potential disparity between FSA and SSA sentences, and to provide the possibility for early release for some types of offenders, at the time of this writing, these have not been enacted into law. Furthermore, there has been no legislation introduced which would re-introduce parole for felons convicted under the SSA.**

While we are unable to discuss every bill dealing with criminal law or prisoner

rights issues that has been introduced, we have assembled the following list of bills, along with a brief description of where they are currently in the legislative process.

House Bill 1730, entitled "An Act to Balance Fair Sentencing and Structured Sentencing and to Keep Inmates Who Pose Great Risks to Society in Prison," would provide that inmates convicted prior to effective date of SSA would be paroled if the Parole Commission determines that:

- The inmate has served more time than the maximum sentence that would have been imposed under the SSA.
 - The inmate does not pose a
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PRESIDENT BUSH SIGNS THE SECOND CHANCE ACT OF 2007 INTO LAW

In the March 2008 issue of NCPLS Access, we reported on the passage of the Second Chance Act of 2007 by Congress. This legislation provides increased grant funding to programs that are working towards the re-entry of ex-offenders into society. On April 9, 2008, President Bush signed this Act into law. Below are excerpts from the President's signing statement:

The country was built on the belief that each human being has limitless potential and worth. Everybody matters. We believe that even those who have struggled with a dark past can find brighter days ahead. One way we act on that belief is by helping former prisoners who've paid for their crimes -- we help them build new lives as productive members of our society.

The work of redemption reflects our values. It also reflects our national interests. Each year, approximately 650,000 prisoners are released from jail. Unfortunately, an estimated two-thirds of them are rearrested within three years. The high recidivism rate places a huge financial burden on taxpayers, it deprives our labor force of productive workers, and it deprives families of their daughters and sons, and husbands and wives, and moms and dads.

Our government has a responsibility to help prisoners to return as contributing members of their community. But this does not mean that the government has all the answers. Some of the most important work to help ex-convicts is done outside of Washington, D.C., in faith-based communities and community-based groups. It's done on streets and small town community centers. It's done in churches and synagogues and temples and mosques.

I like to call the folks who are engaged in this compassionate work, "members of the armies of compassion." They help addicts and users break the chains of addiction. They help former prisoners find a ride to work and a meal to eat and place to stay. These men and women are answering the call to love their neighbors as they'd

like to be loved themselves. And in the process, they're helping prisoners replace anger and suffering and despair with faith and hope and love.

The bill I'm signing today, the Second Chance Act of 2007, will build on work to help prisoners reclaim their lives. In other words, it basically says: We're standing with you, not against you.

First, the act will authorize important parts of the administration's Prison Re-entry Initiative. The goal of this initiative is to help America's prisoners by expanding job training and placement services, improving their ability to find transitional housing, and helping newly released prisoners get mentoring, including from faith-based groups.

The past three years, congressional appropriations have supported the work in 20 states through a series of pilot programs awarded to community and faith-based organizations by the U.S. Department of Labor. The early efforts have fielded promising results. In the first two years of the program, more than 12,800 offenders have enrolled in the prisoner re-entry program. More 7,900 have been placed in jobs. Only 18 percent of those enrolled in the program have been arrested again within a year -- that's less than half the national average. We like to measure results, and the results of these pilot programs are very encouraging.

With the legislation I'll sign today, Congress has recognized the success of this good policy, and I thank them for their good work. Secondly, the act will support the Justice Department's ongoing work to help our nation's prisoners. This bill will help state and local governments, and Indian tribes, and non-profit groups implement programs that will improve the prisoner re-entry process.

These programs will provide further -- former prisoners with essential services, like housing and medical care. It will help develop prisoner drug treatment programs; support prisoner mentoring initiatives. It will support family counseling and other

services to help prisoners re-establish their place in the community.

In both these ways, the Second Chance Act will live up to its name; will help ensure that where the prisoner's spirit is willing, the community's resources are available. It will help our armies of compassion use their healing touch so lost souls can rediscover their dignity and sense of purpose.

I recently went to a program in Baltimore, Maryland, called Jericho. I met a man there who has kindly joined us today named Thomas Boyd. He's 53 years old. He spent more than 20 years of his life using drugs and going back and forth to jail. He remembers the day when his daughter sat down, looked him in the eye and said, "Daddy, I think it's time for you to start doing something with your life."

He took his daughter's advice. He sought out the Jericho re-entry program, which is supported by the Re-entry Initiative. When I visited the program, I tried to remind them that the least shall be first. I also reminded him I was a product of a faith-based program. I quit drinking -- and it wasn't because of a government program. It required a little more powerful force than a government program in my case.

And he told me that he appreciates the love and compassion he felt -- feels on a regular basis. He's working, back with his family; he's a good guy. And I want to thank you for coming, Thomas. (Applause.)

I want to thank you for coming, Thomas. There's a lot of other Thomases out there that we're going to help with this bill. And so I thank the members of Congress for joining us. Thanks for your hard work. I thank the members of my administration who are going to see to it that the bill is implemented properly.

And now it is my honor to sign this important piece of legislation. May God bless the country, and may God bless those who are trying to help. Thank you very much.

Prison Rumors and the 2007-2008 Legislative Session

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substantial risk for violence or recidivism.

- The Commission determines that the inmate’s crime was not so heinous that the Commission cannot in good conscience release the person.

A “maximum sentence” is calculated as the top of Level VI in the presumptive range for the same class of offense as would apply under the SSA. This act does not apply to persons serving life sentences for first-degree murder. This bill was referred to the House Committee on the Judiciary (II) on April 19, 2007, and has not come out of committee review at this time.

Two Senate bills would affect the potential sentences for persons convicted of drug trafficking. Under Senate Bill 727 a drug trafficking defendant could receive a probationary sentence if the court determined that:

1. The person provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or;
2. The person has no prior convictions for crimes that produced or threatened serious bodily harm; has no prior felony convictions for the manufacture, sale, delivery, or possession of controlled substances as defined in this Article; and the sentencing judge finds by a preponderance of the evidence that the person: (i) did not possess a firearm during the commission of the offense; (ii) played a minimal role in the drug scheme that led to the offense; (iii) carried out the offense at the direction of another; and (iv) stood to receive substantially less pecuniary gain from the

offense than the person who directed the commission of the offense

Senate Bill 1504 contains the same language providing for probationary sentences, and also amends GS 15A-1370A by providing that the DOC has the authority to grant early release to a person convicted of drug trafficking if:

1. At the time of the inmate’s sentencing, he or she satisfied all of the criteria in G.S. 90-95(h)(5)b for a possible probationary sentence (first offense, no use of a firearm, minimal role, etc.);
2. The inmate has no violence-related infractions or attempted escapes on his or her record while incarcerated;
3. Has served at least one-half of his or her sentence; and
4. Does not have an order of removal against him or her from the United States Office of Homeland Security.

In determining whether to grant an early release, the DOC may consider:

1. Whether the inmate’s early release would unduly depreciate the seriousness of the inmate’s crime or promote disrespect for the law;
2. Whether the inmate’s continued correctional treatment, medical

care, or vocational or other training in the institution will substantially enhance the inmate’s capacity to lead a law-abiding life if the inmate is released at a later date; and
3. Whether there is a substantial risk that the inmate would engage in further criminal conduct in the United States.”

Both of these bills were referred to Senate Committees in March 2007 and have not come out of committee review.

Senate Bill 1955 would provide for the limited release of certain prisoners to immigration officials for deportation. Under this bill, persons convicted of non-violent offenses, who had served at least one-half of their minimum sentence, and for whom the DOC had received a final order of removal from the United States Immigration and Customs Enforcement (ICE), could be released at the discretion of the Post-Release Supervision and Parole Commission. An inmate who returns illegally after such a release could, in addition to other penalties, be re-arrested and made to serve the remainder of his prior sentence(s). This bill was referred to the Senate Committee on the Judiciary on May 27, 2008.

Senate Bill 1480 allows for the release of inmates who are determined to be “permanently and totally disabled, terminally ill, or geriatric,” and “incapacitated to the extent that the inmate does not pose a public safety risk.” The bill, which adds several new statutory sections to Chapter 15A of the General Statutes, sets up procedures for seeking such medical release. This bill has been passed by both the House and Senate, ratified, and sent to the Governor for signature.

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**THE NEWSLETTER OF NORTH CAROLINA
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<http://www.ncpls.org>***

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House Bill 2105 would increase the amount of compensation due to a person who had been wrongly convicted and received a pardon of innocence from the Governor. Under this bill the amount of authorized compensation would increase from \$20,000.00 to \$40,000.00 per year, up to a maximum amount of \$750,000.00. The Industrial Commission would also be permitted to make adjustments in these awards to reflect increased in the Consumer Price Index. The Industrial Commission would also be empowered to make additional compensation for lost educational and training opportunities caused by the wrongful conviction, which could be used to pay tuition for such training. This bill was referred to the House Committee on the Judiciary May 15, 2008. If it receives a favorable review in that committee it will be forwarded to the House Appropriations Committee.

Senate Bill 1214 would amend the Interstate Compact for the Supervision of Adult Offenders. This Compact allows for persons who are on probation, parole, or other

types of supervised release to transfer supervision to another state. Among the changes that would be made is the addition of two new positions to the Interstate Compact Commission, one of whom is a district attorney and the other a Sheriff, both of whom are to be appointed by the Governor. Another proposed amendment is a requirement that the transferee pay a transfer application fee of \$150.00. (This may be waived if the Compact Commissioner determines that such a fee would be an undue burden on the applicant.) An additional amendment would allow for waiver of the monthly supervision fee for persons who are being supervised under the Compact if it is determined that this fee would also be an undue burden. This bill has passed the Senate and has been referred to the House. It is currently before the House Committee on Finance.

We will continue to monitor legislative developments and report on bills of interest in future editions of *NCPLS Access*.