

NASDDDS Litigation Updates

January - July 2009

The following articles published in *State News Briefs (SNB)* (formerly called *Beyond the Beltway (BYB)*) and [Community Services Reporter \(CSR\)](#) summarize notable litigation cases concerning individuals with developmental disabilities throughout the country. Source citations for *SNB/BYB* or *CSR* are included at the end of each entry. To subscribe to *CSR*, click [here](#). Subscription form is at the bottom of the page.

Updates are organized by the following categories and then by state:

1. Access to Services

A. Lawsuits challenging state policies that prevent people with disabilities from promptly obtaining Medicaid home and community services. Some of these lawsuits may concern people with developmental disabilities who are on waiting lists for services.

B. Lawsuits challenging policies that prevent people with disabilities from promptly obtaining services. Some of these lawsuits concern people with autism whose insurance companies have refused to pay for necessary autism services.

2. Community Placement of Institutionalized Persons,

Lawsuits principally (but not exclusively) being brought by persons served in publicly operated institutions who want supports so they can live in community-based settings.

3. Limitations on Home and Community-based Services

Lawsuits challenging state policies that affect the scope and quality of Medicaid services in the community. Some lawsuits concern the adequacy of state payments for community services. Others challenge state restrictions on access to Medicaid benefits.

4. Institutional Reform / CRIPA

Lawsuits stemming from inadequate or unsafe conditions and services in institutions and/or lawsuits stemming from the Department of Justice implementation of the Civil Rights for Institutionalized Persons Act (CRIPA);

5. Death penalty exemption / determination of MR/DD to be exempt

Lawsuits pertaining to states' definitions and determination of "mental retardation" and related issues to the 2002 U.S. Supreme Court ruling that executions of individuals with mental retardation is "cruel and unusual punishment" and therefore illegal. However, the Supreme Court did not define "mental retardation," leaving individual states to make that determination in order to discern if someone convicted of committing a capital crime is exempt from capital punishment.

6. Miscellaneous

Lawsuits that do not fit into any of the above categories.

LITIGATION UPDATES

1. ACCESS TO SERVICES

A.

Tennessee Waiting List Lawsuit Update

Circuit court judges had a mixed response March 9 to an appeal of a district court's denial of the Tennessee Department of Finance's motion to vacate a settlement agreement in [Brown et al. v. the Tennessee Department of Finance](#):

"...we do not believe the district court abused its discretion in refusing to vacate the settlement in its entirety. But it did misapply Rufo [Supreme Court decision in **Rufo v. Inmates of Suffolk County Jail**, 502 U.S. 367], and it did abuse its discretion in refusing to modify the agreement at all. At this time, we will modify the decree in two ways. First, we vacate Tennessee's commitment to develop 'provider network capacity,'...which does not appear to remedy any violation of federal law after [**Westside Mothers v. Olszewski**, 454 F.3d 532 (6th Cir. 2006)].

"Second, any commitment Tennessee arguably made to eliminate the waiting list for services is likewise unenforceable after *Westside Mothers II*. Absent more, a waiting list for waiver services is not inconsistent with Tennessee's duty to provide 'medical assistance' to individuals eligible for its HCBS waiver with 'reasonable promptness.'" **BYB** March 25, 2009 / April **CSR**.

B.

California Parents Sue Kaiser P for Autism Services

Two parents in the Bay Area filed a class action lawsuit against Kaiser Permanente February 11 to compel Kaiser to provide services for their respective children, [The San Francisco Chronicle](#) reported. **BYB** May 6, 2009 / June **CSR**.

Michigan Insurer Ordered to Prove ABA Experimental

U.S. Magistrate Michael Hluchaniuk ordered Blue Cross Blue Shield of Michigan in early March to file documents proving its claim that applied behavioral analysis (ABA) is experimental with the court by March 25, *The Detroit News* said.

Christopher Johns, whose son has autism, said Blue Cross Blue Shield of Michigan "denied claims for his son's ABA treatment because the method is experimental," the newspapers said, and Johns is seeking class action status for families with similar claims.

Meanwhile, Michigan legislators are considering [Senate Bill No. 359](#) that would require health maintenance organizations to “provide coverage for the screening, diagnosis, and treatment of autism spectrum disorder, including, but not limited to, coverage for speech therapy, occupational therapy, physical therapy, psychological services, psychiatric services, and applied behavioral analysis, as prescribed or ordered by the insured’s or enrollee’s treating physician or psychologist.” **BYB** March 25, 2009 / April **CSR**

2. COMMUNITY PLACEMENT OF INSTITUTIONALIZED PERSONS

Federal Judge Approves Settlement Agreement in California Community Integration Case

A federal judge granted final approval of a settlement agreement September 18 in a class-action civil rights lawsuit between residents of a large San Francisco hospital and the city and county of San Francisco. The plaintiffs, who reside/resided in the 1,200-bed Laguna Honda Hospital and Rehabilitation Center, sued the city and county of San Francisco in 2006 alleging the city was discriminating in forcing them into institutionalized housing when they were eligible and capable of residing in community settings. About 30-50 of the plaintiffs have developmental disabilities (see **BYB** December 26, 2007/**CSR** January 2008).

The settlement agreement for [Chambers v. City and County of San Francisco](#), signed March 20, 2008, calls for the creation of an innovative program to coordinate services across city departments, enabling San Franciscans with disabilities who live at, or are referred to, Laguna Honda, to instead receive community-based housing and services. Eligible individuals will be assessed for, referred to, and provided with subsidized housing, attendant and nursing care, case management, and other services.

In addition, several hundred Medi-Cal (Medicaid) home and community-based waiver slots will be made available to those who qualify.

The agreement also requires the development of a rental subsidy program, through which San Francisco will, over the next five years, secure and subsidize scattered-site, accessible, independent housing for approximately 500 people with disabilities and seniors who are eligible for community-based services. February **CSR**.

Appeal Seeks to Keep Massachusetts Institution Open

The attorney for guardians who want to keep the Fernald Developmental Center open and stop the transfer of Fernald residents to another developmental center have filed an appeal to the U.S. Supreme Court, *The Daily News Tribune* said. The appeal seeks to overturn Massachusetts Governor Deval Patrick’s appeal of U.S. District Court Judge

Joseph L. Tauro's August 14, 2007 decision to reopen a case that had been closed for 15 years (see **BYB** October 15, 2008). **BYB** March 25, 2009 / April **CSR**.

U.S. Supreme Court Declines to Hear Fernald Case

The U.S. Supreme Court declined April 6 to hear an appeal of a closing order for the Fernald Development Center. **BYB** May 6, 2009 / June **CSR**.

Missouri County Settles Lawsuit Over Closing of Institution

Madison County in Southeast Missouri, population ~12,000, reached a settlement in a lawsuit over its decision to close its "Sheltered Care Home" for individuals with developmental disabilities or mental illness, [KWMU/NPR](#) reported. **BYB** May 6, 2009 / June **CSR**.

New York Law School P&A Files Records Access Lawsuit

Albany Law School (ALS) and Disability Advocates Inc. (DAI) [filed a records access lawsuit](#) against the Office of Mental Retardation and Developmental Disabilities (OMRDD) December 22, 2008, with [supporting documentation](#) filed January 9, 2009.

Unlike other states, New York's protection and advocacy agencies are contracted out regionally. Albany Law School, through its Civil Rights and Disability Law Clinic, the complaint explains, "simultaneously serves as a clinical legal education program at the law school and as a P&A agency" for nine New York counties.

The complaint says OMRDD refused access to records of individuals receiving services through:

- 1) The Capital District Developmental Disabilities Service Office (CDDDSO), which operates an intermediate care facility for individuals with "mental retardation" (ICF/MR) and a residential school for individuals with developmental disabilities; and
- 2) The Taconic Developmental Disabilities Service Office (TDDSO) which operates another ICF/MR.

In monitoring discharge practices for CDDDSO, the petitioners ALS/DAI say they discovered residents who were "deemed ready to live in a less restrictive environment but were deprived of the opportunity" leading petitioners to conclude "there was probable cause to suspect abuse and/or neglect of [those] individuals," the complaint said. "This abuse and neglect includes both the denial of rights to live in less restrictive settings and the failure to provide necessary treatment that would prepare and enable individuals with disabilities to live in such settings."

On March 20, OMRDD [filed a motion to dismiss the case](#) with a memorandum saying, “The petitioners have been given the names and contact information for individuals who have the capacity to consent and for the representatives of individuals who do not have the capacity to consent. Before the petitioners are given the clinical records of those individuals they should be required to obtain their consent.”

On June 5, ALS/DAI [filed a request for the court to deny OMRDD's motion](#), saying that they “must have access to the records of [residents’] treatment, and such access is unambiguously provided for under both New York State and federal law.”

The case is pending in State court. **BYB** June 17 / **CSR** July.

Pennsylvania Lawsuit Filed on Behalf of Individuals with Dual Diagnosis

Disability Rights Network of Pennsylvania filed a class action lawsuit against the Department of Public Welfare on behalf of individuals with intellectual disabilities living in state psychiatric facilities that would be better served in community-based settings, the [Times Leader](#) reported June 12. Almost all of the plaintiffs also have co-occurring mental health problems, the report said.

The article quotes Robert W. Meek, an attorney with the Disability Rights Network, as saying: “Part of the problem is that the staff at the hospitals is not trained to provide mental health services to persons with [intellectual disabilities].... They haven’t adapted their treatment modalities to account for the intellectual disabilities our clients have.” **BYB** June 17 / July **CSR**.

Judge Says Virginia P&A Cannot Sue Another State Agency

The [U.S. Court of Appeals for the Fourth Circuit](#) said June 2 that the Virginia Office of Protection and Advocacy (VOPA), because it is a state agency, cannot sue another state agency or state officials in federal court. VOPA sued the Department of Behavioral Health and Developmental Services (formerly called the Department of Mental Health, Mental Retardation, and Substance Abuse Services) to obtain peer review records.

VOPA filed suit in federal court and the Department filed a motion to dismiss arguing that sovereign immunity prevented one state agency from suing another in federal court. The district court denied the Department’s motion but the Department appealed to the 4th Circuit and obtained a favorable ruling. The federal court was not established to decide intramural state agency disputes under the doctrine of sovereign immunity. **BYB** June 17 / July **CSR**.

3. LIMITATIONS ON HOME AND COMMUNITY-BASED SERVICES

Arizona Judge Blocks DD Service Cuts

A Superior Court judge blocked the Department of Economic Security from cutting services to any of the state's estimated 30,000 individuals with developmental disabilities, the [East Valley Tribune](#) reported March 11. Maricopa County Superior Court Judge Joseph Heilman criticized a 10% across-the-board cut to service providers without public input or considering the impact on individuals needing services, the Tribune said. The newspaper quoted the Judge saying the Department's haste implementing budget cuts "has served to create nothing less than mass confusion, anxiety, and uncertainty" among Arizonans with developmental disabilities.

On January 31, 2009, the Arizona Legislature passed and Governor Jan Brewer signed a revised budget for state fiscal year 2009 to address a \$1.6 billion shortfall in state revenues. The budget for the programs and services administered by the Arizona Department of Economic Security (DES) was reduced by almost \$103 million, including a lump sum reduction and fund transfers, an update on the DES website says. In addition, the Department needed to address an additional \$50 million in unfunded budget shortfalls and caseload-related shortfalls. Thus, the total budget shortfall facing DES is \$153 million to be resolved between now and June 30, 2009. **BYB** March 25 / **CSR** April.

Arizona Judges Say State Can Implement Cuts

Arizona's State Court of Appeals said April 30 that the Department of Economic Security can implement budget cuts:

"Plaintiff Beneficiaries and those who care for the developmentally disabled understandably seek to ensure that services to that vulnerable population continue without interruption. We also recognize that the abrupt nature of the services suspensions and rate reductions the Division impose in February caused great alarm and dismay. Finally, we appreciate the difficulty of assembling and presenting evidence—on very short notice—to demonstrate facts to support the existence of serious legal questions as to whether the Division's decisions will cause the State to breach its obligations under federal law. We conclude, however, that the record before us at this time simply does not contain substantial evidence to support enjoining the Division's service suspensions or rate reductions." (See **BYB** March 25).
BYB May 6 / June **CSR**.

California Lawsuit Filed to Prevent Service Cuts

The California Primary Care Association [filed a lawsuit](#) against the state of California April 29 to prevent critical Medi-Cal (Medicaid) benefits currently being provided by California's Federally Qualified Health Centers (FQHCs) and Rural Health Centers (RHCs) from being cut.

In February, Governor Arnold Schwarzenegger and the state legislature enacted a budget that eliminated, effective July 1, 2009, nine Medi-Cal "optional benefits," including adult dental, psychology, chiropractic, acupuncture, speech therapy, incontinence creams and washes, audiology, optometry, and podiatry services.

The lawsuit contends that the state of California has mischaracterized certain core FQHC/RHC services as optional benefits, and that the State must continue to reimburse FQHCs/RHCs for core services provided to Medi-Cal beneficiaries.

To learn more about the suit, click [here](#). To download the [Writ of Mandate](#), click [here](#). **BYB** May 6 / **CSR** June.

California Capitol People First Suit Settled

California Superior Court Judge Robert Freedman approved a final [settlement agreement](#) for the seven-year-old Capitol People First et al v. Department of Developmental Services et al. lawsuit.

The settlement agreement includes the following:

"Subject to Legislative approval, DDS [Department of Developmental Services] will provide additional funds to each Regional Center to assist the Regional Center in arranging for a case worker to attend Individual Program Plan (IPP) meetings of persons residing in Developmental Centers (DCs).

"Regional Centers will provide information to persons living in certain large private facilities about possible living arrangements in smaller, community-based settings.

"DDS will provide training to DC staff about community living options.

"DDS will work with Disability Rights California and the State Council on Developmental Disabilities to provide information and training to class members about community living options.

"Regional Centers and DDS will continue to use the Community Placement Plan process to help class members move from the DC s to community settings.

“Regional Centers and DDS will develop new community programs and housing options.

The Settlement will remain in effect for three years. During this period, Disability Rights California, the attorneys for the Plaintiffs, will receive reports which will allow it to monitor the Defendants’ performance under the Settlement Agreement.”

For more information and background, go to www.disabilityrightsca.org. **BYB** May 6 / June **CSR**.

Delaware Constitutional “Right to Travel” Medicaid Case Reaches Settlement

Back on September 11, 2007, Delaware lost a case in the U. S. District Court concerning its not processing and approving a Medicaid application on behalf of a North Carolina resident with DD until she moved to Delaware. U.S. District Court Judge Gregory Sleet said in his ruling that the state’s actions regarding the Medicaid recipient were a “violation of her constitutional right to travel” (see **BYB** Nov.14, 2007).

Delaware appealed, and the case went to mediation. The parties [agreed to a settlement](#) contingent upon Judge Sleet’s [vacating his September 11, 2007 opinion and order](#), which he did on September 11, 2008. On September 25, 2008, the 3rd Circuit Court then [dismissed the case](#), and the case was closed.

In the settlement agreement, the State of Delaware agreed to process applications for long-term care Medicaid services made by non-residents of Delaware with developmental disabilities who would move directly from an intermediate care facility for individuals with “mental retardation” (ICF/MR) outside of Delaware to an ICF/MR facility inside of Delaware. The settlement agreement expressly excludes pre-residency applications for Delaware’s home- and community-based services waiver services. There were other procedural agreements (e.g. process for submitting an application to Delaware’s sole private ICF/MR) and an agreement concerning attorneys’ fees. **SNB** June 17 / **CSR** July.

Floridians with DD File Lawsuit Over Budget Cuts

Three Floridians with developmental disabilities and the [Advocacy Center for Persons with Disabilities, Inc.](#) filed a lawsuit January 13 against the state’s [Agency for Persons with Disabilities](#).

Plaintiffs allege that cuts to the funding levels for home and community-based services for individuals with developmental disabilities will cause them and thousands of others to “suffer irreparable harm by the loss of medical and behavioral therapies essential to their well being, and the denial of their right to hearing,” the complaint said, “Many will

be at risk for institutionalization. Many will languish in their home without meaningful day activities, and their behavior problems will increase. Others will lose social and rehabilitative skills. There is no other relief available to Plaintiffs to redress the violation of rights and loss of essential services.”

FMI: To read the full complaint, click [here](#). **BYB** January 21 / **CSR** February.

Judge Dismisses Florida Budget/Service Cuts Lawsuit

A circuit court judge in Florida dismissed a lawsuit January 23 that was filed against the Agency for Persons with Disabilities, [The Tampa Tribune](#) reported. The suit, filed January 13, alleged that cuts to the funding levels for home and community-based services for individuals with developmental disabilities would cause them and thousands of others to “suffer irreparable harm” (see **BYB** January 21).

“Judge John Cooper ruled Friday that the [[Advocacy Center for Persons with Disabilities, Inc.](#)] and its clients had not exhausted their options for hearing their grievances through state channels,” the report said.

Related Action. In the meantime, the Center filed a Petition for [Writ of Mandamus](#) January 13 on behalf of an individual with developmental disabilities whose services were being cut by \$6,000. The Petition requests the Court to direct the Agency for Persons with Disabilities to grant the individual’s request for a hearing. **BYB** Feb 4 / March **CSR**.

Court in Georgia Medicaid Suit Says Doctors Do Not Have Final Say

“A private physician’s word on medical necessity is not dispositive,” the 11th U.S. Circuit Court of Appeals said April 24 in regard to a case where personal care hours for a girl with disabilities were reduced from 94 hours a week to 84.

“[I]t does not follow that the state is wholly excluded from the process of determining what treatment is necessary. Instead, both the state and [the girl’s] physician have roles in determining what medical measures are necessary to “correct or ameliorate” [the girl’s] medical conditions.”

To read the [Moore vs. Medows](#) decision, click [here](#). **BYB** May 6 / **CSR** June.

Judge Blocks Cuts in Idaho

U.S. District Judge Justin Quackenbush issued a temporary restraining order April 28 against Idaho's Department of Health and Welfare to block a 55% cut to payments to service agencies, [Idaho Business News](#) reported. **BYB** May 6 / **CSR** June.

Ohio EPSDT Lawsuit Filed for Autism Services

The Ohio Legal Rights Service (OLRS) filed a [brief](#) in the U.S. Court of Appeals for the Sixth Circuit January 12 in a case on behalf of children with autism. The brief asks the Court to uphold the preliminary injunction order and to remand the case for trial in the district court.

The lawsuit, *Parents' League for Effective Autism Services (PLEAS) v. Helen Jones-Kelley, Director of the Ohio Department of Job and Family Services*, filed a year ago, stems from complaints OLRS received from families of children with autism regarding the state's "narrow definition of rehabilitative services" in its Medicaid Early, Periodic, Screening, Diagnostic, and Treatment (EPSDT) program, an OLRS announcement said.

Click [here](#) for more information and [updates](#). May 6, 2009

Center Sues Tennessee State Agency Over Budget Cuts

A Nashville center for individuals with developmental disabilities and their families is suing the state over payment reductions to its programs, *The Tennessean* reported. The Rochelle Center filed a lawsuit against the Tennessee Division of Mental Retardation Services March 23 in Davidson County Chancery Court. Another local newspaper explained that the Center filed the suit after the DMRS suspended all admissions to Rochelle amid a dispute over funding levels. **BYB** March 25 / **CSR** April.

4. INSTITUTIONAL REFORM / CRIPA

DOJ Sues Arkansas

The U.S. Department of Justice (DOJ) [filed a lawsuit](#) against the state of Arkansas January 16 for "egregiously and flagrantly" depriving children and adults with developmental disabilities housed in Conway Human Development Center of safe conditions, personal security, and appropriate habilitation and training.

“The Center’s treatment, supports, and services substantially depart from generally accepted professional standards of care,” the complaint said. “Defendants have failed and are continuing to fail to adequately assess individuals residing in the Center....”

The complaint points out failures “to ensure that restraints are administered to residents by appropriately qualified professionals...and are not used as punishment, in lieu of treatment, or for the convenience of staff.”

The Department of Justice sent its [investigation letter](#) concerning Conway Human Developmental Center to then Governor Huckabee in April 21, 2004.

To read the complaint the Department of Justice recently failed against the state of Arkansas, click [here](#). **BYB** Feb 4 / **CSR** March.

Kentucky Funds Restored

Federal funding has been restored for three of four units at Oakwood Developmental Center, the *Lexington Herald-Leader* reported March 24. “The cash-strapped state has been paying the full bill for patients at Oakwood since May 2008,” the report said, “when the Centers for Medicare and Medicaid Services terminated funding to the facility because of repeated problems, including two deaths.” **BYB** March 25 / **CSR** April.

Nebraska DC Residents Sue State

Guardians of six Beatrice Developmental Center residents transferred to other facilities are suing the State of Nebraska saying the state violated their civil rights by not improving conditions in the long-troubled facility. “Plaintiffs say that in defiance of warnings from the Justice Department, the state merely removes residents with serious problems from the facility against their will, rather than address problems at the center,” the [Courthouse News Service](#) reported May 5. **BYB** May 6 / **CSR** June.

Tennessee Files Motion to Vacate Ruling to Compensate Residents

The State of Tennessee filed a motion September 3 to “vacate a federal court ruling requiring the state to compensate residents of the Arlington Developmental Center for violating their rights,” the [Memphis Commercial Appeal](#) reported. Stephen Norris, Deputy Commissioner of the Division of Mental Retardation Services, was quoted as saying that because of the ruling, “the state spends more for services to Arlington residents named in the suit than for identically situated mentally retarded individuals in the state system.” Plans are in place to close the center 2010, the report said.

The U.S. Department of Justice sued the State of Tennessee in 1992 for violations of the Civil Rights of Institutionalized Persons Act (CRIPA) at the Arlington Developmental Center. Since November 1993, the facility has been under a U.S. District Court order to correct conditions at the facility, the Division's website says. **BYB** May 6 / **CSR** June.

District Court Rules Against Tennessee Motion

Last fall, Tennessee [filed a motion](#) to dismiss a federal lawsuit concerning the violation of rights of Arlington Developmental Center (ADC) residents. The Center is slated for closure.

"The State works diligently in meeting its court-directed obligations," Division of Intellectual Disability Services Deputy Commissioner Stephen Norris said in a [letter](#) to stakeholders concerning the motion, "Nothing is more important than the health and safety of the persons we support. Having legal proceedings drawn to a conclusion will allow DMRS to move forward, redirecting its resources to enhancing its service delivery system and allowing for more persons to receive supports. The cost of the lawsuit is sobering when you consider there are more than 6,300 persons on the Division's Waiting List for services. The State is inhibited financially from enrolling more of those persons into supports. Tennesseans in the Arlington Waiver receive several court-ordered benefits that their counterparts in the Statewide Home and Community-based (Main) Waiver do not receive....The obligations of DMRS in the ADC lawsuit is costing the State more than \$30 million over what would be spent if those persons in the Arlington Waiver were treated the same as those persons in the Main Waiver."

The District Court ruled against the motion. **SNB** June 17 / July **CSR**.

U.S. Department of Justice and Texas Reach Settlement

The U.S. Department of Justice and the State of Texas came to an [agreement](#) May 30 on a comprehensive action plan to improve care and coordination of services for individuals with developmental disabilities residing in Texas' 13 state schools.

The Department of Justice sent its Civil Rights of Institutionalized Persons Act (CRIPA) investigation letter of 12 of the state schools to Governor Rick Perry last December, and previously sent an investigation letter to the governor concerning Lubbock State School in August 2008 (see **BYB** January 7, 2009). Altogether, the institutions house 4,500 residents whose average age is 46 years old.

According to the [settlement agreement](#), Texas' Department of Aging and Disability Services (DADS) will hire 1,160 additional staff for the 13 facilities, including 27

psychiatrists, 11 clinical pharmacists and eight dentists to meet the standards of care outlined in the agreement. The plan is expected to cost \$24 million a year in state general revenue funds.

“We are committed to striving every day to make our programs safer and stronger,” DADS Commissioner Addie Horn said. “We’ve [already] reduced the use of restraints, strengthened training of direct care workers, and added hundreds of staff across the state, including a myriad of programmatic changes throughout all services delivered in the schools that work toward achieving best practices.”

Key elements of the agreement include:

Completing abuse investigations more quickly. The state expects to add 42 staff at the Texas Department of Family and Protective Services to do this.

- Selecting independent monitors to review the state schools and determine if they are complying with the standards of care outlined in the agreement. There are expected to be at least three monitors, and each will have a support team that issues a report every six months on the performance of each school.
- Improving the quality of medical care for residents through better screening of individuals with high risk health conditions and improved coordination of care.
- Increasing the number of psychology staff on site to improve assessments and monitoring of behavioral health plans.

SNB June 3 / **CSR** July.

Individual Lawsuits

Alabama Wrongful Death Lawsuit Filed

A lawsuit was filed April 7 claiming that a 58-year-old Partlow Developmental Center resident died from neglect, [Tuscaloosa News](#) reported. Johnnie Mack Whitten, who was supposed to be under 24-hour observation, “suffered a traumatic brain [when] the night staff person assigned to Whitten left him unsupervised at various times on the night that he was injured and later altered timesheets to hide the fact that she left her post,” the newspaper said citing an October Centers for Medicare and Medicaid Services report.

The Alabama Disabilities Advocacy Program released an investigative report, [At What Cost: Partlow’s Legacy of Shame](#), last December, calling for the closure of the developmental center. **BYB** May 6 / June **CSR**.

Illinois Wrongful Death Suit Filed

The sister of a Howe Developmental Center resident with developmental disabilities who died last year filed a wrongful death lawsuit against the state, [The Chicago Tribune](#) reported March 2. **BYB** March 25 / **CSR** April.

Claims Seek ~\$5 Million for Nebraska DC Abuse

[Nebraska Advocacy Services, Inc. \(NAS\)](#) filed a \$1.85 million tort claim February 18 against the State of Nebraska on behalf of Debra Bauer, and her brother/guardian Michael Ellsworth.

Debra, a 53-year-old woman who has been living at BSDC for 48 years, suffered two broken legs February 15 yet received no help for her injuries for several days, NAS said.

The mother of a 24-year-old BSDC resident with developmental disabilities and diabetes also filed a \$1.35 million claim against the state February 18 because of alleged negligence that caused her son to nearly die.

There's also a \$1.75 million lawsuit and claim filed against the state earlier in February by the family of 18-year-old BSDC resident Olivia Manes who died in January from a seizure. Her family blames her death on inadequate care at the Center, [a local newspaper said](#). **BYB** March 4 / **CSR** April.

Nebraska Settles Wrongful Death Claim

Parents of a teenager who died in Beatrice Developmental Center will receive over a half a million dollars to settle a wrongful death claim against the state, the *Omaha World-Herald* reported March 24 (see **BYB** March 4). The center lost its Medicaid certification for repeated failures to meet federal care standards, the article said, yet it continues to receive matching federal Medicaid funds because it has appealed (see **BYB** March 19, 2008 and July 9, 2008). **BYB** March 25 / **CSR** April 2009.

5. DEATH PENALTY EXEMPTION

U.S. Supreme Court Considers DD Determination of Death Row Prisoner

The U.S. Supreme Court is being asked to create a 'brand new rule' related to its 2002 [Atkins v. Virginia](#) decision barring the execution of offenders with intellectual disability

("mental retardation"), [The New York Times](#) recently reported. The Supreme Court left it to the states to define "mental retardation."

Almost 10 years before the Atkins decision, the State of Ohio sentenced to death Michael Bies for the murder of a 10-year-old boy. At the penalty phase of his trial, Bies offered as mitigating evidence the testimony of a psychologist who explained that his IQ fell within the range of mild to borderline "mental retardation."

"Prosecutors in Ohio want a fresh shot at litigating the question of whether Mr. Bies is retarded," The New York Times said, noting: "It does not bode well for a death row inmate when his lawyer must spend the bulk of a Supreme Court argument fending off combative questions from two of the court's most liberal justices." See [Bobby v. Bies, No. 08-598](#).

Bie's lawyer was "asking the court to create a 'brand new rule' that 'a subsidiary fact determination' in a case the defendant loses can be used as a defense in a later proceeding," *The New York Times* said, quoting U.S. Supreme Court Justice David Souter.

Click [here](#) to access documents related to this case. Click [here](#) to read a summary of the arguments before the U.S. Supreme Court, written by a Stanford University law student. **BYB** May 6 / **CSR** June.

U.S. Supreme Court Rules Ohio Can Litigate Offender's Disability

The U.S. Supreme Court unanimously ruled June 1 to allow the State of Ohio to litigate a death row prisoner's intellectual disability in [Bobby v. Bies](#) (see **BYB** May 6). The State of Ohio sentenced to death Michael Bies in 1992 for the kidnapping, attempted rape, and murder of a 10-year-old boy.

When the Ohio Supreme Court considered Bies' appeal in 1996, it confirmed his death sentence saying that the aggravating evidence of the nature of the crime against a child outweighed the mitigating evidence of Bies having an intellectual disability ("mental retardation"), which had been described as mild or borderline.

About 10 years later, when the U.S. Supreme Court in [Atkins v. Virginia](#) barred the execution of offenders with mental retardation in 2002, Bies then argued that because the state's Supreme Court had already acknowledged that he had mental retardation, he should not be executed. He also argued that to re-litigate the case would be double jeopardy—prohibited by the U.S. Constitution, i.e., prosecuting someone twice for the same crime.

The State of Ohio said because it had considered Bies' mental limitations in its judgment before the Atkins decision took place, to now litigate the veracity of his disability does not constitute double jeopardy. The U.S. Supreme Court agreed.

“Recourse first to Ohio’s courts is just what this Court envisioned in remitting to the States responsibility for implementing the Atkins decision,” Justice Ruth Bader Ginsburg said, writing on behalf of the Court. “The State acknowledges that Bies is entitled to such recourse, but it rightly seeks a full and fair opportunity to contest his plea under the post sentencing precedents set in [Atkins](#) and [Lott](#).”

Click [here](#) to access documents related to this case. Click [here](#) to read a summary of the arguments before the U.S. Supreme Court, written by Cornell University law students. **SNB** June 17 / **CSR** July.

Pennsylvania Supreme Court Says Criminals with Mental Impairments Can Be Executed

The state Supreme Court ruled January 23 that any criminal defendant with mental impairments, short of being legally defined as “mentally retarded,” can be executed for capital offenses. Read the decision by clicking on [Commonwealth of Pennsylvania v. James Vandivner](#). **BYB** March 25 / **CSR** April.

6. MISCELLANEOUS

Furloughs for California State Workers

Sacramento Superior Court Judge Patrick Marlette ordered state Controller John Chiang January 29 to implement a Schwarzenegger administration plan to furlough state workers two days a month, resulting in a 10% pay cut, [The Sacramento Bee](#) reported. **BYB** May 6 / **CSR** June.

Montana Support Provider Salary Disparity Settlement Agreement.

A district court judge held a proposed settlement agreement hearing May 7, 2008 in [S.L., et al. v Joan Miles. et al.](#) The Montana Association For Independent Disability Services, Inc., now renamed the Montana Association Of Community Disability Services, along with several individual recipients of developmental disabilities services filed the lawsuit in 2002 challenging the disparity in wages and benefits as between employees of community services providers providing services to persons with developmental disabilities and state employees at state institutions.

This disparity, plaintiffs said, made it difficult for community service providers to provide support services to persons with a developmental disability in a community setting. Plaintiffs further alleged that this disparity also threatened Montanans with developmental disabilities living with a community service provider, or living in a private home and receiving services funded in part from the State of Montana, with the possibility of institutionalization at MDC or another institutional setting.

To read the proposed settlement agreement and related information posted on Montana's Developmental Disabilities Program website, click [here](#). **BYB** March 25 / **CSR** June.

Pennsylvania Decision Curtails Guardians from Refusing Life-Sustaining Treatment

When a 50-year-old man with an intellectual disability swallowed a hairpin in December 2007, he got sick with aspiration pneumonia and was taken to the hospital. The doctors wanted to put him ("D.L.H." as the court records referred to him) on a mechanical ventilator to help him breathe; but his parents, as his legal guardians, said no. Hospital staff put him on the ventilator anyway.

His parents filed a petition January 2008 to grant them authority to "exercise the powers of a health care agent on behalf of the incapacitated" to deny him treatment. Pennsylvania's Department of Public Welfare objected to the petition on the grounds that the 50-year-old "was neither terminally ill nor permanently unconscious and never appointed a health care agent under the [\[Health Care Agents and Representatives Act](#) which became effective January 2007] to refuse healthcare necessary to the preservation of his life," a court document said (click here to read excerpts from the [Act](#)).

In the meantime, D.L.H. was able to breathe on his own after about three weeks and was taken off the ventilator. But because the situation might come up again, for him or others, the trial court was requested to rule on the merits of the petition.

The trial court, relying principally on the Health Care Agents and Representatives Act, said January 24, 2008 that the parents/guardians failed to meet statutory requirements necessary to become D.L.H.'s "health care agent," and thus could not refuse life-sustaining medical treatment on his behalf.

The parents/guardians then appealed this decision to the Superior Court who confirmed the trial court's decision.

"We find no error in the trial court's ultimate disposition," the Superior Court said February 10, "accordingly, we affirm the trial court's order, albeit through different reasoning."

Following, is an excerpt from a [summary](#) of the Superior Court's decision provided by Mark Murphy, Legal Director of the [Disability Rights Network of Pennsylvania \(DRN\)](#):

“A court order that appoints a person as a plenary guardian does not authorize that person to refuse life-sustaining treatment for incapacitated persons who do not have end-stage medical conditions or who are not permanently unconscious. In other words, a guardianship order by itself does not authorize the guardian to make such a decision. “A guardian must secure a special court order to allow him to refuse life-sustaining treatment for an incapacitated person who does not have an end-stage medical condition or who is not permanently unconscious. The guardian has an ‘extraordinary burden’ to prove by clear and convincing evidence that death would be in the incapacitated person’s best interests, i.e., that extending life would be inhumane under the circumstances. The guardian must present specific medical evidence about the incapacitated person’s diagnosis, prognosis, pain, etc. and, if at all possible, evidence concerning the incapacitated person’s wishes either prior to or during the treatment. The individual’s cognitive disability should generally not be considered. “In sum, this decision will make it extremely difficult, if not impossible, for a guardian to secure an order that would allow him to refuse life-sustaining treatment when an incapacitated person does not have an end-stage medical condition or is not permanently unconscious.” **BYB** March 25 / **CSR** April.

Judge Says Sperm Bank Liable for Pennsylvania Child’s Fragile X

In an unprecedented decision, Senior U.S. District Judge Thomas N. O’Neill Jr. said a 13-year-old girl with an intellectual disability in Pennsylvania can sue a sperm bank in New York under product liability laws for “failing to detect that a sperm donor had a genetic defect,” [The Legal Intelligencer](#) reported April 2. **BYB** May 6 / **CSR** April.

Texas Judge Sentences Teen with DD 100 Years in Prison

An 18-year-old with an IQ of 47 who pleaded guilty to sexually molesting a six-year-old boy was sentenced to 100 years in prison April 7 by Judge Eric Clifford of the 6th District Court in Lamar County, Texas, [The Los Angeles Times](#) reported.

Aaron Hart sat silent, shackled in his chair in the courtroom while his appellate attorney David Pearson, argued that “the teenager had received ineffective legal assistance because his trial attorney had failed to present any expert testimony about Hart’s diminished mental functioning or his ability to comprehend the charges against him,” the newspaper said.

“This case cried out for a mental health evaluation, to explain this disability to the judge and jury,” Pearson told Clifford. “One of the features of people with this kind of mental retardation is they cannot appreciate degrees of wrongfulness.” **BYB** May 6 / **CSR** June.

Other Noteworthy Legal Issues

American Bar Association Addresses Guardians’ Concerns

Under the [“DD Act Under Attack”](#) section of its website, the Virginia Office of Protection and Advocacy posted a response from the American Bar Association to a letter from the VOR (Voice of the Retarded).

See: [American Bar Association \(ABA\) Response to VOR Letter - Guardians of Individuals with Intellectual Disabilities \(04/16/09\)](#) and [VOR Letter to the ABA - Rights of Guardians of Individuals with Intellectual Disabilities \(01/09\)](#) **BYB** May 6 / **CSR** June.

Olmstead Plans and Lawsuits

The Center for Personal Assistance Services (PAS) released a report on states’ implementation of the 1999 U.S. Supreme Court Olmstead decision that people have the right to receive care in the most integrated, least restrictive setting appropriate.

The report provides tables outlining states’ strategies to comply with this decision and summary of community integration lawsuits related to Olmstead.

A [clickable U.S. map](#) is also included, providing Olmstead plans and related lawsuits by state.

Report website: <http://pascenter.org/olmstead/index.php>

Report [PDF](#) (179K, 16 pages)

Table 1- State Olmstead plans [PDF](#)

Table 2 - Olmstead-related lawsuits [PDF](#)