

Check out [VOR's New Website!](#) New and Improved! Your one-stop advocacy resource!

VOR Weekly E-Mail Update
August 21, 2009

=====
Table of Contents

LEGAL BRIEFS

Source:

Most of the litigation updates in this issue of VOR's Weekly E-Mail Update were prepared by the National Association of State Directors of Developmental Disabilities Services (NASDDDS) and included in its July 2009 edition of "Community Services Reporter." For subscription information, see, <http://www.nasddds.org/Publications/newsletters.shtml>.

LEGAL BRIEFS

- 1. DELAWARE:** Constitutional "Right to Travel" Medicaid Case Reaches Settlement.
- 2. NEW YORK:** Law School P&A Files Records Access Lawsuit.
- 3. PENNSYLVANIA:** Lawsuit Filed on Behalf of Individuals with Dual Diagnosis.
- 4. TENNESSEE: State loses bid to have Arlington case dismissed**
- 5. VIRGINIA:** P&A Cannot Sue Another State Agency
- 6. CALIFORNIA: State Psychiatric Technicians File Lawsuit to Fight Furloughs**

VOR and YOU!

5. YOUR VOR MEMBERSHIP and DONATIONS MAKE A DIFFERENCE!!

6. iGive: Shop online and benefit VOR with iGive.com

=====

1. DELAWARE Constitutional "Right to Travel" Medicaid Case Reaches Settlement.

"Community Services Reporter" (CSR), July 2009 (NASDDDS)

Back on September 11, 2007, Delaware lost a case in the U. S. District Court concerning its not processing and approving a Medicaid application on behalf of a North Carolina resident with DD until she moved to Delaware. U.S. District Court Judge Gregory Sleet said in his ruling that the

state's actions regarding the Medicaid recipient were a "violation of her constitutional right to travel" (see *CSR*, November 2007).

Delaware appealed, and the case went to mediation. The parties agreed to a settlement contingent upon Judge Sleet's vacating his September 11, 2007 opinion and order, which he did on September 11, 2008. On September 25, 2008, the 3rd Circuit Court then dismissed the case, and the case was closed.

In the settlement agreement, the State of Delaware agreed to process applications for long-term care Medicaid services made by non-residents of Delaware with developmental disabilities who would move directly from an intermediate care facility for individuals with "mental retardation" (ICF/MR) outside of Delaware to an ICF/MR facility inside of Delaware. The settlement agreement expressly excludes pre-residency applications for Delaware's home- and community-based services waiver services. There were other procedural agreements (e.g. process for submitting an application to Delaware's sole private ICF/MR) and an agreement concerning attorneys' fees.

2. NEW YORK Law School P&A Files Records Access Lawsuit

"Community Services Reporter" (CSR), July 2009 (NASDDDS)

Albany Law School (ALS) and Disability Advocates Inc. (DAI) filed a records access lawsuit against the New York Office of Mental Retardation and Developmental Disabilities (OMRDD) December 22, 2008, with supporting documentation filed January 9, 2009.

Unlike other states, New York's protection and advocacy agencies are contracted out regionally.

Albany Law School, through its Civil Rights and Disability Law Clinic, the complaint explains, "simultaneously serves as a clinical legal education program at the law school and as a P&A agency" for nine New York counties.

The complaint says OMRDD refused access to records of individuals receiving services through:

**The Capital District Developmental Disabilities Service Office (CDDDSO), which operates an intermediate care facility for individuals with "mental retardation" (ICF/MR) and a residential school for individuals with developmental disabilities; and

**The Taconic Developmental Disabilities Service Office (TDDSO) which operates another ICF/MR.

In monitoring discharge practices for CDDDSO, the petitioners ALS/DAI say they discovered residents who were "deemed ready to live in a less restrictive environment but were deprived of the opportunity" leading petitioners to conclude "there was probable cause to suspect abuse and/or neglect of [those] individuals," the complaint said.

"This abuse and neglect includes both the denial of rights to live in less restrictive settings and the failure to provide necessary treatment that would prepare and enable individuals with disabilities

to
live in such settings."

On March 20, OMRDD filed a motion to dismiss the case with a memorandum saying, "The petitioners have been given the names and contact information for individuals who have the capacity to consent and for the representatives of individuals who do not have the capacity to consent. Before the petitioners are given the clinical records of those individuals they should be required to obtain their consent."

On June 5, ALS/DAI filed a request for the court to deny OMRDD's motion, saying that they "must have access to the records of [residents'] treatment, and such access is unambiguously provided for under both New York State and federal law."

The case is pending in state court.

3. PENNSYLVANIA Lawsuit Filed on Behalf of Individuals with Dual Diagnosis.

"Community Services Reporter" (CSR), July 2009 (NASDDDS)

Disability Rights Network of Pennsylvania filed a class action lawsuit against the Department of Public Welfare on behalf of individuals with intellectual disabilities living in state psychiatric facilities that would be better served in community-based settings, the Times Leader reported June 12. Almost all of the plaintiffs also have co-occurring mental health problems, the report said.

The article quotes Robert W. Meek, an attorney with the Disability Rights Network, as saying: "Part of the problem is that the staff at the hospitals is not trained to provide mental health services to persons with [intellectual disabilities].. They haven't adapted their treatment modalities to account for the intellectual disabilities our clients have."

4. TENNESSEE: State loses bid to have Arlington case dismissed

Last fall, Tennessee filed a motion to dismiss a federal lawsuit concerning the violation of rights of Arlington Developmental Center (ADC) residents. The center is slated for closure.

"The State works diligently in meeting its court-directed obligations," Division of Mental Retardation Services (DMRS) Deputy Commissioner Stephen Norris said in a letter to stakeholders concerning the motion, "Nothing is more important than the health and safety of the persons we support. Having legal proceedings drawn to a conclusion will allow DMRS to move forward, redirecting its resources to enhancing its service delivery system and allowing for more persons to receive supports. The cost of the lawsuit is sobering when you consider there are more than 6,300

persons on the Division's Waiting List for services. The State is inhibited financially from enrolling more of those persons into supports. Tennesseans in the Arlington Waiver receive several court-ordered benefits that their counterparts in the Statewide Home and Community-based (Main) Waiver do not receive..The obligations of DMRS in the ADC lawsuit is costing the State more than \$30 million over what would be spent if those persons in the Arlington Waiver were treated the same as those persons in the Main Waiver."

The district court ruled against the motion.

5. VIRGINIA P&A Cannot Sue Another State Agency

"Community Services Reporter" (CSR), July 2009 (NASDDDS)

The U.S. Court of Appeals for the Fourth Circuit said June 2 that the Virginia Office of Protection and Advocacy (VOPA), because it is a state agency, cannot sue another state agency or state officials in federal court. VOPA sued the Department of Behavioral Health and Developmental Services (formerly called the Department of Mental Health, Mental Retardation, and Substance Abuse Services) to obtain peer review records.

VOPA filed suit in federal court and the department filed a motion to dismiss arguing that sovereign immunity prevented one state agency from suing another in federal court. The district court denied the department's motion but the department appealed to the 4th Circuit and obtained a favorable ruling. The federal court was not established to decide intramural state agency disputes under the doctrine of sovereign immunity.

6. CALIFORNIA: State Psychiatric Technicians File Lawsuit to Fight Furloughs

California Association of Psychiatric Technicians PRESS RELEASE August 17, 2009

State Psychiatric Technicians File Lawsuit to Fight Furloughs
CAPT Says Governor's Unpaid Furloughs Break Several Labor Laws and Orders

The California Association of Psychiatric Technicians filed a lawsuit today in the Sacramento Superior Court on behalf of its 7,000 state-employed members outlining several illegal actions taken by Governor Arnold Schwarzenegger and state departments toward CAPT members in state hospitals, developmental centers and prisons.

According to the lawsuit:

California Labor Code Section 212 requires employees to be paid in cash or cash equivalents. Because the three-a-month furlough days implemented by Governor Schwarzenegger are entirely unpaid, CAPT contends the furlough days are clearly illegal according to this Labor Code. In

addition, the state is only paying Psychiatric Technicians for 32 hours out of a 40-hour workweek, which also is a violation of Section 212.

. State departments are not complying with Governor Schwarzenegger's own court-approved executive order requiring employees to take unpaid furlough days off work. As level-of-care nursing staff caring for Californians with severe mental illnesses and developmental disabilities, CAPT members are subject to legal staffing ratios. Their requests to take furlough days off are frequently and consistently denied, with the reason being that the required staffing ratios must be met. Therefore, state departments are in violation of the governor's own executive order.

. Governor Schwarzenegger implemented a third furlough day instead of the 5-percent pay cut he originally proposed, creating a violation of collective bargaining law. When the Legislature turned down his 5-percent pay-cut proposal, the governor implemented the third unpaid furlough day; however, absent legislative approval of salary reductions, as outlined in Government Code Section 19826 (b), neither the governor nor his representative, the Department of Personnel Administration, can implement pay cuts.

The union's lawsuit is separate from lawsuits filed by other unions. A hearing date is forthcoming.

CAPT members currently are holding weekly informational pickets calling for the reduction or complete elimination of furlough days and an end to the proposed layoff of dozens of vital level-of-care employees.

The next informational picket will take place Wednesday, August 19, 10 a.m. - 2 p.m. at Coalinga State Hospital, 24511 West Jayne Ave., Coalinga, Calif.

Members of the public are welcomed and encouraged show their support for state Psych Techs' services by filling out an online petition at www.psychtechs.net. Signatures will be forwarded to decisionmakers during CAPT's continuing efforts to end harmful staffing reductions and cuts.

###

The California Association of Psychiatric Technicians is the elected union for more than 7,000 state-employed Psychiatric Technicians and related workers who provide compassionate, professional mental health and developmental services for the Californians in our care.

CAPT also is the official professional organization for all of the state's 14,000 licensed Psychiatric Technicians.

VOR and You!

7. YOUR MEMBERSHIP AND DONATIONS MAKE A DIFFERENCE!!

VOR is the only national advocacy organization that expressly opposes efforts to eliminate the facility option while also supporting expansion of quality community programs. VOR advocates that final determination of what is appropriate depends on the unique abilities, needs and desires of each individual, with the input of family guardians where necessary and appropriate.

8. iGive: Shop online and benefit VOR with iGive.com

Going Shopping? Why not benefit VOR at the same time. Here's how:

- a. Visit, <http://www.igive.com>
- b. Select "Voice of the Retarded" as your cause (use the keyword search to find "Voice of the Retarded")
- c. Go shopping and a percentage of your purchase goes to VOR.

Editor: Tamie Hopp, VOR Director of Government Relations & Advocacy

**THANK YOU FOR YOUR SUPPORT!
TO JOIN OR CONTRIBUTE: \$25 per individual, \$150 per family organization, or \$200 per provider/professional organization. Extra donations are welcome!**

You may pay by check or credit card
VOR (Voice of the Retarded)
836 S. Arlington Heights Rd., #351
Elk Grove Village, IL 60007

605-271-0445 fax (for referrals or credit card payments)
Tamie327@hotmail.com (for referrals or credit card payments)

Name

Address (if paying by credit card, use billing address). All forms must include complete address including zip code)

City St Zip

Phone Fax

E-Mail

Family/Professional Organization Affiliation (if applicable)
If paying by credit card, please provide the following information:
Amount to charge to card: \$ _____
Card Type: ____ Mastercard ____ Visa
Card Number: _____
Expiration Date: _____
Cardholder's Signature: _____
=====