THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY
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Mental Health Law Update
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I. SUPREME COURT

A. DECISIONS

*Florida v. HHS, (*5-4 holding individual mandate of Affordable Care Act unconstitutional under the Commerce Clause, 5-4 holding individual mandate constitutional as a tax, 7-2 holding expansion of Medicaid unconstitutionally coercive under the 10th Amendment if penalty for not expanding Medicaid is withholding of all federal Medicaid funds)

Florence v. Board of Chosen Freeholders of County of Burlington, et al. (upholding the practice of visual strip searches of all arrestees committed to the general population of a jail)

B. PENDING

Genesis Healthcare Corp v. Symczyk, No. 11-1059 (Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims). NOTE: this is a Fair Labor Standards Act case, but obviously has implications for Rule 23 class actions

Behrend v. Comcast Corporation, No. 11-864 (in wake of *Walmart,* Court grants cert. on another case regarding level of proof necessary for class certification, see *Boring but Vital*, below)

C. PETITIONS FILED

Mount Holly v. Mount Holly Gardens Citizens in Action, No. 11-1507, petition filed July 13, 2012 (are disparate impact cases cognizable under Fair Housing Act, and seeking to resolve a conflict in the circuits about how such cases should be analyzed—burden-shifting, balancing, or hybrid approach)

Chester v. Thaler, No. 11-1391 (the State of Texas continues to try to execute mentally retarded offenders, despite previous Court holdings prohibiting the execution of mentally retarded offenders and delineating standards and process for determining when an offender is mentally retarded)

Elizondo v. City of Garland, No. 11-1375 ((1) Whether, when an officer precipitates a violent confrontation ending in his use of force, his own conduct making that force necessary should be considered among the totality of circumstances determining whether the force was constitutionally excessive; and (2) whether an individual's obvious mental illness reduces the government's justification for using force against him during an encounter with police.)

Strutton v. Meade, No. 11-1329, petition filed June 19, 2012 (see case summary below)(Whether an individual, civilly committed for being a "sex offender," or for otherwise exhibiting a mental abnormality posing a danger to others, has a substantive due process right to treatment that may ameliorate the danger posed by his abnormality, particularly where -- as here -- the withheld treatment was designed with the intention of providing a path to at least a conditional release from custody)

Pennsylvania v. Banks, No. 11-952 (seeking clarification of Supreme Court standard on competence to be executed)

II. ADA Cases

A. OLMSTEAD DECISIONS AND PENDING ACTIONS

DAI v. New York Coalition for Quality Assisted Living and Cuomo, 675 F.3d 149 (2nd Cir. 2012)(holding that a P&A subcontractor did not have standing to bring claims on behalf of P&A constituents)

Shelton v. Arkansas Department of Human Services, 677 F.3d 837 (8th Cir. 2012)(no claim based on improper medical treatment can be brought under ADA or Section 504; also rejecting attempt to frame ADA claim that defendants willfully failed to place plaintiff in environment appropriate to her needs)(see more about this case under "Rights in the Community")

United States v. North Carolina, No. 5:12-cv-557 (E.D.N.C. August 23, 2012)(settlement agreement with many unusual provisions, including: standards for how guardians of individuals covered by the agreement shall behave, priority populations of people residing in segregated community settings listed prior to people residing in psychiatric hospitals; requiring ACT teams, community support teams, and peer services; all service plans shall include advance directives and crisis plans; specific service requirements for people with limited English; supported employment), see www.ada.gov/olmstead/olmstead_cases_list2.htm

United States v. Virginia, No. 3:12cv59-JAG (E.D.Va. August 24, 2012)(approving consent decree requiring thousands of community housing waiver slots, comprehensive and detailed crisis services, supported employment, data collection and quality review)(for settlement see www.ada.gov/olmstead/olmstead_cases_list2.htm)

United States v. Virginia, 2012 U.S.Dist.LEXIS 66694 (E.D.Va. May 9, 2012)(when U.S. and Virginia filed a consent decree and complaint on the same day seeking to promote integration of residents of Virginia's institutions for people with developmental disabilities, court grants intervention as of right to individuals who want to remain in the institution)

Lane v. Kitzhaber, 841 F.2d 1149 (D.Ore. 2012)(dismissing without prejudice action against state for failing to provide employment services in the most integrated setting possible because remedy demanded that defendant provide an adequate array of supported employment services to enable plaintiffs to work in an integrated environment, rather than the permissible remedy of (1) a treatment planning process that properly and fairly assesses the individuals' ability and interest in supported employment; (2) provision of supported employment services to those individuals who qualify for and are interested in them; and (3) a supported employment program that complies with CMS and other national accrediting standards.)(for excellent class certification decision in this case, see Boring but Vital, below)

Benjamin v. Department of Public Welfare, 807 F.Supp.2d 201 (E.D.Pa. 2011)(approving settlement of Olmstead action on behalf of institutionalized individuals with intellectual disability requiring scheduled community placements; rejecting argument that residents opposing community placement would be discharged as they were not members of the certified class, and arguments that bed reductions would lead to institutional closure as too speculative for fairness hearing)

B. Olmstead/Medicaid Cases

M.R. v. Dreyfus, 663 F.3d 1100 (9th Cir. 2011)(granting preliminary injunction against budget cuts that would have cut personal care services on grounds that plaintiffs would be at risk of institutionalization)(DOJ statement of interest)

M.R. v. Dreyfus, 2012 U.S.App.LEXIS 12322 (9th Cir. June 18, 2012)(refusing to rehear en banc, over dissent by nine conservative judges) Dissent agrees Olmstead covers "at risk" populations but limit it to state provision of services in institutions not provided in the community, forcing people into institutions, or if budget cuts favor institutionalized service recipients over those in the community, and criticize deference to DOJ statement of interest)

Day v. District of Columbia, 2012 U.S.Dist.LEXIS 18213 (D.D.C. Feb. 14, 2012)(challenging unnecessary segregation in nursing homes and analyzing the necessary components of an Olmstead Plan as an affirmative defense; helpful case that 1) reaffirms that public entities can cause segregation in private facilities by their administrative systems; 2) rejects the arguments that DC professionals must determine that plaintiffs are appropriate for community setting; and 3) rejects argument that plaintiffs must affirmatively plead cost issues to make out an Olmstead claim)

Van Meter v. Harvey, 2012 U.S.Dist.LEXIS 61387 (D.Me. May 2, 2012)(approving settlement of class action alleging ADA and PASAAR claims involving people with

developmental disabilities stuck in nursing homes; settlement involves state application for HCBW specifically for class members and placement of 15 persons a year in the community as well as enforcing nursing home and state PASAAR obligations)

B.N. v. Murphy, 2011 U.S.Dist.LEXIS 132482 (D.Ind. Nov. 16, 2011)(extremely well written and well analyzed case invalidating 60 hour cap on in-home services under ADA and Sec. 504 and finding no fundamental alteration defense, despite the fact that defendants did not plead it)

Oster v. Lightbourne, 2012 WL 685808 (N.D. Ca. March 2, 2012)(certifying class of persons whose state in-home support services would be cut or limited by 20% under new law)

Pashby v. Cansler, 279 FRD 347 (EDNC Dec. 8, 2011)(certifying class challenging rule that would eliminate eligibility for in-home care; rejecting arguments on standing and mootness because some plaintiffs have received services they requested)

Royal v. Cook, 2012 U.S.Dist.LEXIS 84537 (N.D.Ga. June 19, 2012)(granting permanent injunction finding that plaintiff succeeded on ADA claim because Medicaid cutbacks of medically necessary home nursing care placed him at "high risk" of premature entry into institution, and defendant's cutbacks were not based on individualized assessment but were caused by policy and practice of shifting skilled care onto parent caregivers)

T.H. v. Dudek (No. 0:12-cv-60460-CIV-Zloch, S.D.Fla. filed March 13, 2012) (challenging inappropriate placement of children with developmental disabilities in nursing homes; cases involving children already in nursing homes and children at risk of placement in nursing homes through reduction of Medicaid funded in-home skilled nursing services consolidated; DOJ filed statement of interest June 28, 2012)

Gattuso v. N.J. Department of Human Services, 2012 USDist LEXIS 102458 (D.N.J. July 25, 2012)(pro se disabled parents seeking only damages challenge monthly cost cap under HCBS waiver for care of their disabled child as violative of ADA and Medicaid; court finds no cause of action under ADA because child has not yet been institutionalized and parents are not qualified to receive services from defendant under ADA)

C. Other ADA/Section 504/IDEA Cases

1. School Cases

Bryant v. New York State Education Department (2nd Cir. Aug. 20, 2012)(upholding New York state regulation banning aversive interventions in school against IDEA and Section 504 based challenges (!!)

Los Angeles Unified School District v. Garcia, 669 F.3d 956 (9th Cir. 2012)(certifying question to the California Supreme Court as follows: Does California Education Code §

56041 — which provides generally that for qualifying children ages eighteen to twenty-two, the school district where the child's parent resides is responsible for providing special education services — apply to children who are incarcerated in county jails?)

Hoffman v. Saginaw Public Schools, 2012 U.S.Dist.LEXIS 88967 (E.D.Mich. June 27, 2012)(dismissing ADA claim because insufficient claims that severe bullying of disabled boy was due to disability, with disturbing "kids will be kids" dicta about constant harassment)

D.L. v. District of Columbia, 277 FRD 38 (DDC Nov. 16, 2011)(refusing to decertify class of children eligible for but not identified to receive special education)

P.V. v. School District of Philadelphia, 2012 U.S.Dist.LEXIS 27129 (E.D.Pa. March 1, 2012)(challenging practice of excessive school transfers of children with autism; holding no exhaustion required when systemic failures alleged and rejecting motion to strike class allegations prior to discovery)

J.P.M. v. Palm Beach County School Board, 2012 US Dist.LEXIS 94152 (S.D.Fla. July 6, 2012)(charging excessive restraint of child with autism under IDEA, Section 504, ADA, Section 1983, and state claims; court finds plaintiffs must prove intentional discrimination rather than departure from professional judgment to prevail on ADA/504 claims)

Alexander v. Lawrence County Board of Developmental Disabilities, et al. 2012 U.S.Dist.LEXIS 32197 (S.D.Ohio March 12, 2012)(refusing to dismiss substantive due process, ADA, and Section 504 claims against segregated school for frequent prone restraints and basketholds but striking equal protection claims because there were no non-disabled students in the school; also striking failure to train claims)

S.H. v. Plano Independent School District, 2012 USAppLEXIS 17369 (5th Cir. August 17, 2012)(holding that parents could not receive reimbursement even if child showed no educational progress because correct standard under *Rowley* is whether IEP is reasonably calculated to enable child to achieve educational benefit)(also, for important attorney fee aspect of this case, see Boring but Vital, below)

J.W. v. Birmingham Board of Education, No. 2:10-cv-03314-AKK(N.D.Ala.Aug. 31, 2012) (certifying class of students maced by Birmingham security officers and finding that questions of whether Birmingham Police policy for use of mace in school settings and training provided school resource officers was constitutionally deficient stated common questions of law).

Ebonie S. v. Pueblo School District, 2012 WL 3667403 (10th Cir. Aug. 28, 2012)(see Rights in the Community, below).

2. Other ADA Cases

Doe v. Salvation Army in the United States, 685 F.3d 564 (6th Cir. 2012)(Salvation Army allegedly denied employment to applicant because he was taking psychotropic medication; court holds that religious organizations receiving federal funds not necessarily immune under Section 504 and finding genuine issue of material fact over the question of whether Salvation Army is primarily engaged in providing social services)

Frame v. City of Arlington, 657 F.3d 215 (5th Cir. 2011)(en banc) cert. den. 2012 USLexis 1527 (Feb.21 2012)(by 8-7 vote, 5th Circuit determines that Title II applies to require public entities to construct accessible sidewalks over a dissent that considers sidewalks "facilities" rather than "services" and would hold that plaintiffs' sole right is to fix sidewalks that make public services inaccessible; also holding that plaintiffs' cause of action accrues when they discover the sidewalks are inaccessible rather than when the city builds inaccessible sidewalks)

III. Rights in Institutions

A. Search/Seizure

Ahlers v. Rabinowitz, 2012 USAppLEXIS 7035 (2nd Cir. April 12, 2012)(elucidating 4th Amendment protections against seizure of personal and commercial mail of institutionalized patients—court limitations of these protections may be related to fact that case was brought by civilly committed sex offender)

B. Right to Treatment

Strutton v. Meade, 668 F.3d 549 (8th Cir. 2012)(in case brought by civilly committed sexual offender, no substantive due process right to treatment; cutbacks in treatment programs analyzed under "shocks the conscience" rather than "professional judgment" standard)

Burch v. Jordan, 2011 USAppLexis 19552(10th Cir. Sept. 22, 2011) (sexual predator claim no right to treatment culminating in release; no right to treatment if dangerous)

Marcucci v. Ancora State Hospital, 2012 USDistLEXIS 86763 D.N.J. June 22, 2012)(applying "shocks the conscience" test to claim of violation of substantive due process of civilly committed person resulting in her death

F.A. v. Hansen, 2011 U.S.Dist.LEXIS 111670 (N.D.Fla. Sept. 29, 2011)(declining to dismiss case by involuntarily committed "Mentally Retarded Defendants Program" alleging violation of professional judgment standard in failing to provide individualized behavior plans and treatment programs)

C. Freedom from Seclusion and Restraint

Blackmon v. Board of County Commissioners of Sedgwick County, 2012 US.Dist.LEXIS 90252 (D.Kan. June 29, 2012)(finding that claims that restraints were used unconstitutionally on child in juvenile justice program are not subject to professional judgment of fourteenth amendment, but rather to deliberate indifference standard of Eighth Amendment, but also finding that use of restraint chair and mechanical restraints stated a claim for violation of the Eighth Amendment)

D. Right to Refuse Treatment

United States v. Loughner, 672 F.3d 731 (9th Cir. 2012)(holding that *Harper* standards govern involuntary medication of pretrial detainee for dangerousness)

IV. Rights in the Community

A. Scope of Constitutional Rights, Negligence and Malpractice in the Community

Ebonie S. v. Pueblo School District, 2012 WL 3667403 (10th Cir. Aug. 28, 2012)(finding that a chair which a student could not unlatch, but could crawl out of by crawling over or under the desktop was not an unconstitutional restraint under the 4th Amendment; placing great emphasis on the fact that the student was neither physically bound nor removed from the classroom. Also chair did not violate substantive due process even if it violated state law on restraint. Nor did it violate equal protection although the chair was used only for special education students; declining to subject decisions affecting only special education students to heightened scrutiny) NOTE: the lower court rejected defendant's motion for summary judgment on an ADA/Section 504 claim that use of the chair discriminated on the basis of disability, and defendants apparently did not appeal this ruling.

Campbell v. State Dept. of Health and Social Services, 671 F.3d 837 (9th Cir. 2011)(finding no constitutional violation when woman in group home drowned in bathtub because no "special relationship" based on custody or state created danger)

Shelton v. Arkansas Department of Human Services, 677 F.3d 837 (8th Cir. 2012)(state had no constitutional duty to voluntary patient in state facility who hanged herself three days after being taken off suicide watch under *DeShaney;* because no duty no constitutional claim arose from fact that when patient was cut down she was still alive and 1) nurse refused to perform mouth to mouth resuscitation because no protective shield was available; 2) hospital policy permitted nurses to refuse to provide assistance under those circumstances; 3) ambubags were in locked storage room and key had been locked in the room)

Coscia v. Town of Pembroke, 659 F.3d 37 (1st Cir. 2011)(man picked up after car accident asserting he would throw himself in front of a train; fourteen hours after release

he did so; no police liability when failure to provide medical treatment while in custody did not create or contribute to his suicidality)

Paine v. Cason, 678 F.3d 500 (7th Cir. 2012)(when police picked up woman with serious psychiatric problems at airport, took her to two jails, and discharged her into a dangerous neighborhood where she was raped and ended up severely brain damaged, police did not have a duty to extend her detention to receive mental health treatment but did have a constitutional duty not to release her into a worse situation than they found her)

Gross v. Rell, 304 Conn. 234, 40 A.3d 240 (Conn. 2012)(holding that conservators enjoy immunity from suit for actions ordered or authorized by the Probate Court, but not for actions neither authorized nor approved by the court; holding that attorneys appointed to represent potential wards and nursing homes where they are placed do not enjoy immunity)

Peterson v. Reeves, 315 Ga.App. 370 (2012)(holding over vigorous dissent that a psychiatrist may be held liable in the case of a voluntary outpatient's suicide if he failed to perform adequate risk assessment or be available or arrange for coverage on the date his patient was discharged from a residential facility)

O'Brien v. Bruscato, 289 Ga. 739 (Ga. 2011)(holding that it did not contravene public policy to allow plaintiff to sue his psychiatrist for malpractice after the psychiatrist discontinued his medications and the plaintiff subsequently murdered his mother)

MC v. Arlington County School District, 2012 USDistLEXIS 103064 (SDNY July 24 2012)(asking nonsuicidal student with Asperger's questions about suicidality and having him taken involuntarily by police to hospital to assess suicidality, while a restraint on liberty, does not "shock the conscience"

B. Rights Under Medicaid

K.G. v. Dudek, (granting preliminary injunction to provide child with autism applied behavioral analysis (ABA) services under Medicaid)

V. Boring but Vital

A. Class Certification

M.D. v. Perry (5th Cir. 2012)(reversing class certification of class of children claiming constitutional violations in long-term foster care in Texas)

Jamie S. v. Milwaukee Public Schools, 668 F.3d 481 (7th Cir. 2012)(refusing to certify class of disabled children challenging school district's compliance with IDEA-required services)

N.B. v. Hamos, (N.D.Ill. May 30, 2012)(refusing to certify EPSDT class where named plaintiffs, who had developmental disabilities, were not sufficiently representative of described class of children with SED, and did not include a child in foster care, and class description in case requesting community services did not exclude children who might desire institutionalization)

J.W. v. Birmingham Board of Education, No. 2:10-cv-03314-AKK (certifying class of students maced by Birmingham security officers)

Lane v. Kitzhaber, (D.Ore. August 6, 2012)(granting class certification to *Olmstead* action challenging segregated sheltered workshops)(DOJ filed statement of interest and has investigated Oregon and issued letter of findings on June 29, 2012, see www.ada.gov/olmstead/olmstead_cases_list2.htm

Dykes v. Dudek, M.D.Fla. Oct 2011 (denying class certification on waiting list claims of violation of Medicaid rights to reasonably prompt services and freedom of choice because plaintiff's proposed class of people in institutions and in the community meet neither commonality or typicality despite plaintiff's proposed grouping into sub-classes)

Taco Bell v. Mueller, 2012 USDistLEXIS 104454 (N.D.Ca. July 26 2012)(altering class in response to Walmart holding that Rule 23(b)(2) class members cannot have individual damage claims, but rejecting defendants' motion to decertify class)

B. Attorney's Fees and Offers of Judgment

S.H. v. Plano Independent School District, 2012 USAppLEXIS 17369 (5th Cir. August 17, 2012)(applying IDEA rule prohibiting attorney's fees if plaintiff turns down offer of judgment that is more than is subsequently received to reject attorney's fees for work performed after the offer, and the IDEA rule prohibiting fees for unreasonably protracting the litigation by not agreeing to settlement; the latter finding over a passionate and eloquent dissent that beautifully articulates the crucial importance of attorney's fees to obtaining the results envisioned by the IDEA)

C. Pleading Standards

Shreve v. Franklin County, 2012 U.S.Dist.LEXIS 63311 (S.D.Ohio May 4, 2012)(striking boilerplate affirmative defenses while refusing to decide whether Iqbal and Twombley apply to affirmative defenses)

D. Interlocutory Appeal

United States v. Loughner, 672 F.3d 731 (9th Cir. 2012)(holding district court's approval of involuntary medication constituted collateral order appropriate for immediate appeal)