

NASDDDS LITIGATION UPDATES

May 2007 to January 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

Delaware

U.S. District Court Judge Gregory Sleet said September 11, 2007 that the State of Delaware not processing and approving a Medicaid application on behalf of a North Carolina resident with DD until she moves to Delaware is a “violation of her constitutional right to travel.” The 33-year-old woman, whose disabilities include autism, intellectual disability, blindness, and seizures, is a Medicaid beneficiary and currently resides in an intermediate care facility for mental retardation (ICF/MR) in North Carolina. Her parents, who cannot care for her on their own, according to the court document, moved to Delaware in 2001 and began application to the Delaware Division of Developmental Disabilities Services (DDDS) for residential placement and services for their daughter through the state’s Medicaid Program. When DDDS “determined that [the woman] was not a (Delaware) resident and her residential placement needs were not ‘urgent’....[and therefore she] would not be provided with community residential services,” her parents filed a lawsuit on her behalf in 2005. Judge Sleet, in his September 11 decision in *Duffy v. Meconi, et al.*, denied the state’s motion for summary judgment and granted the plaintiff’s motion for summary judgment. Delaware state officials, according to an Associated Press report, said they will appeal the ruling.

FMI: To read Chief District Judge Sleet’s ruling and order in this case, go to <http://www.healthlaw.org/library.cfm?fa=download&resourceID=109186&print>. (BYB November 14, 2007/CSR November 2007)

2. COMMUNITY PLACEMENT OF INSTITUTIONALIZED PERSONS

California

Capitol People First (CPF) v. Department of Developmental Services (DDS). The Court of Appeal for the First Appellate District reversed a trial court judgment September 25, 2007 to allow class-action status for the *CPF v. DDS* lawsuit. The lawsuit, originally filed in 2002, seeks community placements for more than 7,000 Californians with developmental disabilities receiving services from the state’s 21 Regional Centers who are either living in state or private institutions, or are at risk of institutionalization.

“The [Alameda County Superior Court] order denying class certification cannot stand because it was based on improper criteria and incorrect legal assumptions. Had the trial court properly analyzed appellants’ theory of recovery and approach, it would have found commonality. Had it understood the type of conflict that will defeat adequacy of representation, it would not have concluded that appellants failed to

establish this element," Justice Timothy A. Reardon said. "...with these proper understandings [the Alameda County Superior Court] would have recognized that the class action was the only way to resolve appellants' claims."

FMI: To view court documents and other information about this case, go to <http://www.pai-ca.org/advocacy/cpfvdds/index.htm>.
(BYB November 14, 2007/CSR November 2007)

Chambers v. City and County of San Francisco. Advocates with disabilities living in a large San Francisco hospital and the city of San Francisco came to a preliminary settlement agreement November 27, 2007 in a class-action civil rights lawsuit. The plaintiffs, who reside in the 1,200-bed Laguna Honda Hospital and Rehabilitation Center, sued the city 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.

The agreement includes the requirement that San Francisco provide community-based services for named plaintiffs within a reasonable period of time. Facilitating access to services through 500 slots in a Medi-Cal Nursing Facility A/B waiver and providing a "point person" for the waiver is one strategy the city agrees to take. Another is the establishment of an interagency program, the Diversion and Community Integration Program (DCIP), that will provide a Community Living Plan for each class member with the goal of placing individuals in the most integrated setting appropriate to their needs and preferences. The agreement also includes steps the city will take to provide affordable housing.

The preliminary settlement agreement is awaiting approval by the Board of Supervisors, the Health Commission, and the Court.

FMI: To learn more about *Chambers v. City and County of San Francisco*, go to <http://www.pai-ca.org/news/LHH/LHHPressRelease-2007-11-27.pdf>. To read a summary of the preliminary agreement, click on <http://www.pai-ca.org/news/LHH/LHHSummaryOfAgreement-2007-11-27.pdf>.
(BYB December 26, 2007/CSR January 2008)

Massachusetts

Fernald Developmental Center (Ricci v. Okin). U.S. District Court Judge Joseph Tauro issued an order August 14, 2007 that reopens a class-action lawsuit, *Ricci v. Okin*, regarding conditions at Fernald Developmental Center - the oldest institution in the United States. The lawsuit formally ended in 1993. Judge Tauro's order requires that any further communication from the Massachusetts Department of Mental Retardation (DMR) to Fernald residents and their guardians soliciting choices for further residential placement include Fernald among the options presented. Specifically, the option of remaining in Fernald must be communicated in developing a person's individual support plan (ISP).

"It does not mean that the Commonwealth may never close Fernald," Judge Tauro said, "It does mean, however, that the DMR must carefully assess the needs and wishes of each resident, and provide a genuine and meaningful opportunity for their guardians to participate in their placement decisions....the court believes that the Commonwealth's compliance with this order will remedy the systemic failure identified. Accordingly, the case may again be closed."

The judge's order also dissolves the Court's injunction prohibiting transfers of individuals from the Fernald Developmental Center (FDC) who have been waiting to be transferred for at least a year-and-a-half. In 2004, following then Governor Mitt Romney's announcement of the closure of Fernald, class members moved to re-open the case, alleging violations of law in the voluntary transfer of 43 individuals from the FDC. The motion was denied, but Judge Tauro allowed the plaintiffs to conduct a review of files on the individuals transferred out of the facility. Plaintiffs conducted their review, then filed another motion attempting to halt the closure. This time, in February 2006, the judge appointed the U.S. Attorney for the District of Massachusetts as Court Monitor to review the transfers and render an opinion on the plaintiffs' claims. The judge also entered an injunction barring any transfer -- voluntary or involuntary -- pending completion of the Court Monitor's review.

Based on an extensive series of visits to institutional and community-based residences and a careful review of the medical records of the former Fernald residents conducted by a panel of medical experts, the Court Monitor concluded in his March 2007 report that there was no merit to the plaintiffs' claims that DMR had failed to certify that previously placed residents were receiving "equal or better" services in their new locations, as required under an earlier order issued by Judge Tauro in the 33-year-old lawsuit (see *BYB* March 21, 2007 and *CSR* May 2007).

FMI: To read Judge Tauro's memorandum and order, click on [http://www.nasddd.org/pdf/MassRicciDocument219\[MEMO\]8-14-2007.pdf](http://www.nasddd.org/pdf/MassRicciDocument219[MEMO]8-14-2007.pdf) or [http://www.nasddd.org/pdf/MassRicciDocument220\[ORDER\]8-14-2007.pdf](http://www.nasddd.org/pdf/MassRicciDocument220[ORDER]8-14-2007.pdf). (*BYB* August 22, 2007/*CSR* October 2007)

Secretary of Massachusetts' Health and Human Services JudyAnn Bigby, M.D., announced September 12, 2007 that the state will file an appeal to Judge Joseph L. Tauro's recent decision in the case of *Ricci v. Okin* that required the Department of Mental Retardation (DMR) to offer the Fernald Developmental Center as an on-going option for its current residents (see *BYB* August 22, 2007 and *CSR* October 2007).

Pending the outcome of the appeal, the state intends to work toward closing Fernald and will facilitate a transition that prioritizes cooperative individualized planning with each resident. In the meantime, the state intends to comply with the current order while it is in effect.

"We understand and respect that people who have lived much of their lives in institutions and their families may wish to continue institution-based services," Dr. Bigby said, "the Department of Mental Retardation will ensure that these residents will have an opportunity for placement at one of Massachusetts' remaining institutions."

The state's decision is consistent with a national shift away from institutional care in favor of community living, Dr. Bigby explained, citing that decades of research indicate that community settings offer people with developmental disabilities the best care available and the highest quality of life. Massachusetts Governor Deval L. Patrick and his administration believe that community living is the best environment in which to ensure family connections, service access, education, training employment, and full inclusion for people with developmental disabilities, she said. "Our experience is that most people with mental retardation, including some of the most profound levels of mental retardation and those living with seriously disabling conditions, can and do benefit from the opportunity to live in community settings," Dr. Bigby said.

The Patrick Administration also plans to reconstitute the Governor's Commission on Mental Retardation to advise in the transition process and on other issues facing DMR. Members of the Commission will be named at a later date.

Dr. Jean McGuire, Assistant Secretary for Disability Policies and Programs, added, "Planned properly, the transition to community life is smooth and offers people with mental retardation opportunities for growth and development. DMR accomplished past closures successfully at Belchertown State School, Dever Developmental Center, and JT Berry Regional Center with residents that had similar needs to those now living at Fernald. I am confident that this process will also be successful."

"As DMR moves forward in the transition process, we will partner with residents and their families in developing individualized service plans in a manner that is compassionate, caring and consistent," said Department of Mental Retardation Commissioner Elin Howe. "Our highest priority is providing our residential clients with the setting that best suits each individual's unique needs, whether that is a community-based home, shared living options, or in one of our other institutions."

Six out of seven institutions for individuals with mental retardation in New England are in Massachusetts. The Commonwealth has lagged behind the region and much of the nation in closing old, expensive, and ineffective institutional settings, Dr. Bigby said.

Fernald is the most expensive of the state's six institutions to operate, with costs in excess of \$239,000 per resident per year, compared to \$102,000 for comparable services provided in community settings. In addition, the facility faces at least \$14 - 20 million in needed capital improvements. Closing the facility, which currently has

only 180 residents on 196 acres, will enable DMR to consolidate its resources in order to provide the best services available to all 32,000 of its clients throughout the state.

The state will maintain an on-going presence on the Fernald campus. Malone Park, with 24 beds, will remain open and will be run as state-operated group homes.

FMI: To view other news at DMR, see

<http://www.mass.gov/?pageID=eohhs2topic&L=4&L0=Home&L1=Government&L2=Departments+and+Divisions&L3=Department+of+Mental+Retardation&sid=Eeohhs2>.

(BYB October 3, 2007/CSR October 2007)

West Virginia

Shawn Shumbera, a 27-year-old West Virginian with developmental and other disabilities who has resided in the Mildred Mitchell-Bateman Hospital since 2001, filed a class action lawsuit August 24, 2007 against West Virginia Department of Health and Human Resources Secretary Martha Walker for being denied a Medicaid home and community-based waiver for services. Mr. Shumbera seeks MR/DD program benefits for himself and any member of the class. "The defendant has a pattern and practice of denying recipients and applicants to the Medicaid MR/DD Waiver Program due process," the complaint says, "by (1) failing to follow written policy concerning eligibility for the Program; (2) ignoring precedent set by court decisions concerning Defendant's improper eligibility determinations; (3) failing to provide an impartial decision maker to consider appeals of denials and other adverse decisions; and (4) making eligibility determinations based on standards that are not articulated or ascertainable. In addition, the Defendant discriminates against recipient and applicants that suffer from a mental illness."

FMI: To read the complaint in its entirety, go to

<http://www.nasdds.org/pdf/CSR/WVComplaint.doc>.

(BYB November 14, 2007/CSR November 2007)

3. LIMITATIONS ON HOME AND COMMUNITY-BASED SERVICES

District of Columbia

Evans v. Fenty. A U.S. District judge ruled March 30, 2007 that the District of Columbia's continued failure to comply with court orders to provide services and supports that meet minimum standards for D.C. residents with developmental disabilities is "systemic" and "serious." Still, Judge Ellen S. Huvelle did not place the district's Department of Disability Services (DDS) into receivership, as plaintiffs in the 30-year-old class action lawsuit (*Evans v. Fenty*) requested almost a year ago (see *BYB* June 21, 2006/*CSR* July 2006).

Instead, she is enlisting the help of Special Masters for this case to make findings and recommendations concerning the "current status of defendants' compliance, what are

the available options for curing identified deficiencies, and whether a receivership is the most effective and efficient remedy available to the Court." The Special Masters will assist the parties in the case to develop a joint plan to address the deficiencies in the DDS system by April 20, 2007.

"Failures have occurred throughout defendants' service delivery system, from providers and case managers to the managerial level," Judge Huvelle said. "Nor are these failures limited to a few isolated providers or case managers....defendant's service system has been wholly inadequate...for many years."

D.C. Mayor Adrian M. Fenty is preparing to introduce a major reform plan, the Washington Post reported, to address the troubled service system. The plan includes independent investigations into the deaths of group home residents, employment programs, and the transfer of individuals into less-restrictive residences.

FMI: To download the 85-page decision, go to <http://www.nasddds.org/pdf/DC-Opinion.pdf>.

(BYB April 18, 2007/CSR May 2007)

New Jersey

New Jersey's Supreme Court upheld an appeals court ruling September 12, 2007 to order the state's health insurance plan to cover autism services such as speech therapy, occupational therapy, and applied behavioral analysis/verbal behavior therapy for children of state government workers.

The January 17, 2007 appeals court ruling in *Micheletti v State Health Benefits Commission* said, "In this case the denial of coverage for [Jake Micheletti's] prescribed treatment is couched in terms of the contractual exclusion of benefits for non-restorative speech, physical and occupational therapy, but the medical evaluations of Jake indicate that the therapy is the only treatment modality for an autistic child. Denial of the treatment amounts to exclusion from coverage of a class of dependents, notably afflicted children, based on the nature of their mental illness, which is beyond the limits of the statutory authority of the [State Health Benefits Commission].... We hold the exclusions relied upon by the SHBC to deny coverage for the treatment sought for autism are void. We direct that speech and occupational therapy be instituted for Jake without delay, and that the date of coverage is retroactive to the date of the initial petition."

FMI: While the September 12 decision is not available online as of this writing, the January 17 ruling is available at

<http://lawlibrary.rutgers.edu/decisions/appellate/a4418-05.opn.html>. National Public Radio also covered this case in a recent report:

<http://www.npr.org/templates/story/story.php?storyId=14577821>.

(BYB November 14, 2007/CSR November 2007)

Pennsylvania

Two individuals with intellectual disability living in personal care homes in Scranton, Pennsylvania filed a lawsuit November 5, 2007 against the state's Department of Public Welfare (DPW) claiming it removed them and others off a benefit program without proper notification or the right to appeal.

According to the complaint, filed by Robert Meek of the Disability Rights Network of Pennsylvania, DPW in January 2007 informed plaintiffs and about 75 other Pennsylvanians living in personal care homes who were receiving services through the Consolidated Waiver that their enrollment in the waiver was terminated and that they had no right to appeal. DPW had received federal approval December 2006 to amend its Consolidated Waiver to exclude from eligibility all individuals residing in personal care homes.

DPW transferred plaintiffs to another home and community-based waiver program "that confers a far more limited entitlement to services than the Consolidated Waiver," the complaint says. Plaintiffs, because of their intellectual disability, did not understand the notice DPW sent them or its consequences. Another allegation, the complaint says, is that DPW did not afford plaintiffs and others any assistance in finding alternative housing. Plaintiffs are seeking declaratory and injunctive relief.

FMI: To read the complaint, go to <http://www.nasddd.org/pdf/CSR/PennLawsuit.pdf>.
(BYB November 14, 2007/CSR November 2007)

Texas

U.S. District Judge William Wayne Justice approved a settlement in June 2007 for a 14-year-old lawsuit that claimed the state of Texas violated Medicaid law in not providing adequate services to children. The settlement agreement includes a 25% increase in reimbursement rates for physicians and a 50% increase for dentists for services provided to children on Medicaid; more service providers in underserved areas, additional case managers to help parents; and improved transportation options so children can get to medical appointments. The Texas legislature has budgeted nearly \$1.8 billion for the next biennium to fulfill the settlement terms.
(BYB July 25, 2007/CSR August 2007)

Washington

Washington State's Supreme Court ruled May 3, 2007 in favor of three individuals with disabilities who challenged a Department of Social and Health Services (DSHS) rule that reduces the number of hours of paid aid available to individuals with disabilities by 15 percent when they are in a "shared living" arrangement with their caregivers.

The "shared living" rule is a component of an assessment tool DSHS uses called "Comprehensive Assessment Reporting Evaluation" (CARE) that is used to determine a person's eligibility for in-home care through one of four programs. (The programs are:

medical personal care; community options program entry system waiver program; medically needy in-home waiver program; and the Chore program for individuals not eligible for Medicaid personal care services.) The 15 percent reduction used in the "shared living" rule was calculated by DSHS, the Court said, based on a study's "conclusion that the percentage of time devoted by live-in caregivers to household tasks ranged from 33 percent to 42 percent but, DSHS does not explain...how it arrived at the 15 percent figure."

The court said the DSHS "shared living" rule violated the federal Medicaid's law regarding comparability (42 U.S.C. section 1396), saying that "the medical assistance a state provides for any categorically needy individual 'shall not be less in amount, duration, or scope' than the assistance provided to any other categorically needy individual." The 15 percent reduction rule, as a type of one-size-fits-all approach, "ignores," the Court said, "the realities of the recipients' individual situations....[and that] no reduction is justified unless an individual determination is made supporting that reclassification."

The three plaintiffs, David Jenkins, Vennetta Gasper, and Tommye Myers, had different physical and developmental disabilities and were dependent on in-home personal care for such daily living needs as bathing, dressing, shopping, housekeeping, and meal preparation.

FMI: To read the Court's decision in *Jenkins v. Washington Department of Social and Health Services*, see [http://op.bna.com/hl.nsf/id/psts-72yrw5/\\$File/jenkins_1.pdf](http://op.bna.com/hl.nsf/id/psts-72yrw5/$File/jenkins_1.pdf).
(BYB May 30, 2007/CSR June 2007)

4. INSTITUTIONAL REFORM / CRIPA

Louisiana

U.S. District Court Judge James Brady said the state of Louisiana, working with the U.S. Department of Justice, did an "exceptional job" of improving conditions at the state's two largest residential facilities for people with developmental disabilities. The judge's statements came as he signed a ruling, effectively dismissing a lawsuit regarding the conditions at Pinecrest (Pineville) and Hammond Developmental Centers. The settlement agreement, filed January 12, 2004, was consequently terminated on June 15, 2007, on the grounds that the state of Louisiana had substantially complied with all provisions of the agreement.
(BYB July 25, 2007/CSR August 2007)

5. DEATH PENALTY EXEMPTION

New Jersey

The New Jersey Supreme Court ruled in June four-to-two that if a defendant convicted of a capital offense (e.g., murder), can convince just one juror during post-trial sentencing hearings that s/he has mental retardation, then s/he would not be subject to the death penalty. Instead, the defendant would be sentenced to life imprisonment.

FMI: To find out more about the decision, click on <http://www.judiciary.state.nj.us/opinions/supreme/A-75-06corrected.pdf>.
(*BYB* July 25, 2007/*CSR* August 2007)

6. MISCELLANEOUS

Colorado

Autism - Insurance/Medical Coverage. An Arbiter issued an award November 20, 2007 to parents of a young girl with autism who had filed a lawsuit against Anthem Blue Cross and Blue Shield to cover applied behavior analysis (ABA) autism therapy for their daughter. The award includes the coverage of ABA therapy under the Anthem PPO Policy; reimbursement to the parents for costs in pursuing and prosecuting the arbitration; and the commitment of the Counsel to meet within 30 days to resolve other remaining issues in the case. "We undertook this battle with two goals," explained Jill Tappert, mother of four-year-old Abby. "(1) To get coverage for Abby's treatment and (2) To help the rest of the Autism community by setting a precedent and, win or lose, by educating as many people as possible along the way....I will work with the Autism Society of Colorado to spread the word and to use this ruling to best help others."

FMI: To read the award document, click on <http://www.nasddd.org/pdf/ColoradoTappertArbitrationAward.pdf>.
(*BYB* November 14, 2007/*CSR* November 2007)

Indiana

The Indiana Court of Appeals ruled July 16, 2007 that the Family and Social Services Administration (FSSA) broke state law when it granted a no-bid \$95 million contract to Liberty Healthcare to operate the now-closed Fort Wayne State Developmental Center (see *BYB* May 16, 2007/*CSR* June 2007). The FSSA "failed to follow the public bidding process as required for Public-Private Agreements," Judge Patricia A. Riley said in the decision. "We conclude that the trial court abused its discretion in denying Appellants' request for preliminary injunctive relief."

FMI: To read the decision, see <http://in.gov/judiciary/opinions/pdf/07160701par.pdf>.
(*BYB* July 25, 2007/*CSR* August 2007)

Ohio

Parental Rights. The Ohio Supreme Court ruled April 4, 2007 that having a low IQ is not sufficient grounds to deny parents the right to raise their child. “[w]hen determining the best interest of a child,” the justices said, “at a permanent-custody hearing, a trial court may not base its decision solely on the limited cognitive abilities of the parents.” The circumstances of the case started in 2004 when parents with lower-than-normal IQ’s were forced to relinquish custody of their then 10-year-old son who was having behavioral problems to the Tuscarawas County Job and Family Services. In trying to gain custody of the boy, the agency claimed the parents were neglecting their son. Even though the couple underwent therapy and parenting training, a trial court in late May said that, although the parents loved their son and were willing to do anything necessary to bring him home, returning their son to them was not in the boy’s best interest because they have “very low cognitive skills that hinder their day to day functioning.” The boy wanted to be returned to his parents.

FMI: To learn more about the case, go to
<http://www.supremecourtofohio.gov/rod/newpdf/0/2007/2007-Ohio-1105.pdf>.
(*BYB* July 25, 2007/*CSR* August 2007)

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