

NASDDDS Litigation Updates January - July 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

Kentucky

Michelle P. v. Janie Miller. A federal judge told Kentucky's Cabinet for Health and Family Services March 4 that it had to comply with a settlement agreement in a waiting list lawsuit by March 7. The settlement agreement for ***Michelle P. v. Janie Miller*** (formerly called ***Michelle P. v. Mark Birdwhistell***), which had been approved March 29, 2006 (see ***BYB*** April 19, 2006 / ***CSR*** May 2006), included a stipulation that the state would increase funding for home and community-based waiver services.

After going back and forth with the Centers for Medicare & Medicaid Services (CMS) about an appropriate waiver program to meet the needs of the plaintiffs, the state eventually applied for and received CMS approval for a Enhanced Community Services (1915c) waiver last summer (see <http://chfs.ky.gov/news/Settlement+2007.htm>). This Michelle P. Waiver program was supposed to be rolled out January 1, 2008. Then the roll-out date was changed to April 1, 2008 because the state had "made a mistake in calculating the costs of the Waiver," a court document said, and could not launch the waiver program.

In December 14, 2007, plaintiffs filed a request for the Court to enforce the section of the settlement agreement that calls for changing the state's HCBS waiver program to provide plaintiffs the services and supports they need. The Court concluded that the state "cannot be excused from performance of an obligation based on financial reasons, where they knowingly entered into the obligation after lengthy negotiation in which they were represented by counsel," Chief U.S. District Judge Joseph M. Hood said, and ordered the Michelle P. Waiver to be implemented no later than March 7, 2008.

FMI: To read Judge Hood's memorandum opinion and order, click on <http://www.nasddd.org/pdf/KentuckyOrder.pdf>. For other information and updates about the Michelle P. case, go to <http://www.kypa.net/drupal/?q=node/865>, the Website of Kentucky's Protection and Advocacy that filed the lawsuit. ***BYB*** April 2 / ***CSR*** April 2008

New Jersey

New Jersey Protection and Advocacy, Inc. v. Jennifer Velez. The New Jersey Protection and Advocacy, Inc. filed a lawsuit April 16 against the state's Department of Human Services for not providing home and community-based services for individuals with developmental disabilities. The complaint specifically

describes six individuals with developmental disabilities who have been placed on a waiting list for home and community-based waiver services, along with some 8,000 other individuals, for a number of years. "None of the individuals...have been informed of their status on the list, or how much longer they will have to wait for the services to which they are entitled to," the complaint said. The parents/guardians of the individuals are aging and fear their children will be institutionalized when they should be provided with residential placements and services.

FMI: To read the complaint, click on <http://www.nasddd.org/pdf/NewJerseyComplaint.pdf>. *BYB* May 28 / *CSR* June 2008.

2. COMMUNITY PLACEMENT OF INSTITUTIONALIZED PERSONS

Georgia

U.S. Dept. of Health and Human Services v. State of Georgia.

The State of Georgia and the Health and Human Services' Office for Civil Rights signed a voluntary compliance settlement agreement July 1 that formalizes efforts to transition Georgians with developmental disabilities or mental health issues out of state hospitals.

More than 2,300 Georgians with disabilities are currently institutionalized in the state's eight public psychiatric hospitals and intellectual disability facilities.

According to the agreement with the Office for Civil Rights (OCR), Georgia maintains its position that it did not violate the Americans with Disabilities Act or Section 504 of the Rehabilitation Act of 1973. As part of the agreement, the OCR is suspending its investigation of class complaints filed by a coalition of disability advocacy organizations as it works with the state to increase the delivery of community services for qualified individuals with mental and developmental disabilities.

Georgia's implementation of the settlement agreement will rely, in part, on a \$44 million Money Follows the Person Rebalancing Demonstration Grant, which was awarded to the state by the HHS Centers for Medicare & Medicaid Services June 30, 2008.

The state will involve individuals receiving services and other advocates in planning how best to provide adequate community services to meet the needs of all Georgians with disabilities who are either living in institutions or at risk of institutionalization without community supports.

Key provisions of the agreement include:

- An Olmstead Coordinator who reports to the governor and is charged with developing and implementing Georgia's Olmstead Plan objectives, as well as hearing and addressing problems, will be created.
- The Olmstead Coordinator, DHR and, the Department of Community Health (DCH) will make annual estimates of the need for community services for Georgians with developmental or mental health disabilities who are institutionalized or at risk of institutionalization.
- Mental health and developmental disabilities "Olmstead lists" and "transition lists" will be kept that outlines all institutionalized individuals who do not actively oppose receiving services in the community, as well as specific individuals DHR is planning to discharge into the community in a given fiscal year.
- Proper notification of discharge plans for individuals.
- Proper notification and explanation of denial of discharge based on determination of state treatment professionals, as well as methods of recourse available to individuals who wish to contest these decisions.

Progress has already been made in achieving some provisions of the Olmstead Plan, Georgia Governor Sonny Perdue said. Some state hospitals have been closed and a number of Georgians have either been transitioned out of state hospitals or are receiving increased community services. Georgia's Department of Human Resources (DHR) now has a policy that individuals with developmental or mental health disabilities hospitalized longer than 60 days be assessed at least monthly for discharge into the community, the governor explained.

The agreement settles statewide complaints filed with OCR by the Georgia Advocacy Office, Atlanta Legal Aid Society, Georgia Legal Services Program, and the Disability Law and Policy Center of Georgia.

FMI: To read the settlement agreement, see <http://www.hhs.gov/ocr/GAOlmsteadagreement.html>. To review other information about the case, go to <http://www.hhs.gov/ocr/mis.htm#stories>.

Massachusetts

Ricci v. Patrick. Massachusetts Governor Deval Patrick filed an appeal March 20 of U.S. District Court Judge Joseph L. Tauro's August 14 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 (FDC) as an on-going option for its current residents (see BYB August 22 and October 3, 2007). NASDDDS also filed an amicus brief in March 27FILED and the

Massachusetts Arc and Disability Law Center filed a brief February 13 in appeal of the court's order in *Ricci v. Patrick* (previously known as *Ricci v. Okin*).

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.

"But there was no evidence to support such a finding," the appeal said, "In fact, the Monitor found, and the court accepted, that DMR was in full compliance both with the Decree and with federal and state law when it transferred 49 individuals out of the FDC."

The appeal said that the court's previous decision was based on the Monitor's "speculation" that Fernald residents would suffer harm if transferred out of the institution. "The Monitor's mere speculation," the appeal said, "is inadequate to provide the basis for the court's Order and is, in fact, contradicted by the evidence in the record, include the Monitor's own report."

In regard to Judge Tauro's order to require DMR to include Fernald Developmental Center as an option for its residents, the appeal said that decision "improperly exceeded the limits" of the case's final decree. "[A]lthough the district court disclaimed any intention to mandate that the FDC remain open, its injunction requiring DMR to list the FDC as an option for all Fernald plaintiffs and their guardians effectively did just that," the appeal said. "The court had not authority to issue such a directive. The court's order intruded on the Commonwealth's policy decisions and its right to control its own programs, facilities, and budget, and conflicted with both state law and the law of the case."

FMI: To read Massachusetts Arc's and the Disability Law Center's appeal and request that the U.S. District Court August 14 decision be "vacated," see <http://www.centerforpublicrep.org/uploads/gl/XG/glXGJZ3dvRpkIn2qEYR43w/First-cir-brief-FINAL.pdf>. **BYB** April 2 / **CSR** April 2008

Rolland v. Patrick. As part of a long-standing class action lawsuit settlement, about 600 individuals with developmental disabilities will be transitioned out of nursing homes and into appropriate community settings in the next four years, state officials announced March 20, a local Massachusetts newspaper said.

The suit was originally filed in 1999 on behalf of individuals with developmental disabilities who felt they were inappropriately confined to nursing facilities when they preferred and were capable of living in community-based settings.

A court ruling last August approved and adopted active treatment plans for the plaintiffs (see http://newsmanager.commpartners.com/mecf/downloads/2007_Aug_29/Rolland_court_monitors_CourtOrder_DraftActiveTreatmentStandards.pdf), and directed the Court Monitor to use the plans to develop a protocol for active treatment reviews. The Court Monitor, Lyn Rucker, developed a website to provide information about the origin and expectations of the active treatment reviews and to make available other information about the case (see <http://www.rollandatreview.org/index.htm>). **BYB** April 2 / **CSR** April 2008

3. LIMITATIONS ON HOME AND COMMUNITY-BASED SERVICES

Alaska. Gary McGrew v. State of Alaska. An Alaska Superior Court ruled last fall that the state's Division of Senior and Disabilities Services cannot deny respite services to family members who provide caregiving for an individual with a developmental disability.

The Division, a court document said in the **Gary McGrew v. State of Alaska** case, denied respite services as part of its 'respite limitation' policy in order to "minimize fraud and abuse of the Medicaid system by families' and the risk that Medicaid would become over-utilized by families who should be performing these services through 'informal supports.'"

The Court didn't find the Division's respite policies "to be a reasonable or rational fit regarding prevention of fraud, nor does the Court find that a family member [personal care assistance] PCA provider is any likelier to commit fraud against the Division than [a] family member who is not a PCA provider."

The Court's response to the Division's contention that if they provide all services to individuals "who choose to have their family members care for their needs, the consumers and families who choose an unrelated individual to provide services would be at a disadvantage," is that the Division is being discriminatory to parents who choose to provide personal care assistances for their children.

"...the Court finds that if the Division offers respite services to any class of family members, its disparate treatment of family members based on their preference to care for a Medicaid recipient is unreasonable...."

FMI: To read the judge's order, go to <http://www.nasdds.org/pdf/McGrewOrder.pdf>. **BYB** May 28 / **CSR** June 2008.

District of Columbia. *Evans v. Fenty*. A Court Monitor's report released May 8 says services provided for individuals with developmental disabilities in the District of Columbia improved in 10 cases, but "the findings overall are troubling." The District is trying to stave off court receivership of its Department of Disability Services (DDS) for continued failure to comply with court orders to provide minimum-standard services for plaintiffs with developmental disabilities in a 30-year-old *Evans v. Fenty* class action lawsuit.

"Our monitoring concludes that the health care provided to the majority of the class members reviewed fails to meet minimally acceptable standards of care. These class members remain at very serious risk," Court Monitor Elizabeth Jones said in the report. "One of the most serious areas of concern is the failure to ensure competent and consistent monitoring of psychotropic drugs and their side effects."

U.S. District Judge Ellen S. Huvelle held a status hearing May 15 including a review of Jones' report and DDS objections to some of the methodologies used to create the report. Smith said her report findings were consistent with findings made by the D.C. Health Resources Partnership. "Although everyone connected to this litigation is working very hard, even though there are many plans being talked about, about the changes that will take place," Jones said, "outcomes are not yet secured for many class members." Judge Huvelle later commented that DDS and the Court Monitor can collaborate on methodologies so that systemic conclusions can be drawn about service delivery performance.

Judge Huvelle did not accept a health care agreement agreed to by the U.S. Department of Justice and the District of Columbia, primarily due to the absence of the plaintiffs from the agreement.

A follow-up hearing will take place September 25.

FMI: To access the Court Monitor's report, see [http://www.nasddd.org/pdf/QuarterlyReportToTheCourt\(05-8-08\).pdf](http://www.nasddd.org/pdf/QuarterlyReportToTheCourt(05-8-08).pdf). To read the court transcript, click on [http://www.nasddd.org/pdf/EvansStatusTranscript\(05-15-08\).pdf](http://www.nasddd.org/pdf/EvansStatusTranscript(05-15-08).pdf). **BYB** June 25 / **CSR** July 2008.

Illinois. *Radaszewski v. Maram*. A case involving a young man with multiple disabilities who was living at home and receiving services under the State's medically fragile waiver (Katie Beckett waiver) was settled March 26. "The adult waiver in Illinois provides significantly fewer in-home services and as a result, he was at risk of institutionalization when he turned 21," explained Barry C. Taylor, Legal Advocacy Director for Equip for Equality who provided **BYB** with the court

document for the case. "The State argued that to provide services in the home would be a fundamental alteration. At trial, the court found in favor of the plaintiff and found that there was no fundamental alteration and that the State's position was contrary to the Supreme Court's decision in *Olmstead*."

FMI: To read the opinion and order for *Radaszewski v. Maram*, go to <http://www.nasddds.org/pdf/Radaszewski-v-Maram.pdf>. **BYB** May 28 / **CSR** June 2008.

4. INSTITUTIONAL REFORM / CRIPA

Indiana. The Family and Social Services Administration (FSSA) announced April 28 the dismissal of a consent decree signed by the State of Indiana and the United States Department of Justice (DOJ) on December 29, 2000. The DOJ sued FSSA alleging that conditions at the Muscatuck State Development Center (MSDC) and Fort Wayne State Developmental Center (FWSDC) violated the rights of the people who lived there. The DOJ acknowledged the great success Indiana had in meeting the terms of the Settlement Agreement that was filed on December 29, 2000.

Since the investigation began, MSDC and FWSDC have both been closed. Former residents are now working, volunteering, and being involved in a variety of community-based activities. In addition, DDRS implemented a number of wide-reaching changes to the system that have ensured quality assurance mechanisms to further protect individuals from abuse, neglect, and mistreatment, and provided improved community placements and services. **BYB** May 28 / **CSR** June 2008.

Nebraska. The U. S. Department of Justice and Nebraska's Department of Health and Human Services announced June 30 that they have reached a settlement regarding the care given to people served at the Beatrice State Developmental Center (BSDC). The state-owned and operated residential facility serves almost 300 individuals with developmental disabilities. The agreement, submitted to and subject to the approval of the U.S. District Court, stems from concerns about conditions and practices at BSDC based on DOJ's investigation of the facility last fall (see http://www.usdoj.gov/crt/split/documents/beatrice_sdc_findingsletter_03-07-08.pdf).

"We are very pleased that we were able to work cooperatively with the State to arrive at a resolution that will ensure that the rights of persons with developmental disabilities are protected," said Grace Chung Becker, Acting Assistant Attorney General for Civil Rights. "We applaud the State of Nebraska

for its innovative efforts to more effectively serve BSDC residents and ensure their health, safety, and welfare."

Under the terms of the agreement, Nebraska will fund and work with an independent expert who will oversee the state's compliance with the agreement. The agreement contemplates that the state will reach compliance within four years.

In the settlement, DHHS agrees to the following:

- Monitoring implementation of the settlement agreement by an independent expert through regular on-site visits to BSDC and quarterly reporting.
- Protecting residents from abuse and neglect and taking effective steps to minimize or eliminate resident injuries and other significant incidents that impact their health and welfare through zero tolerance policy and adequate staffing.
- Securing additional professional and medical staffing at BSDC, including a psychologist, neurologist, psychiatrist, and medical personal.
- Ensuring placement of BSDC clients in most integrated setting possible and providing enhanced counseling for those living at BSDC for many years on community based service options.
- Enhancing transition plans for individuals served at BSDC.
- Developing and expanding community capacity and monitoring of community placements, which includes expansion of BSDC's intensive treatment services (ITS) and outpatient treatment service (OTS) programs.
- Enhancing the Health Care Service (mortality review committee, peer review of medical staff) and monitor use of psychotropic medications.
- Ensuring that people served at BSDC are free from unreasonable restraints.

Efforts to reduce the number of people served at BSDC so that staffing is consistent with providing quality care are having a tremendous impact already, said John Wyvill, director of the DHHS Division of Developmental Disabilities. For example, in December, 2007 the census was 329 individuals, on March 15 [2008] it was 305, and on June 27, it was 267. At the same time, mandatory overtime dropped from 604.50 hours for the March 3-16, 2008 pay period to 84 hours for the June 9-22, 2008 pay period.

FMI: To read the settlement agreement, click on <http://www.nasddd.org/pdf/US-DOJvNebraskaSettlementAgreement.pdf>. **BYB** July 9 / **CSR** July 2008. To read the BSDC six-point plan, click on <http://www.nasddd.org/docs/Nebraska-BSDC6point-R-Rplan4-08.doc>.

5. DEATH PENALTY EXEMPTION

6. MISCELLANEOUS

U.S. Government

Hannah Poling v. Secretary of Health and Human Services.

The U.S. Government conceded that vaccines caused damage to girl with autism. In a heavily redacted court document in the *Hannah Poling v. Secretary of Health and Human Services* case, medical personnel for HHS' Division of Vaccine Injury Compensation said they concluded that the facts of the case for now nine-year-old Hannah Poling "meet the statutory criteria for demonstrating that the vaccinations she received on July 19, 2000, significantly aggravated an underlying mitochondrial disorder which predisposed her to deficits in cellular energy metabolism, and manifested as a regressive encephalopathy with features of autism spectrum disorder." They recommended, according to the document filed November 9, that compensation be awarded to her and her parents.

In a *New York Times* article about the case, Hannah's mother explained there were two theories about what happened to her daughter. One is that Hannah had an "underlying mitochondrial disorder that vaccinations aggravated" and the second is that the vaccinations caused the mitochondrial disorder itself.

"The government chose to believe the first theory," Ms. Poling said, and added, "We don't know that she had an underlying disorder."

While some individuals assert that the mercury preservative, Thimerosal, used in vaccinations in the past cause autism, Hannah's parents don't think so, the article said. Hannah's father, a medical doctor and former neurology resident at Johns Hopkins Hospital, did note that "there was no debate that vaccines had risks" (see <http://www.nytimes.com/2008/03/08/us/08vaccine.html>), *BYB* April 2 / *CSR* April 2008.