

Tackling Medicaid Waiver Cuts & Waiting Lists: Part 2

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Outline for Today's Discussion

- HCBS waiver litigation – choices & challenges after filing
- Motions to Dismiss
- Discovery & experts
- Summary Judgment
- Other challenges

A Tale of Two Cases:

- 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.
- OH: Ball v. Kasich
 - Federal class action on behalf of individuals with development disabilities and The Ability Center of Greater Toledo challenging waitlist, unnecessary institutionalization, and lack of services.

NC Challenges

- Motion to Dismiss – exhaustion, standing
- Managing discovery / securing experts / fending off broad 30b6 deposition
- Summary judgment – same
- Identifying a remedy

At Risk of Institutionalization – Circuit Courts (1)

- *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003)
 - “We agree, and conclude that *Olmstead* does not imply that disabled persons who, by reason of a change in state policy, stand imperiled with segregation, may not bring a challenge under the ADA’s integration regulation without first submitting to institutionalization.”
- *M.R. v. Dreyfus*, 663 F.3d 1100 (9th Cir. 2011), amend by 697 F.3d 706 (2012)
 - “[a]n ADA plaintiff need not show that institutionalization is ‘inevitable’ or that she has ‘no choice’...a plaintiff need only show that the challenged state action creates a serious risk of institutionalization.”

At Risk of Institutionalization – Circuit Courts (2)

- *Pashby v. Delia*, 709 F.3d 207 (4th Cir. 2013) cited *Fisher* and pointed to the varied language of the declarations
 - “the declarations indicate that all but two of the PCS Recipients ‘may,’ ‘might,’ ‘probably’ would, or were ‘likely’ to enter an ACH facility due to the termination of their in-home PCS.”

Risk of Institutionalization – Circuit Courts cont.

- *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016)
 - Compare to *Amundson v Wis. Dep't Health Servs.*, 721 F.3d 871 (2013)
 - Also: *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004)
 - See also *Murphy by Murphy v. Harpstead*, 421 F.Supp.3d 695
- *Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016)
- *Carpenter-Barker v. Ohio Dep't of Medicaid*, 752 Fed.Appx. 215 (6th Cir. 2018)
 - “Plaintiff’s claims of discrimination are analogous to that which the Supreme Court held the ADA does *not* require.”
 - Court distinguished each ROI case cited by plaintiffs as addressing a broader policy, not a one-off assessment

Case Example of ROI Analysis

- *Clinton L. v. Wos*, 2014 WL 4274251 (Aug. 28, 2014)
 - “not every admission to [an institution] can be considered an ‘institutionalization.’ The length of admission and the reasons for institutional placement must be considered.”
 - Would not consider an admission to a medical facility unrelated to the developmental or mental health disabilities
 - Differentiated between sporadic or brief periods of hospitalization or institutionalization and situations that create the significant risk of long-term institutionalization
 - Simply demonstrating any risk of institutionalization is insufficient
 - Fact intensive and involves multiple variables (citing DOJ guidance)

Other Recent Cases

- *Woods v. Tompkins*, 2019 WL 1409979 (N.D. N.Y. Mar. 28, 2019)(aff'd in summary order 2020 WL 2488496)
 - State not responsible for private provider agencies refusing to serve plaintiff
- *Waskul v. Washtenaw County Community Mental Health*, 2019 WL 1281957 (E.D. Mich. Mar. 20, 2019) (appeal filed)
- *Alexander v. Mayhew*, 2020 WL 1547880 (N.D. Fla. Mar. 31, 2020)
- *U.S. v. Mississippi*, 400 F.Supp.3d 546 (S.D. Miss. Sept. 3, 2019)
- *Belancio v. Kansas Dept of Health and Environment*, 2018 WL 4538451 (D. Kan. Sept. 21, 2018).
- *Rogers v. Cohen*, 2019 WL 938874 (E.D.N.C. Feb. 25, 2019)
- *S.D. v. Saiki*, 2018 WL 7108063 (D. Or. Oct. 11, 2018)
 - Dicta regarding plaintiff having a child during the relevant time period in discussing segregation claim

Intersection with Other Issues

- Class Certification
 - *Ball v. Kasich*
 - *Brown v. D.C.*, 928 F.3d 1070 (D.D.C. 2019)
- Choice Issue
- Motions to Dismiss
 - Effectively working Olmstead plans
 - Other claims mooted

Olmstead Plan

- “Comprehensive, effectively working plan”
- General assurances and good-faith intentions not enough
- Verifiable benchmarks or timelines
- Commitment to community placement that can be held accountable with measurable targets
- Not a collection of documents
- Does it show a successful record leading to a reasonable rate of deinstitutionalization?
- Is there waiver slot growth?

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.

Opposition from ICF guardians

We also had strong opposition from a group of pro-ICF guardians, who were very effective in changing the dynamics of the case.

Ball v. DeWine

We identified a number of reasons for massive waiting lists across the state:

- Obviously, under-investment in waiver programs.
- County-based funding structure for waiver services caused incentives for institutionalization.
- We learned from working with clients how these waiting lists impacted them.

Motions to dismiss

- State's motions to dismiss: DRO could not file a class action with CAP funds, Eleventh Amendment and claims against the governor (ADA and Medicaid claims dismissed, 504 claim allowed to go forward), res judicata arguments denied, ripeness of at-risk claims, organizational standing, enforceability of Medicaid freedom-of-choice claim.

Class certification

Following a lengthy class-based discovery phase, the federal court finally granted class certification in March 2018, though much narrower than we had hoped.

We also brought Medicaid freedom-of-choice claims since many people in ICFs did not know about their community service options. Only our ADA/504 integration claims were certified as class claims, however.