

Tackling Medicaid Waiver Cuts & Waiting Lists: Part 1

Elizabeth Edwards, Senior Attorney, NHeLP

Lisa Grafstein, Legal Director, Disability Rights NC

Kevin Truitt, Attorney-Community Integration Team Leader, Disability Rights OH



Outline for Today's Discussion

- Overview of Medicaid HCBS waivers
- Common problems
- Exploring advocacy options through examples: NC & OH
- Closing questions and discussion

1915(c) – HCBS Waiver Programs (1)

- Optional, community-based Medicaid programs
- Requires an institutional level of care (LOC)
- Mix of:
 - Statutory services described in 1915(c)
 - “other services” as permitted by the Secretary
 - Extended state plan services
 - Note: EPSDT
 - Supports for self-direction
- Sometimes paired with 1915(b) for managed LTSS

1915(c) – HCBS Waiver Programs (2)

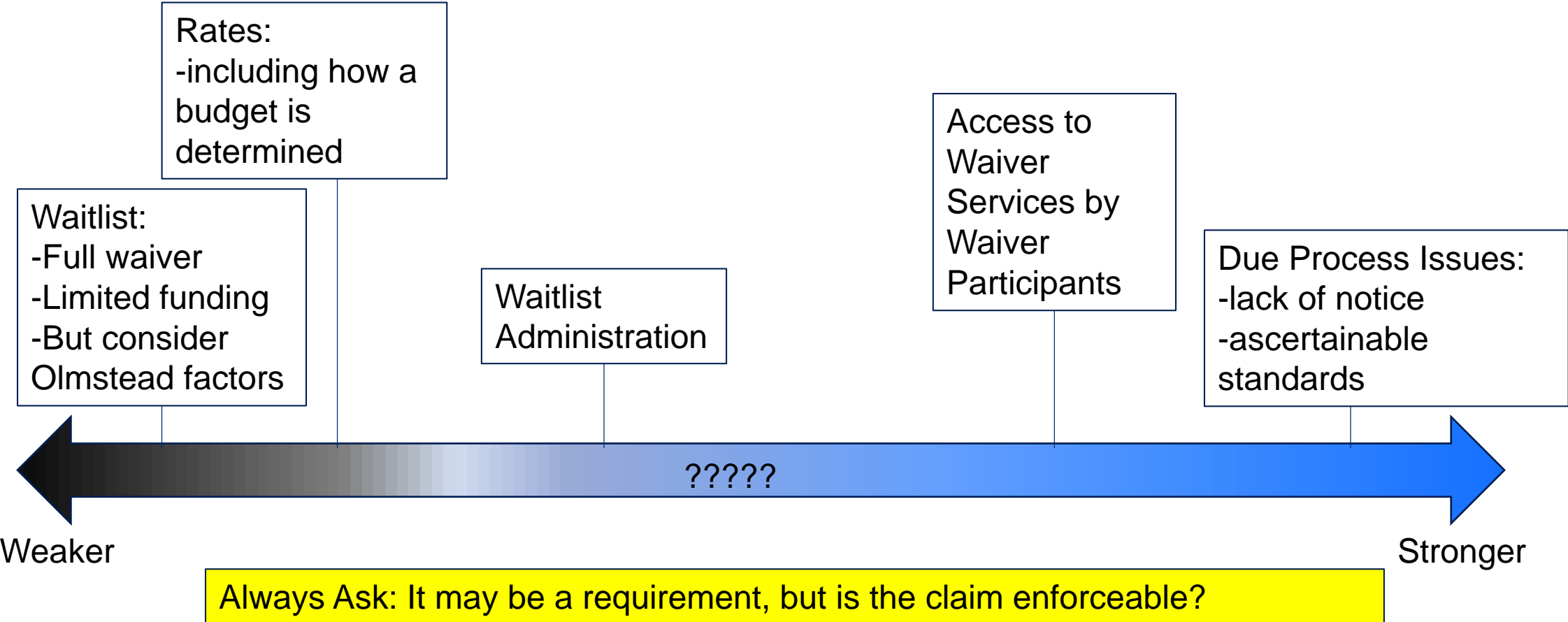
- Not considered “entitlements”
 - HHS may allow states to waive statewideness and comparability, impose enrollment caps
- Periodic renewal
- and budget neutrality required

- Resource to Know: CMS, 1915(c) Technical Guide, https://wms-mmdl.cms.gov/WMS/help/35/Instructions_TechnicalGuide_V3.6.pdf

Common 1915(c) Problems

- Waitlists
 - Can wait indefinitely/long periods
 - Administration: Who goes on/when, stays on, moves off/gets waiver?
- Assessments
 - Eligibility determinations
 - Level of care determinations/renewals
 - Waitlist position
 - Service determinations/budgets
- Not all waiver services available
- Lack of providers/workers
- Due process: notices for eligibility, denial of services, etc.

Continuum of Claims – some general examples



A Tale of Two Cases: (1)

- NC: Samantha R. et al. and Disability Rights NC v. North Carolina, NC DHHS, and Mandy Cohen, in her official capacity as Secretary of NC DHHS
 - Individuals and P&A challenging waitlist and insufficient waiver services for North Carolinians with intellectual and/or developmental disabilities

A Tale of Two Cases: (2)

- OH: Ball v. Kasich
 - Federal class action on behalf of individuals with development disabilities and The Ability Center of Greater Toledo against the State of Ohio, Ohio Department of Developmental Disabilities, Ohio Department of Medicaid, Opportunities for Ohioans with Disabilities, and the Ohio Association of County Boards of Developmental Disabilities.
 - Challenging administration, management, and funding of the OH service system for people with intellectual and developmental disabilities putting them at risk of institutionalization or unnecessarily institutionalization them.

Ball v. DeWine

- DRO and our partners brought this class action lawsuit in March 2016 on behalf of adults with intellectual and developmental disabilities in Ohio in ICFs or at serious risk of institutionalization. Massive waiting lists for waiver programs for this population in Ohio violated *Olmstead* and the ADA, we alleged.

Ball v. DeWine

At the time of our filing, there were around 6,000 people in ICFs, thousands of whom were on waiting lists to transition into the community (but the median wait time to enroll in a waiver program was over 13 years). For those are serious risk of institutionalization, we estimated about 22,000 people were on waiting lists.

NC: Waiver & Olmstead Issues

- Discharge barriers
- Waiver waiting list
- Resource Allocation (algorithms)
- Funding biases

Ball v. DeWine

- Pre-litigation, we had many issues to resolve: the scope of the lawsuit, who the defendants would be, what claims we would bring against those defendants, the proposed class definition.

Ball v. DeWine

- Scope of the lawsuit: people in ICFs receive segregated residential, employment, and day services and people at serious risk of institutionalization were at serious risk of this segregation.
- How to define “serious risk of institutionalization”?
- We focused on ICFs with eight or more beds.

Ball v. DeWine

- Defendants: governor of Ohio and the directors of three state agencies
- Claims: ADA and 504 integration claims and Medicaid freedom-of-choice claims
- Proposed class definition.

NC: Case Design / Choices

- Scope: Ripping off DR Ohio
- Theory: Every system is perfectly designed to get the results it gets
- Venue/choice of law/claims – NC law in state court
 - Claims: Integration Mandate violations; due process
- Plaintiffs – including the P&A
- Defendants – not the MCOs

NC: Addressing Waiver issues

- Waiting list is, by definition, a list of people at risk of institutionalization
 - Specific waiver language/assurances that the waiver is offered as an alternative to institutionalization
 - Various state-generated documents reinforced this admission
- Resource Allocation / Waiver cuts
 - DP claim for failure to apply medical necessity as the criteria
 - Failure to use ascertainable standards
 - Violation of Natural Supports rules

Elizabeth Edwards, edwards@healthlaw.org

Lisa Grafstein, lisa.grafstein@disabilityrightsnc.org

Kevin Truitt, ktruitt@disabilityrightsohio.org

Connect with National Health Law Program online:



www.healthlaw.org



[@NHeLProgram](https://www.facebook.com/NHeLProgram)



[@NHeLP_org](https://twitter.com/NHeLP_org)

WASHINGTON, DC OFFICE

1444 I Street NW, Suite 1105

Washington, DC 20005

ph: [\(202\) 289-7661](tel:(202)289-7661)

LOS ANGELES OFFICE

3701 Wilshire Blvd, Suite 750

Los Angeles, CA 90010

ph: [\(310\) 204-6010](tel:(310)204-6010)

NORTH CAROLINA OFFICE

200 N. Greensboro Street, Suite D-13

Carrboro, NC 27510

ph: [\(919\) 968-6308](tel:(919)968-6308)