

## **NASDDDS Litigation Updates July – December 2008**

*The following articles published in Beyond the Beltway (BYB) and Community Services Reporter (CSR) summarize notable litigation cases concerning individuals with developmental disabilities throughout the country. Source citations for BYB or CSR are included at the end of each entry.*

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

### **1. Access to Services**

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.

### **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

#### Ohio.

***Parents League For Effective Autism Services, et al., v Helen Jones-Kelley, et al.*** Autism Lawsuit Seeks Medicaid Coverage for ABA

The Parents' League for Effective Autism Services (PLEAS) in Ohio filed a lawsuit May 2 against the state's Department of Job and Family Services, the agency responsible for the administration of the state's Medicaid program, and the Ohio Department of Mental Health, to stop them from enforcing proposed rules that would eliminate Medicaid reimbursement for medically necessary services currently delivered to children with autism.

At the heart of this case is whether the state, as a participant in the federal Medicaid program, is obligated to provide Applied Behavioral Analysis (ABA) treatments to children with autism. The state argued that coverage of those services is not required under Medicaid because those services are "habilitative" rather than "rehabilitative."

Having found that new Ohio Administrative Rules, which were to become effective July 1, 2008, were designed to deny ABA services to Ohio children by characterizing them as habilitative, the Court temporarily enjoined the enforcement of those rules June 30 on the grounds that they would effectively deny such children services that they were entitled to receive under the federal Medicaid Act. On July 10, 2008, the state filed a Notice of Appeal from the Order as well as a motion to stay enforcement of the Order pending the outcome of the appeal.

In regard to "habilitative" versus "rehabilitative" services, Judge James Graham of the U.S. District Court, Southern District of Ohio, said July 17 "this dichotomy has no relevance to medical or remedial services for children when the treatment has been recommended by a physician or other licensed practitioner for the 'maximum reduction of a physical or mental disability.'" He denied the state's motion for stay and stayed further activity at the trial court.

**FMI:** To access legal documents for this case, go to <http://olrs.ohio.gov/asp/PLEAScase.asp>. **BYB** Dec 10 / **CSR** December 2008.

## 2. COMMUNITY PLACEMENT OF INSTITUTIONALIZED PERSONS

### Massachusetts

***Ricci v. Patrick***. Governor's Appeal in Fernald DC Case Succeeds.

Last March, Massachusetts Governor Deval Patrick filed an 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 and to require the state's Department of Mental Retardation (DMR) to offer the Fernald Developmental Center as an on-going option for its current residents (see ***BYB*** April 2, 2008; August 22 and October 3, 2007 or ***CSR*** April 2008 and October 2007).

The Governor's 70-plus-page appeal included a statement that the court lacked jurisdiction to reopen the Ricci case on the grounds that the state had violated the terms of the 1993 decree that closed the case.

NASDDDS filed an amicus brief (as did the Massachusetts Arc and Disability Law Center) in appeal of the court's order in ***Ricci v. Patrick*** (previously known as ***Ricci v. Okin***).

The Court of Appeals for the First Circuit reversed the District Court's decision October 1, 2008 dismissing plaintiffs' claims with prejudice, according to Marianne Meacham, General Counsel for the Massachusetts Department of Mental Retardation.

"The Court held that the District Court erred when it re-opened this closed case and entered orders," Meacham said. "The Court based its opinion on lack of jurisdiction finding that the Commonwealth complied with all of the obligations of the 1993 decree. The District Court's conclusion that a 'global policy decision' to close Fernald violated the decree's provisions requiring an individual service planning process was rejected.

"The Court found that the Commonwealth appropriately based its policy decision to close Fernald on several things including the Legislative directive to comply with the ADA and Olmstead, its longstanding policy favoring less restrictive settings and the need to carefully allocate its resources. Further, the Court noted the Commonwealth's history of successfully placing individuals out of institutional settings.

"Although the decision is based primarily on jurisdictional grounds, the First Circuit also issued several statements supporting the Commonwealth's right to close a facility stating that 'so long as equal or better services are available for class members elsewhere, the closing of one residential facility such as Fernald cannot itself constitute a violation [of the consent decree].' The court further stated that 'the [consent decree] does not guarantee that Fernald be maintained

open so long as any particular resident prefers to remain there.' Finally, the Court held that Individual placement decisions, and appeal therefrom, were a matter of state law, and should not be brought in federal court."

**FMI:** To read the First Circuit Court opinion, download [http://www.nasddd.org/pdf/Massachusetts-RiccivPatrickUSCA10Opinion\(10-1-2008\).pdf](http://www.nasddd.org/pdf/Massachusetts-RiccivPatrickUSCA10Opinion(10-1-2008).pdf) **BYB** Oct 18 / **CSR** November 2008.

### **3. LIMITATIONS ON HOME AND COMMUNITY-BASED SERVICES**

### **4. INSTITUTIONAL REFORM / CRIPA**

### **5. DEATH PENALTY EXEMPTION**

### **6. MISCELLANEOUS**