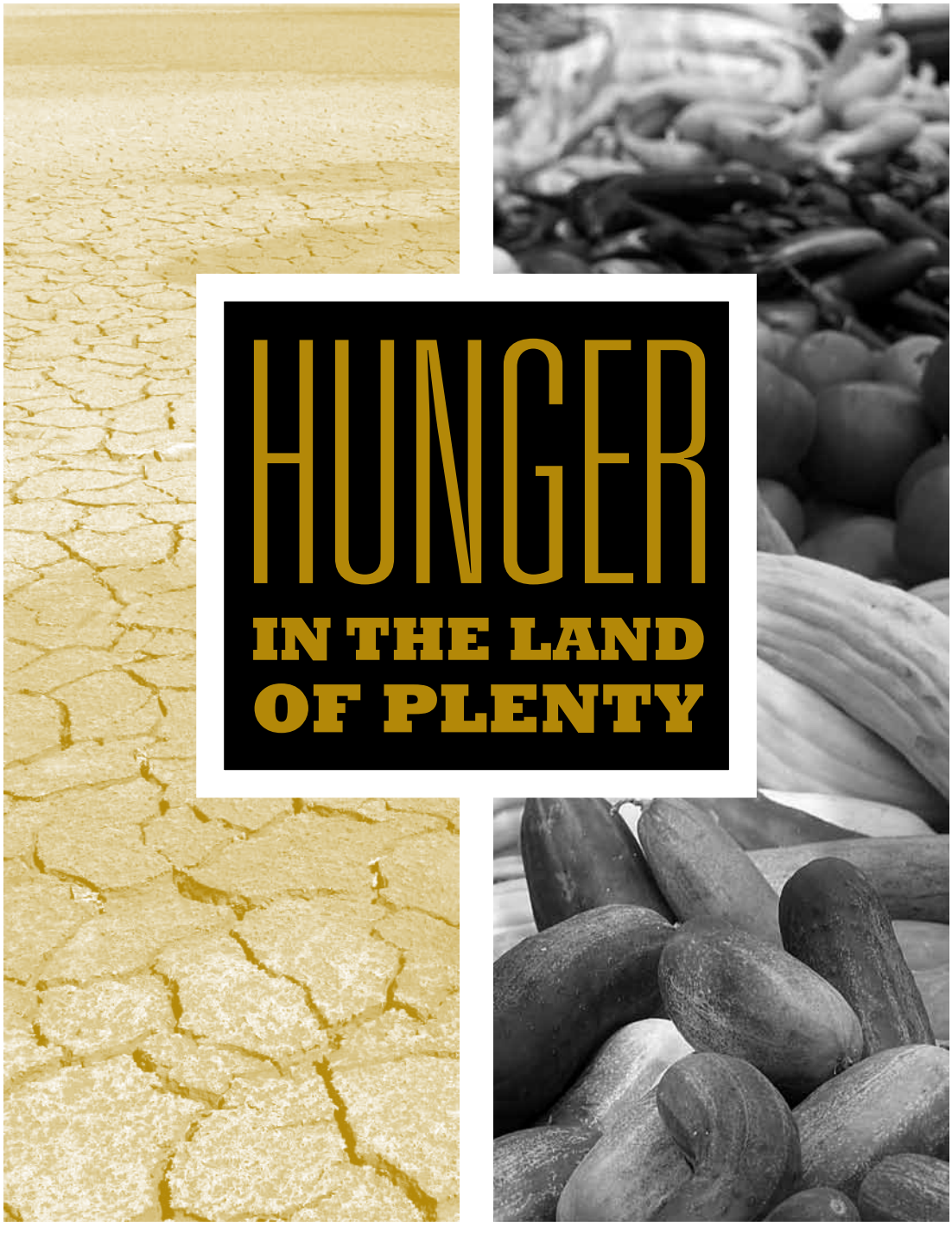
Clearinghouse REVIEW

Journal of Poverty Law and Policy

September–October 2012
Volume 46, Numbers 5–6



SHRIVER CENTER
Sargent Shriver National Center on Poverty Law

EMERGING SOLUTIONS *to the* FAILURE OF INSTITUTIONAL FOOD

By Jota Borgmann

Jota Borgmann
Senior Staff Attorney

MFY Legal Services
299 Broadway 4th Floor
New York, NY 10007
212.417.3717
jborgmann@mfy.org

Whether served in a hospital, a nursing home, a school, or a prison, institutional food has generally been notorious for its unappealing and unhealthy character. Efficiency and cost have become the predominant concerns and determine the source and quality of the food served. The result is flavorless, tedious, and nutritionally deficient meals. Institutions generally offer, besides poor quality and taste, little if any choice in what and how food is eaten. Here I focus on food service in New York adult homes, known as "board and care homes" in other states, and the parallel problems and solutions presented in other types of institutions—nursing homes, schools, and prisons.

Food in New York's Adult Homes

Adult homes are institutions licensed to house older adults and people with disabilities.[1] In New York City many adult homes are large facilities primarily housing people with psychosocial disabilities. Adult homes are required to provide a range of services, including meals, in exchange for an elevated facility payment of $1,208 through residents' Supplemental Security Income.[2] MFY Legal Services offers free legal assistance to adult home residents throughout New York City and regularly fields complaints about the food in the homes.

The New York State Department of Health regulates adult homes. In the last quarter of 2011 a fifth of all regulatory violations found by the Department of Health in adult homes were related to food service.[3] Residents have characterized adult home food service as one of many services where they are nickel-and-dimed by the owner-operator. One resident described the meat in his meals as "mystery meat." Another

[1]See N.Y. Soc. Serv. Law § 2(21) (McKinney 2012).

[2]Most residents receive Supplemental Security Income (SSI), although some residents receive welfare, social security disability, or other income. SSI beneficiaries have a statutorily protected personal-needs allowance of $184 (see *id.* § 131-o). The remaining $1,208 is the amount that most adult homes charge residents as a monthly facility rate.

[3]See New York Department of Health, Adult Care Facilities Survey Report—October 1 Through December 31, 2011 (July 2012), http://bit.ly/OF647N.

explained how he consumed nutritional drinks in lieu of eating the meals offered. Residents who try to manage their weight or who have diabetes complain that the food is high in carbohydrates. Many say that they are rarely served fresh fruit or vegetables or only when a Department of Health inspector comes to the home. More than a hundred residents of the Garden of Eden Home for Adults (not the idyllic place the name suggests) recently petitioned the administration to "upgrade" the quality of the "bankrupt" food.[4]

Aside from the quality of meals, a key problem with food in adult homes is the lack of choice and control. Residents do not have access to a kitchen to cook or store their own food. They complain about the monotony of the food served. "They give us chicken nineteen times per month," said one resident at Oceanview Manor Home for Adults. "Chicken teriyaki, chicken paprika … chicken cooked the same way with different sauces."[5]

In *Disability Advocates Incorporated v. Paterson* the plaintiff alleged that people with mental illness were unnecessarily segregated in adult homes in New York City in violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.[6] The court evaluated whether adult homes were institutions, defining an institution as "a segregated setting for a large number of people that through its restrictive practices and its controls on individualization and independence limits a person's ability to interact with other people who do not have a similar disability."[7] In concluding that adult homes were institutions, the court considered testimony regarding the inflexible schedules for mealtimes, which were announced over the public address system; residents' assigned seating in the dining room; and residents not being allowed to invite guests to meals.[8] Indeed, food service in adult homes is in some ways similar to that in prisons, where inmates typically have no control over when meals are served, where they are served, with whom they may eat, the types of food they eat, and the quantity of food served.[9]

Not surprisingly, adult home residents frequently report that they use much of their limited incomes to purchase food outside the home.[10] But what is available near the typical adult home to someone without access to a kitchen? Residents report that they get Chinese takeout or buy canned goods from a bodega. Eating out is an expensive alternative for the typical resident who has a monthly allowance of $184 to pay for clothing, toiletries, transportation, medical copayments, and other personal needs.[11] Residents of institutions are not eligible to receive food stamps.[12] Some residents keep small refrigerators in their rooms—if they are allowed—or keep food in a cooler. Norman Bloomfield of Surf Manor Home for Adults in Coney Island is one such resident. During a recent visit, Bloomfield pointed to the cooler he used to store plain yogurt and juice since refrigerators are prohibited in resident rooms. Each day Bloomfield goes food shopping and spends $2 on a new bag of ice for his cooler.[13]

[4]Petition by Residents of Garden of Eden Home for Adults (2011) (on file with MFY Legal Services).

[5]Telephone Interview with Oceanview Manor Home Resident (May 14, 2012).

[6]*Disability Advocates Incorporated v. Paterson*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009). For a description of similar litigation to integrate people with disabilities in the community in Illinois, see Barry C. Taylor, *Integrating People with Disabilities in the Community Through Innovative Collaboration*, 46 Clearinghouse Review 4 (May–June 2012).

[7]See *Disability Advocates*, 653 F. Supp. 2d at 199.

[8]*Id.* at 199–200, 210, 224.

[9]See Avi Brisman, *Fair Fare?: Food as Contested Terrain in U.S. Prisons and Jails*, 15 Georgetown Journal on Poverty Law and Policy 49, 54–68 (2008).

[10]See *Disability Advocates*, 653 F. Supp. 2d at 206 (recounting testimony of one adult home resident that many residents at his home would "eat out to the extent their monthly funds allow it because the food at the facility is so bad").

[11]See N.Y. Soc. Serv. Law § 131-o.

[12]See Supplemental Nutrition Assistance Program, 7 U.S.C. § 2012(n)(4) (2006); Certification of Eligible Households Rule, 7 C.F.R. § 273.1(b)(7)(vi) (2012).

[13]Interview with Norman Bloomfield in Brooklyn, N.Y. (May 22, 2012).

When residents discuss moving to their own apartments or another independent setting, they often mention their desire to do their own food shopping and cooking. One resident who was able to move from an adult home to an apartment described the joy of having control over her food: "[I]t's just so great … to be able to stand in front of your own stove and cook something nice and tasty and fresh. A totally different lifestyle."[14] One witness in the *Disability Advocates* case testified about how she felt living in her own apartment after spending sixteen years in an adult home: "I can limit what I eat or I can expand my choices. I can have as much salad as I like. I can have as little grease as I like. I can eat foods that were not permitted in the home…. I do my own shopping. I do my own food selection…. It's freedom for me. It's being able to actually live like a human being again."[15]

Food-Related Health Issues for People Living in Institutions

Residents of institutions often have health conditions that could benefit from an individualized diet. In nursing homes most residents are 65 or older and thus are more likely to have conditions such as diabetes and hypertension.[16] Studies show that Vitamin D deficiencies are prevalent among elderly patients in nursing homes.[17] Of the residents in New York's assisted living facilities, which include some adult homes, approximately 41 percent have a diagnosis of serious and persistent mental illness and many have conditions such as diabetes, chronic respiratory problems, cardiac conditions, or high blood pressure treated with medication.[18] On average, residents of New York assisted living facilities take six to nine medications daily.[19] Studies show that people who take antipsychotic drugs are at higher risk of developing type 2 diabetes.[20] People with these diagnoses require healthy individualized diets, which are lacking in many institutions. In fact, one recent study of the microbiota, or gut bacteria, of older adults found that those living in long-term residential care settings had significantly less diverse microbiota than those of community dwellers. The study found that this lack of microbiota diversity correlated with increased frailty.[21]

Growing evidence links food security and quality to mental health and well-being.[22] The nutrients most commonly associated with good mental health are polyunsaturated fatty acids, minerals such as zinc and magnesium, and vitamins; many of these nutrients are found in fresh fruits and vegetables, whole grains, and fish.[23] These items are not commonly part of institutional food service. Despite the

[14]CIAD (Coalition of Institutionalized Aged and Disabled) Media Team, *Choice in Housing: Coco's Story*, YouTube (Sept. 29, 2009), http://bit.ly/Lxulkp.

[15]*Disability Advocates*, 653 F. Supp. 2d at 222.

[16]See Centers for Medicare and Medicaid Services, Nursing Home Data Compendium 2010, at 26 (2010), http://go.cms.gov/MkdLnB; Margaret McDonald et al., *Prevalence, Awareness, and Management of Hypertension, Dyslipidemia, and Diabetes Among United States Adults Aged 65 and Older*, 64A Journals of Gerontology Series A: Biological and Medical Sciences 256 (2009), http://1.usa.gov/LrCx0Z.

[17]See, e.g., Stefan Pilz et al., *Low 25–Hydroxyvitamin D Is Associated with Increased Mortality in Female Nursing Home Residents*, Journal of Clinical Endocrinology and Metabolism, April 1, 2012, at E653; Jane E. Brody, *What Do You Lack? Probably Vitamin D*, New York Times, July 26, 2010, http://nyti.ms/OjGWH3.

[18]Cynthia Rudder et al., Long Term Care Community Coalition, Care and Oversight of Assisted Living in New York State 52 (May 2011), http://bit.ly/NWjtfe.

[19]*Id.* at 53.

[20]See, e.g., Michael E.J. Lean & Frank-Gerald Pajonk, *Patients on Atypical Antipsychotic Drugs: Another High-Risk Group for Type 2 Diabetes*, 26 Diabetes Care 1597 (2003), http://bit.ly/Q5OfWC.

[21]See Marcus J. Claesson et al., *Gut Microbiota Composition Correlates with Diet and Health in the Elderly*, Nature (July 13, 2012).

[22]See Courtney Van de Weyer, Changing Diets, Changing Minds: How Food Affects Mental Well Being and Behaviour (Winter 2005), http://bit.ly/Lye0vP; Felice N. Jacka et al., *The Association Between Habitual Diet Quality and the Common Mental Disorders in Community-Dwelling Adults: The Hordaland Health Study*, 73 Psychosomatic Medicine: Journal of Biobehavioral Medicine 483 (2011) (in study of Norwegian adults, finding connection between better-quality diets and lower likelihood to be depressed, whereas higher intake of processed and unhealthy foods was connected with increased anxiety).

[23]See Van de Weyer, *supra* note 22, at 8–17.

range of special dietary needs of institutional residents who could benefit from fresh and varied food, institutional kitchens have become places where food is not chopped or cooked but simply heated and served.[24]

Compounding the problem of fresh, nutritious food not being available is not being able to chew food of any kind. Dental health services are a severely unmet need for adult home residents, nursing home residents, and other beneficiaries of Medicaid. Until recently Medicaid health plans in New York were not required to provide dental coverage.[25] Other states have the option of covering adult dental health as part of their Medicaid plans.[26] One MFY client was unable to chew food because of the pain caused by ill-fitting dentures, and, for many weeks, she subsisted mainly on soft drinks.[27]

Enforcement and Litigation Involving Institutional Food

New York adult homes have detailed regulations around food service. Adult homes must consider "each resident's prescribed dietary regimen and food allergies" in planning, preparation, and service of meals.[28] Certain portions of fruits, vegetables, dairy, and meats or meat "equivalents" must be included in the daily menu, but there are no requirements as to whether they should be fresh, frozen, or canned.[29] The regulations do require meals to reflect "variety in methods of preparation and content" and "seasonal availability of food."[30] Food storage and preparation must preserve flavor, appearance, and nutritional value of the food.[31] The reality of adult home meals is different. The quality of food remains poor, and residents do not receive individualized diets.

Regulatory enforcement and litigation present limited options for improving adult home food. Residents often report that their complaints to the Department of Health about food service, including complaints related to a prescribed dietary regimen, do not bring about significant changes. Litigation against adult homes can take up basic cleanliness but does not reach issues of quality and choice. Residents of Surf Manor Home for Adults recently brought a class action lawsuit against living conditions, including the operator's failure to maintain a clean and sanitary environment.[32] The plaintiffs recounted violations issued by the Department of Health on unsanitary kitchen conditions and storage and preparation of food—for example, mixing spoiled, moldy, and rotting food with fresh foods.[33] The plaintiffs further alleged that the operator had not corrected many of the violations issued by the Department of Health but that the operator had taken some measures under the threat of litigation.[34]

[24]See Marc Eisen, *Institutional Food with Taste*, Progressive, March–April 2011, in Utne Reader (2012), http://bit.ly/M93ckD (describing loss of cooking skills in institutional kitchens where "[e]verything comes pre-chopped, bagged, and frozen"); Kari Lydersen, *Chicago Lunch Ladies Push for Fresh Food for Students … and Job Security*, In These Times, May 4, 2012, http://bit.ly/NzYZbp (describing how school cafeterias have shifted from cooking to "warming kitchens" that heat premade food and the consequent loss of jobs).

[25]See *Dental Services to Be Included in the Medicaid Managed Care Benefit*, New York State Medicaid Update (New York State Department of Health, Albany, N.Y.), April 2012, at 13, http://bit.ly/OaiUN4.

[26]See Medicaid.gov, Dental Care: Dental Care for Medicaid and CHIP Enrollees (n.d.), http://bit.ly/NrOEkv.

[27]See Mark Morales, *It's No Garden of Eden! Residents Say Adult Home Is Abusing Them*, New York Daily News, Oct. 4, 2011, http://bit.ly/Okw3EU.

[28]N.Y. Comp. Codes R. & Regs. tit. 18, § 487.8(c) (2012).

[29]*Id.* § 487.8(d)(2)(i)–(iii).

[30]*Id.* § 487.8(d)(5).

[31]*Id.* § 487.8 (e)(8).

[32]See Mark Morales, *Residents Sue Coney Island Adult Home for Bedbug Infestation and Shoddy Conditions*, New York Daily News, May 8, 2012, http://bit.ly/LXv53O.

[33]Order to Show Cause for a Temporary Restraining Order, Expedited Discovery, and Accelerated Briefing Schedule, *Bloomfield v. Surf Manor Home for Adults*, No. 9038-12 (N.Y. Sup. Ct. Kings Cnty. May 1, 2012).

[34]See *id.*

Whether the case will result in improved food quality remains to be seen.

Dealing with food choice through litigation is similarly limited in other institutional settings. Prisoners have sued under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act to challenge an institution's refusal to accommodate special diet requests based on religious beliefs.[35] The U.S. Supreme Court's analysis of constitutional claims in *Turner v. Safley* looks, in part, at the allocation of prison resources to make the accommodation and whether it could be made at a de minimis cost.[36] In *DeHart v. Horn* the Third Circuit held that, under the First and Fourteenth Amendments, a prison's denial of a special diet consistent with the plaintiff's Buddhist beliefs was reasonably related to the prison's interest in efficient food provision; the court noted that, because the plaintiff would not eat pungent vegetables, the request would require individualized preparation and special ordering of certain food items and secured food storage to avoid theft of those items.[37]

In the school context, students and their parents have sought accommodations and damages for food-related medical needs. A student in New York was denied injunctive relief and damages in a case alleging his school's failure to accommodate his diabetes under the Americans with Disabilities Act, where he claimed that he required special heating equipment and supervision in food preparation.[38] Schools do not have a duty, Maryland's Court of Appeals held, to "identify students with special dietary needs, develop a flagging regimen, or otherwise guard against individual exposure to food allergens" under the National School Lunch Act.[39]

Effective Change Through Pilot Programs and Resident Input

Pilot programs and resident-centered planning demonstrate that institutional food can be healthier and offer greater choice. "Farm to Institution" programs have sprung up around the United States.[40] A Philadelphia-based program connects local farms to schools, universities, hospitals, and elder care communities in Southeastern Pennsylvania, New Jersey, and Delaware.[41] Sacred Heart hospital in Eau Claire, Wisconsin, created a cooperative to connect the hospital with local farmers to use local meats, dairy, fruits, and vegetables.[42] The cost of using local food was 15 percent to 20 percent more, but the facility saw a return in positive public relations.[43]

Movement toward healthier food in public schools has gained momentum nationwide, resulting in proposed regulatory changes.[44] For example, the Fresh Fruit and Vegetable Program was a pilot in certain schools and, after initial success, was expanded to other states and is now part of proposed rules from the U.S. Department of Agriculture to encourage

[35]See, e.g., *Vinning-El v. Evans,* 657 F.3d 591 (7th Cir. 2011); *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010); *DeHart v. Horn*, 390 F.3d 262 (3d Cir. 2004); *Williams v. Morton*, 343 F.3d 212 (3d Cir. 2003).

[36]See *Turner v. Safley*, 482 U.S. 78, 90–91 (1987). The Religious Land Use and Institutionalized Persons Act replaced *Turner*'s "legitimate penological interest" test for prison regulations with the "compelling government interest" test (see 42 U.S.C. § 2000cc-1(a) (2006); *Warsoldier v. Woodford*, 418 F.3d 989, 997–98 (9th Cir. 2005); see also *Abdulhaseeb*, 600 F.3d at 1315–16 (articulating test for when rule imposes substantial burden on exercise of religion in violation of Religious Land Use and Institutionalized Persons Act)).

[37]See *DeHart*, 390 F.3d at 270–72. The case was remanded for further proceedings on the Religious Land Use and Institutionalized Persons Act claim.

[38]*A.M. v. New York City Department of Education*, No. 08-CV-1962, 2012 WL 120052 (E.D.N.Y. Jan. 17, 2012) (holding that request for injunctive relief was moot where student had requested assistance adjusting to his newly diagnosed condition and nearly five years had passed at time of decision).

[39]See *Pace v. State*, 38 A.3d 418, 422–23 (Md. 2012) (student had allergic reaction to peanut butter served at school).

[40]Diane Harris et al., *Farm to Institution: Creating Access to Healthy Local and Regional Foods*, 3 Advances in Nutrition 343 (2012).

[41]See Fair Food, Farm to Institution (n.d.), http://bit.ly/OZ9GTc.

[42]Eisen, *supra* note 24.

[43]*Id.*

[44]See e.g., Ron Nixon, *New Rules for School Meals Aim at Reducing Obesity*, New York Times, Jan. 25, 2012, http://nyti.ms/NigSOH.

consumption of fresh fruits and vegetables by elementary school children.[45]

Some nursing homes' food service goes through a "culture change" program that gives residents input into their care, but adult homes vary in their openness to resident input.[46] At Queens Adult Care Center residents complained that condiments such as jam and syrup were watered down to the point of tastelessness; the residents successfully organized to stop the practice of watering condiments down. At Rockaway Manor in Queens a successful pilot program, funded by a state grant with proceeds from a lawsuit settlement, hired a new chef committed to ensuring variety, using fewer processed foods, and eliciting resident input in menu planning.[47]

JK Canepa, an organizer for the Coalition of Institutionalized Aged and Disabled, helped residents at Rockaway Manor plant vegetables in planters. The produce was used by the chef in their food. Residents at another home became involved with a nearby community garden and grew produce there. Residents in several adult homes have formed food committees with Canepa's help. Food committees can effect change to a certain degree by presenting the administration with petitions and surveys that show what food residents like or do not like and suggesting small changes, such as adding more or less sauce or offering spices and garnishes on the side, Canepa explained. "They're working with a situation where there is little money spent on the food. What they can't do is get the homes to spend more money on the food," said Canepa.[48]

But input from food committees is not always well received at adult homes and can sometimes result in retaliation against the residents. For example, Canepa helped three residents at Garden of Eden Home for Adults form a food committee, but after a few meetings residents were intimidated by the administrator, and the committee quickly dissolved.[49]

Since adult homes are generally privately owned, for-profit entities, they are not mission-driven to provide better food, and, unlike public schools, they face no widespread movement to change the food they offer.[50] Thus the challenge with pilot programs is to convince private operators of institutions to invest in them or develop sufficient funding from public or charitable sources. In a video about the Rockaway Manor program, the chef describes the savings he achieves by making more items from scratch and suggests that adult home operators also might be motivated to ensure happier residents and staff.[51]

■ ■ ■

The most promising change in institutional food comes from pilot programs and other initiatives that offer funding to improve the quality of the food. Such programs can garner wide support because they benefit not only residents or patients of institutions but also the wider community by providing more jobs and greater support for local farmers and other businesses. Because of the special health needs of residents of institutions and the dismal state of food in their homes, institutional food warrants greater attention by food and health policy advocates.

---

[45]Fresh Fruit and Vegetable Program, 77 Fed. Reg. 10981 (proposed Feb. 24, 2012) (to be codified at 7 C.F.R. pts. 211, 235).

[46]See, e.g., Michelle M. Doty et al., Culture Change in Nursing Homes: How Far Have We Come? Findings from the Commonwealth Fund 2007 National Survey of Nursing Homes (May 2008), http://bit.ly/Nzr80A (evaluating, e.g., resident access to cooking appliances and food in refrigerators); Sue Scheible, *South Shore Nursing Homes Have the Recipe for Better Meals*, Patriot Ledger, Nov. 10, 2010, http://bit.ly/MsSsOT.

[47]See FamilyCook Productions, FamilyCook Innovates in Adult Homes (n.d.), http://bit.ly/Pisyjv.

[48]Telephone Interview with JK Canepa, Organizer, Coalition of Institutionalized Aged and Disabled (June 7, 2012).

[49]For other examples of retaliation in adult homes, see *Disability Advocates*, 653 F. Supp. 2d at 202 n.81 (recounting residents' testimony; one testified that administrator threatened to send him to nursing home for complaining about food).

[50]Compared to mission-driven institutions such as Sacred Heart Hospital, whose chief executive officer said that the Franciscan mission to promote health and wellness was part of the motivation to provide healthy, local food (see Eisen, *supra* note 24).

[51]See FamilyCook Productions, *Stirring Up Change in Adult Homes Short*, YouTube (June 23, 2011), http://bit.ly/PivlsW.

CLEARINGHOUSE REVIEW: JOURNAL OF POVERTY LAW AND POLICY is the advocate's premier resource for analysis of legal developments, innovative strategies, and best practices in representing low-income clients. Each issue of the REVIEW features in-depth, analytical articles, written by experts in their fields, on topics of interest to lawyers who represent low-income people. The REVIEW covers such substantive areas as civil rights, family law, disability, domestic violence, housing, elder law, health, and welfare reform.

Get Your Online Subscription Today!

- CLEARINGHOUSE REVIEW: JOURNAL OF POVERTY LAW AND POLICY is published online six times per year.
- Your subscription includes online access to the current issue and the archive of articles published since 1967. With this online access—your "site license"—your organization's entire staff will enjoy fully searchable access to a wealth of poverty law resources, accessible from any computer or mobile device.
- Newly subscribing nonprofit programs are entitled to special discounts on our Training Programs.

CUT HERE

Please fill out the following form to receive more information about subscribing to CLEARINGHOUSE REVIEW.

Name _____

Organization _____

Street address _____ Floor, suite, or unit _____

City _____ State _____ Zip _____

E-mail _____

Subscription pricing varies with the type of program:

	Price
☐ Nonprofit	$300–$1,800 (depending on size of operating budget)
☐ Law School Library	$500
☐ Individual	$400

Please e-mail this form to subscriptions@povertylaw.org.
Or fax this form to Ilze Hirsh at 312.263.3846.

Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602