

NURSING FACILITY LITIGATION FOR PERSONS WITH DISABILITIES: THE ADA, MEDICAID, AND COVID

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Overview

- Legal claims – ADA and Medicaid
- Nursing facility litigation for persons with intellectual and developmental disabilities (IDD)
- Nursing facility litigation for persons with serious mental illness (SMI)
- Nursing facility litigation in the pandemic

Legal Claims: ADA and Olmstead

- Cases have clearly established that Olmstead applies to nursing facilities
 - Nursing facilities are segregated settings
 - Rolland v. Cellucci, 52 F. Supp. 2d 231 (D. Mass. 1999)
 - Steward v. Abbott, 189 F. Supp. 3d 620 (W.D. Tex. 2016)
- DOJ Olmstead Guidance: privately-operated but publicly-funded facilities are subject to Title II
- State's planning, funding, and administering of IDD/MI/long-term care system that relies upon nursing facilities subjects it to Title II's liability for segregating persons with disabilities in nursing facilities

Legal Claims: Medicaid and NHRA

- Since most nursing facilities are funded by Medicaid, State Plan applies to services provided in these facilities
 - Reasonable promptness (42 U.S.C. §1396a(a)(8))
 - Amount, duration, scope, and comparability (42 U.S.C. §1396a(a)(10)(A) & (B))
- Since eligibility for most community programs, and specifically HCS waiver programs, requires an institutional level of care, other Medicaid provisions on home-based services are relevant
 - Freedom of choice (42 U.S.C. §1396n(c)(2))
- Medicaid's special protections for nursing facility residents, enacted through the Nursing Home Reform Amendments of 1987, may provide additional claims

Legal Claims: Medicaid and PASRR

- PASRR (42 U.S.C. §1396r(e)(7)) requires all persons who seek admission to a nursing facility to be:
 - Screened to determine if they appear to have IDD or SMI
 - Assessed to confirm that they have IDD or SMI
 - Evaluated for alternative placement in the community or another setting in order to avoid unnecessary institutionalization in a nursing facility (42 C.F.R. § 483.132)
 - If admission to a nursing facility is necessary, evaluated to determine what “specialized services” are necessary (42 C.F.R. § 483.134 & 136)

Legal Claims: Medicaid and PASRR (2)

- If admission is necessary, State must confirm that the specific nursing facility can provide needed specialized services (42 C.F.R. § 483.126)
- The provision of specialized services must be sufficient to constitute active treatment
- For persons with IDD, specialized services = active treatment as provided in an Intermediate Care Facility (ICF) (42 C.F.R. § 483.440(a)-(f))
- CMS has proposed new rules which abandon the active treatment standard

The Complaint

- The defendants: state officials responsible for planning, funding, and administering the long-term care system and the PASRR program
- The facts, including a detailed description of:
 - The state's long-term care system, the role of nursing facilities in providing long-term care, and why people with disabilities are placed in these facilities
 - The state's community service system and the challenges/barriers for persons in nursing facilities to access this system
 - How and why nursing facilities are segregated settings
 - The State's PASRR program, including how and why it fails to prevent unnecessary institutionalization or provide active treatment

The Class

- Options:
 - All persons in nursing facilities
 - All persons in or referred to nursing facilities who should be screened pursuant to PASRR
 - All persons in or at serious risk of being admitted to nursing facilities
- Classes have been certified under option 2
 - Rolland v. Cellucci, 1999 WL 34815562 (D. Mass. Feb. 2, 1999)
 - Steward v. Janek, 315 F.R.D. 472 (W.D. Tex. 2016)
- The third option is speculative, difficult to ascertain, and potentially very large

Fact Discovery

- Detailed document requests (4) covering all aspects of State's nursing facility, ICF, long-term care, and community service system
- Voluminous data concerning:
 - Medicaid billing and utilization
 - PASRR screening, diversion, evaluation, and transition
 - Nursing facility census, services, costs, and certification surveys
 - Community program capacity, services, costs, and oversight
 - Local IDD entity's staffing, service coordination, and engagement efforts
 - QA and program performance reviews
 - Budget requests, appropriations, and expenditures
- 40 depositions of state officials

Expert Discovery

- Client review –
 - In Texas, four IDD experts conducted an evaluation of a sample (58) of class members
 - Evaluated whether each individual:
 - Received a comprehensive assessment
 - Were receiving all needed specialized services
 - Were receiving active treatment
 - Had an adequate ISP and transition plan
 - Could benefit from community supports
 - Had made an informed choice to remain in the facility

Expert Discovery (2)

- Program review –
 - Assessed each local IDD entity's
 - PASRR evaluation, diversion, and transition activities
 - Amount and intensity of specialized services and knowledge of active treatment
 - Service and transition planning
 - Case management/service coordination activities
 - Informed choice
 - Assessed provider capacity, challenges, and barriers in each region

Expert Discovery (3)

- System review –
 - Assessed the effectiveness and compliance of the PASRR program
 - Assessed the planning, administration, and funding of the community system
 - Assessed the State's Olmstead plan
- Fiscal review –
 - Analyzed the cost of nursing facility services with the provision of active treatment v. the cost of community services
- Data analysis –
 - PASRR screening, admissions, diversions, and transitions
 - Nursing facility census

The Challenge of Informed Choice: The State's Evidence

- In response to litigation, Texas revised its nursing facility PASRR program, assigned case managers to each person with IDD in a nursing facility, and dedicated HCS waiver slots to diversion and transition
- Case managers provided written information semi-annually and recorded the person's choice about whether to stay or leave the nursing facility
- Case managers met monthly with the person to discuss needs and preferences
- Persons who chose to leave the facility had to complete a waiver application
- Approximately ½ of available waiver transition slots were used

The Challenge of Informed Choice: The Plaintiffs' Evidence

- Client Review was designed to rebut State's evidence
 - Discussed community options, barriers, and preferences
 - Determined if the person was interested in exploring transition
 - Determined if the person had made an informed choice to remain
 - Aggregate data found that over 85% of sample had not made an informed choice to remain
- Research expert presented research and literature on challenges to making informed choices for persons with IDD or institutionalized persons, and what accommodations were necessary to ensure an informed choice
- Analysts reviewed Medicaid billing data for case manager visits and concluded that half were less than 12 minutes

The State's Defenses: Olmstead Plan

- There is no single, accepted meaning of what constitutes an adequate Olmstead Plan, particularly in nursing facility cases
 - Third Circuit requires a prospective plan with numerical goals in specified time periods to reduce the number of persons segregated in a particular facility (Frederick L. v. DPW, 422 F.3d 151 (3d Cir. 2005))
 - Ninth Circuit accepts a compilation of prior, generalized actions that resulted in a significant reduction of institutionalized persons in various facilities (Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005))
 - DOJ Guidance follows and expands upon the Third Circuit's test
 - Most circuits have not addressed the issue but good faith efforts and an historical reduction may be sufficient
- It is clear that the defense does not require a single document
- It is unclear whether post-litigation remedial actions to cure longstanding ADA violations can be used to prove the defense

Olmstead Plans for Nursing Facilities

- Most states never focus on nursing facilities in developing Olmstead Plans
- Most states do not have an history of successfully transitioning large numbers of persons with disabilities from nursing facilities
 - That is precisely why PASRR was enacted
 - And why few states ever adopted Alternative Disposition Plans
- States are now being encouraged by CMS to consider the implications of Olmstead in nursing facilities
 - Proposed PASRR rules seek to align (rather weakly) with Olmstead
- But states frequently adopt new transition efforts, increase waivers, and improve PASRR programs in response to Olmstead litigation

The State's Defenses: Fundamental Alteration

- Two basic types of fundamental alteration defense:
 - Programmatic defense: proposed remedy would fundamentally alter the nature or scope of the public entity's program, benefit, or service
 - Cost defense: proposed remedy would require significant additional financial costs that would negatively impact other persons served by the public entity
- Burden of proof
 - Plaintiffs have initial burden of showing that their requested relief is either currently available or could be made available with a reasonable modification of the entity's program
 - Then the public entity has the burden of showing that the requested relief and modification would constitute a fundamental alteration of the program

Fundamental Alteration of the Program or Benefit

- Whether the requested relief requires a fundamental change in the program depends on how the relief is framed
 - Focus on purpose of program – allow individual to receive home-based care – rather than the detailed elements/requirements – self-directed care (Rodriguez v. City of New York, 197 F.3d 611 (2d Cir. 1999))
 - Focus on eligibility standards for the program – institutionalized persons meet these standards and thus are qualified for the program
 - Focus on professional standards for the program – institutionalized persons need this level of care and thus are qualified for the program

Fundamental Alteration of the Program or Benefit (2)

- Focus on similar programs already provided by the entity or similar entities to similarly-situated persons
 - Expanding the number or availability of an existing program is generally not a fundamental alteration, while creating new program is
 - Expanding the scope or intensity of an existing program may/may not be considered a new program
 - Revising the eligibility criteria for an existing program generally is a new program
- But nursing facility residents may require intensive nursing or medical support services, which is not otherwise available
 - Focus on these needs can be met through reasonable modifications to the intensity, frequency, or duration of supports provided by existing programs

Fundamental Alteration in the Cost of Providing Services

- Most nursing facilities receive federal funds (Medicaid or Medicare), so the state cost of institutionalization is usually about half of the per-bed cost of the facility
- For persons with IDD, most community services are provided through home and community-based waiver (HCS) programs, which include a wide range of residential and non-residential habilitation services
- HCS waiver programs eligibility requirements include need for institutional (nursing or ICF) level of care
 - Thus, virtually all persons with IDD in nursing facilities are eligible for HCS services

Fundamental Alteration in the Cost of Providing Services (2)

- Although basic nursing facility services are often less expensive than HCS services, precisely because they are institutional and congregated, when the cost of nursing facilities for persons with IDD is increased to include active treatment, the comparative cost is generally equal
- Thus, the State's fundamental alteration defense is weak in Olmstead cases for persons with IDD in nursing facilities
- Strategic tip: Avoid identifying the number of persons who could live in the community, the range of their needs, and the type/intensity of services they require

Nursing Facility Litigation for Persons with SMI

- ADA
 - The same legal claim -- unnecessary segregation
 - The fundamental alteration program defense is effectively the same
 - But the fundamental alteration cost defense can be more complicated because:
 - Since most nursing facilities are Medicaid-funded, and many community programs are state funded, the cost comparison is problematic
 - HCS waiver programs are generally not available to persons with SMI
 - State plan services (rehab and case management) can receive FFP
- PASRR
 - Screening and evaluation requirements are similar
 - But specialized services are limited to persons with *acute* mental illness
 - Therefore, the critical leveraging effect of increasing the cost of nursing facility services to comply with PASRR is very limited

Nursing Facility Litigation for Persons with Other Disabilities

- ADA/Olmstead is primary claim since PASRR does not apply to persons with other disabilities
- Although many disability support services are covered by Medicaid, most nursing facility residents also need housing, which is not
 - Hutchinson v. Patrick (ABI):
 - While segregation was easy to prove, unnecessary segregation was more challenging due to persons with complex medical needs that could not met easily with the existing range and type of community programs
 - Fundamental alteration cost defense was especially complicated since
 - Many community programs were state-funded
 - There was a small (100 persons) waiver program
 - Larger waiver programs (medically complex, frail elderly) did not include residential supports
 - An effective remedy required the creation of new waivers, which can be a fundamental alteration (Arc v. Braddock)

Nursing Facility Litigation for Persons with Other Disabilities (2)

- Brown v. D.C., 928 F.3d 1070 (D.C. Cir. 2019)
 - Reversing 322 F.R.D. 51 (D.D.C. 2017)
 - D.C. Circuit: District Court used the wrong standard in deciding Plaintiffs' Olmstead claim and class certification
 - Plaintiffs: unnecessary segregation caused by defendants' failure to provide appropriate transition services to obtain housing
 - Defendants: unnecessary segregation caused by lack of affordable, accessible housing, but supply of such housing is not under our control
- When housing not part of the relevant service system, figuring out relief to seek while avoiding fundamental alteration problems requires careful thought and framing

Nursing Facility Litigation to Address COVID Emergencies

- ADA claims and strategies
 - The same legal claim – unnecessary segregation
 - No Olmstead Plan defense
 - But there is likely to be a fundamental alteration defense since relief may/must include modification of various discharge policies and practices based upon the emergency:
 - Appropriate/ready for community living
 - All needed supports in place
- Likely to require different remedies, since at least minimally-necessary support services must be currently available or readily available
 - Basic supports necessary to ensure safety
 - But not all needed supports

Nursing Facility Litigation to Address COVID Emergencies (2)

- PASRR claims and strategies
 - Same legal claims for residents with IDD and SMI
 - Not applicable to all other nursing facility residents
- Screening and evaluation strategies are similar, although CMS has temporarily waived the preadmission requirements and delayed screening and evaluation for 30 days after admission
- Evaluation for alternative placement has heightened urgency
- Specialized services for disability specific COVID risks may be needed

Nursing Facility Litigation to Address COVID Emergencies (3)

- NHRA claims and strategies
- NHRA claims against private nursing facilities are not likely to be enforceable, since numerous courts have held there is no implied cause of action under the NHRA
- NHRA claims against the state may be possible if specific statutory provision meets Gonzaga test for private right of action under 42 U.S.C. §1983
- Most promising provisions for private enforcement are:
 - Quality of life (42 U.S.C. § 1396r(b)(1), (2), & (4))
 - Legal rights (42 U.S.C. § 1396r(c)(1))
 - State survey and certification (42 U.S.C. § 1396r(g)(1))
 - State enforcement (42 U.S.C. § 1396r(h)(1))