Mental Health Law Update

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I. Supreme Court Cases Decided in 2005-2006

United States v. Georgia, 546 U.S. 151 (2006) (decided with No. 04-1236, *Goodman v. Georgia* et al., January 2006) (Parapalegic inmate challenged conditions of confinement as violating the Eighth Amendment and title II of the ADA. District court and Court of Appeals granted summary judgment on Title II damages claims on the basis of sovereign immunity. Supreme Court granted cert. "to consider whether Title II of the ADA validly abrogates state sovereign immunity." (546 U.S. at 880). The Court held that Title II validly abrogates state sovereign immunity where the violations alleged would actually violate constitutional rights but did not decide whether Title II claims by prisoner that did not violate the fourteenth amendment could be asserted, holding the lower court was in the best position to consider that question. Court remanded for further proceedings, ordering lower court to consider Goodman's amended complaint in light of this ruling)

Clark v. Arizona, 548 U.S. ___ (2006) (holding that Arizona's limitation of insanity test to inability to know right from wrong does not violate Constitution; nor does Arizona's exclusion of opinion evidence by psychiatric experts from all stages of criminal trial except insanity defense)

Schaffer v. Weast, 546 U.S. 49 (2005) (Holding that in a hearing before challenging the adequacy of an Individualized Education Program before an administrative law judge, the party seeking relief, in this case the student, bears the burden of proof).

Ark. HHS v. Ahlborn, 126 S. Ct. 1752 (2006) (Court invalidates an Arkansas statute that allowed the state to impose a lien on any third party tort settlements received by a Medicaid recipient for the total cost of Medicaid benefits paid by the state. Court finds that this statute conflicts with federal Medicaid law which only allows the state to take the portion of a third party settlement that is apportioned to medical expenses.)

Gonzales v. Oregon, 126 S.Ct. 904 (2006)(defeating Attorney General Ashcroft's interpretation of the Oregon assisted suicide statute as violating federal controlled substance regulations; expansive discussion of administrative law and levels of deference to agency interpretations.

II. Mental Health Law

a. Right to Refuse Treatment

Green v. City of New York, 465 F.3d 65 (2d Cir. 2006)(see also "Other Title II cases)(man with ALS was transported to the hospital despite his refusal, communicated through eye blinks and computer and by relatives on the scene. His estate and wife sued city of New York, the paramedic who decided to transport, and the private hospital where the patient was taken, alleging violations of Title II of the ADA, HRL (New York state Human Rights law), the 4th and 14th amendments, and state torts claims. Court affirmed dismissal of constitutional claims against the city because there was not enough evidence to support municipal §1983 liability under either a widespread custom and practice theory (in fact, city had policy relating to refusals by non-verbal disabled people which was not followed by paramedic) or a failure to train theory. The court reversed dismissal of 4th amendment claims against paramedic, holding Plaintiff's right to be free from unreasonable seizure was violated and paramedic not entitled to qualified immunity. The court affirmed dismissal of the 14th amendment claims, holding unwanted transport to the hospital is not treatment that would trigger the 14th amendment, and there is no evidence plaintiff refused treatment once at the hospital. Court also vacates dismissal of HRL claims against paramedic and Hospital, but affirmed dismissal of state law torts claims.)

Pabon v. Wright, 459 F.3d 241 (2nd Cir. 2006) (Inmate underwent a liver biopsy and interferon treatment for hepatitis C. Inmate alleged that if he had been informed of the side effects, he would have refused treatment, and filed a 1983 claim alleging violation of his 14th amendment liberty interest in receiving medical information. Court affirms summary judgment for defendants finding that while there was a violation of patient's 14th amendment rights, the medical personnel were entitled to qualified immunity because the right was not clearly established at the time of the violation).

Myers v. Alaska Psychiatric Inst., 138 P.3d 238 (Alaska 2006) (Vacating a lower court's order of nonconsensual administration of psychotropic medications in a non-crisis situation to plaintiff, a committed psychiatric patient. Court held that the Alaskan Constitution guarantees fundamental rights to liberty and privacy, which includes freedom from nonconsensual treatment with psychotropic medications, and thus, before a court can authorize nonconsensual administration of medication, it must make a judicial determination, based on clear and convincing evidence, that involuntary medication is in the patients best interest and no less intrusive treatment is available. Court also discusses best-interest criteria, and affirms that clear and convincing evidence is the standard for the best-interest determination. Finally, court also rejected argument that plaintiff's release rendered case moot.

Comm'r of Corr. v. Turner, 20 Mass. L. Rep. 437 (Mass. Super. Ct. 2006) (Denying commissioner of prison's request for a preliminary injunction to compel a prisoner to accept follow up medical care from a stroke, holding that the prisoner's right to refuse treatment outweighed the commissioner's interest in maintaining life and orderly prison administration. Court based it judgment on the fact that 1) there was insufficient evidence to show that Turner faced an imminent risk of death or serious physical harm, 2) compelling treatment could actually

have the effect of worsening Turner's condition, 3) it would be difficult to effectively compel Turner to take medication in any case, and 4) Turner's refusal of treatment is based on his belief that he would receive better treatment elsewhere, not because he wishes to be transferred to another facility, and thus does not implicate prison security or discipline.)

Matter of Rhodanna C. B. v. Pamela B., 2006 NY Slip Op 7870 (N.Y. App. Div. 2006) (New York trial court granted Guardianship of a non-institutionalized middle-aged mentally ill woman to her adult children, which under New York Law gave the children the right to consent on behalf of their mother to involuntary administration of psychotropic medicines and electroconvulsive therapy without automatic further judicial review of the patients capacity. Citing *Rivers v Katz* the court notes that while the New York law at issue here has a constitutionally adequate inquiry into initial capacity at the time a guardian is declared, the law fails to provide for automatic judicial reassessment of capacity when involuntary treatment is proposed in the future, instead requiring the incapacitated person to affirmatively seek judicial review and request removal of her guardian if she objects to such therapy. Moreover, there is also no adequate mechanism in the New York law for judicial determination that the treatment is narrowly tailored enough to protect the liberty interests of an incapacitated patient. The court reversed the order of the lower court granting the guardians the right to administer involuntary treatment without judicial review, inserting a provision ordering the guardians to obtain the consent of the incapacitated person or an order of the court before administering treatment. The court expressed especial concern in this case, where the guardianship is likely to be long-term due to the relative youth of the incapacitated person.)

b. Institutional Conditions (including claims arising from closing facilities)

Heydrick v. Hunter (2006 U.S.App.LEXIS 24458 (9th Cir. Sept. 28, 2006) (Plaintiffs, a class of individuals committed or awaiting commitment to a state hospital under California's Sexually Violent Predators Act (SVP act), challenged conditions of their confinement and requested declaratory and injunctive relief, as well as monetary damages. District court denied defendants' motion to dismiss on Eleventh Amendment and qualified immunity grounds. Court of appeals affirmed dismissal of claims for monetary damages against the state officials in their official capacity on 11th amendment grounds, but ruled that 11th amendment did not bar plaintiffs from seeking monetary damages against state officials in their personal capacities, and also did not bar claims for injunctive and declaratory relief. Court rules plaintiffs have sufficiently alleged defendant's role in constitutional violations to survive the motion to dismiss, as defendant's positions as important makers and enforcers of policy in the facility mean plaintiffs can assert claim that defendants either 1) created policies that violated constitutional rights or 2) willfully ignored constitutional violation by subordinates. In considering the qualified immunity question, the court acknowledges that this is one of the first major class action challenges to conditions of confinement for SVPs, but says that there is established law that provides a guide for this context; the law regarding prisoners should be considered the "floor" for SVPs, and that the general body of law regarding civilly committed persons also applies to SVPs, although the rights of SVPs "may not necessarily be coexistensive with those of all other civilly detained persons." (at 25). With regard to actual alleged constitutional violations, the court reverses dismissal of the following claims made by the plaintiffs, finding that the law is clear and

qualified immunity is inappropriate: 1) retaliation for exercise of 1st amendment rights stemming from filing of the lawsuit, 2) 4th amendment right to be free from unreasonable searches and seizures and forced medication as punishment or for the convenience of the staff; 3) 14th amendment right to procedural due process to protect liberty interests; 4) substantive due process rights based on failure to protect, inadequate conditions of confinement, and excessive force; 5) equal protection claims based on SVPs being treated differently than other prisoners; 6) 6th amendment right to counsel and 14th amendment right to courts; and 7) plaintiff's right to privacy under the 14th amendment. The court grants qualified immunity and affirms dismissal of a claim alleging violation of patient's 1st amendment right to refuse to participate in SVP treatment, saying the law on this point is unclear. Court also dismisses double-jeapordy and ex-post-facto claims, as well as 8th amendment cruel and unusual claims, saying they are foreclosed by prior decisions affirming civil, non-punitive nature of SVP act. Court also declines to extend immunity based on officials' potentially reasonable but mistaken belief that their conduct was reasonable.)

Senty-Haugen v. Goodno, 462 F.3d 876 (8th Cir. 2006) (Civilly committed sex offender filed a lawsuit challenging the conditions of his confinement, alleging that he had been placed in isolation, denied adequate medical treatment, and been retaliated against in violation of state and federal laws and the Constitution. District court granted summary judgment for the defendants, saying Senty-Haugen's rights were not violated, and that defendants were entitled to qualified immunity, and court of appeals affirms. The court first noted that Senty-Haugen's liberty interest as a civilly committed sex offender was stronger than an incarcerated person, but less than a free person. Applying the Mathews test for procedural due process claims, the court found that the procedures governing his placement in isolation were adequate, noting that Senty-Haugen had been given sufficient notice of the reasons for his isolation and opportunity to consult with his lawyer and file grievances and be heard before hospital review boards, and that the state interest in security in the facility was strong, based on Senty-Haugen's behavior. Court affirmed lower court's grant of summary judgment in Senty-Haugen's 8th amendment claim, finding that he failed to adduce evidence that the alleged inadequacy of medical care worsened his condition. Court also affirmed summary judgment on Senty-Haugen's 1st amendment retaliation claim, finding that he had not shown that he was retaliated against for the exercise of his 1st amendment right, and rejected as unsubstantiated Senty-Haugen's claim that his right to counsel had been interfered with. Court also dismissed a state malpractice claim. Court also found that even if Senty-Haugen's interests had been impaired, the officials were entitled to qualified immunity because the law was not clear. Finally, the court dismissed without prejudice Senty-Haugen's claim that imposing the cost of his treatment on him violated his due process rights, saying the claim was unripe for review because the state had not yet tried to collect the money.)

Torisky v. Schweiker, 446 F.3d 438 (3rd Cir. 2006)(deciding that *Youngberg* rights do not attach to voluntary patients, but interpreting "voluntary" to mean, essentially, whether the individual is free to leave rather than restricting its meaning to "voluntariness" as a legal status. For example, the court notes a number of situations in which a legally voluntary patient might not be free to leave, including, notably "as a result of physical or chemical restraints" (446) or if the individual was subject to legal limitations on the right to leave, including 3-day rules; thus, "voluntary"

patients who were committed to institutions for developmental disabilities by their parents might still be able to assert rights under *Youngberg* arising out of involuntary transfers related to the closure of the facility where they lived).

Smith v. AuSable Valley Cmty. Mental Health Servs., 431 F. Supp. 2d 743 (D. Mich. 2006) (Involuntarily committed patient who was profoundly retarded and suffered from a seizure disorder and major depression died from complications of 2nd and 3rd degree burns she suffered while being bathed, under disputed conditions, by a caregiver in the state-run facility where the patient was committed. Patient's family brought a §1983 case alleging violations of three federal statutes and, rather vaguely, substantive due process. Court found that the three federal statutes, 42 U.S.C.S. §§ 15009(3)(B)(i), 9501(1)(G), and 10841, do not create individual rights enforceable under §1983, and dismissed those claims. However, the court refused to dismiss or grant summary judgment on the substantive due process claim at this time, instead giving plaintiff leave to amend her complaint to properly assert a §1983 substantive due process claim for denial of patient's liberty interest in reasonable safety when institutionalized)

Thiel v. Nelson, 422 F.Supp.2d 1024 (W.D. Wisc. 2006) (Involuntarily committed sex offenders challenge smoking ban in facility where they are detained. Court dismisses plaintiffs' due process claims, noting that plaintiffs do not have a protected liberty interest in smoking, and even if the state failed to follow its own laws in enacting the ban, that does not implicate plaintiffs due process rights. Court also dismissed equal protection claims, finding that the ban had a rational relationship to several legitimate state interests, the correct test given that smoking is not a fundamental right and prisoners are not a suspect class, and that the decision to allow inmates in a given facility to smoke was at the discretion of facility officials. Court also finds no protected interest that would trigger the due process and equal protection clauses in plaintiff's claims that inmates have been deprived of their right to decide when to stop smoking, smoking is a personal choice, and that the facility does not have adequate staff to deal with patients who are deprived of cigarettes. Because plaintiffs did not allege that the smoking ban is punitive, court rules there is no valid claim that conditions of confinement violate due process. Court also dismisses claims regarding insufficiency of treatment, noting that plaintiffs have not alleged injury, and finding that even if they had, their allegations were not of sufficient magnitude for a constitutional claim.)

Goddard v. Blake, 2005 U.S.Dist.LEXIS (SVP's confinement to a day room 13 hours a day without television or radio may raise claim of unconstitutional punishment under 14th amendment)

c. Restraint and Seclusion

Lanman v. Hinson, 2006 U.S.Dist.LEXIS 55777 (W.D.Mich. August 10, 2006)(voluntary patient at Kalamazoo Psychiatric Hospital died after being held down during a physical restraint. Court held that fourteenth amendment *Youngberg* standard did not apply to voluntary patients, but that Fourth Amendment's prohibition on excessive force during a seizure does apply to restraints in state or local government facilities, and the standard is whether actions were objectively

reasonable. Court also finds potential liability for supervisor during restraint who did not tell other defendants to get off plaintiff, and to other defendants for their failure to come to plaintiff's aid after he stopped breathing. Court also finds claims stated for assault and battery, as well as abuse and neglect, under state laws (in prior decision, dismissed contract and EMTALA claims).

Hadix v. Caruso, No. 4:92-CV-110 (W.D.Mich. Nov. 13, 2006)(see also Police/Prison/Jail, below)(T.S., 21, died after four days naked in four point restraints on slab bed filled with his urine in segregation unit of prison; both plaintiff's doctor experts testified that use of restraints amounted to torture under the circumstances. Court found prison's reform to only impose these restraints for six hours at a time insufficient and immediately enjoined prison from using these kinds of restraints, among other requirements. The opinion is also remarkable for its first paragraph: "Say a prayer for T.S. and others who have passed. Any earthly help comes too late for them" and its last paragraph: "God bless T.S. and the others. Their lives were short but their legacies may be long.")

Estate of Charles Agster v. Maricopa County, ($9 million awarded to family of a mentally retarded man who died from positional asphyxia after being improperly strapped into a restraint chair at the county jail. $7 million of the judgment were compensatory damages, and $2 million were punitive damages. see http://www.phoenixnewtimes.com/Issues/2006-03-30/news/news.html) . In the wake of the decision, which was the second multi-million dollar verdict against the county involving use of the restraint chair in less than a decade (Scott Norberg's estate collected 8.25 million in a settlement in 1999), the use of the restraint chair will be discontinued, "Jails to Stop Restraint Chair Use," *Arizona Republic*, August 22, 2006. However, 40 new "safe beds" with restraints are being added to the jails, *id.* Attorney is Michael Manning.

Patrick v. New York, 806 N.Y.S.2d 849 (2005)(court finds state liable in restraint death of individual with mental retardation in the community because of 1) failure to appropriately train people who were conducting restraints; 2) failure to take into consideration known medical risks of restraining this particular individual. Notably, court dismisses defendant's argument about cause of death, finding that if individual died during restraint procedure as a result of restraint procedure, disagreements about what actually caused the death are immaterial. Also case is notable for the detailed, step by step testimony of plaintiff's expert witness, who taught restraint and deescalation in the course required by defendant for its employees, about what went wrong, and also the fact that police investigating the death got employees to reenact the circumstances on videotape.

Disability Law Center v. Matanuska-Susitna Borough School District, just filed (Alaska 2006)(challenging teacher's inappropriate restraint of disabled school children)

III. Americans with Disabilities Act

a. Olmstead

Kiman v. New Hampshire Department of Corrections, 451 F.3d 274 (1st Cir. 2006)(vacating summary judgment in light of *United States v. Georgia* and finding possible ADA claims in failure to provide prescription medication, shower chair, and other accommodations for disabled inmate with ALS, as well as requiring him to use high bunk).

Shepardson v. Stephen, 2006 U.S.Dist.LEXIS 71775 (D.N.H. Sept. 29, 2006)(finding that requiring New Hampshire to expand Medicaid waiver program to serve all people with brain injury on the waiting list would be a "fundamental alteration" under Olmstead where waiver program was effectively always full, New Hampshire continually expanded the number of people served under the waiver, the waiting list of approximately 35 people had not grown during the existence of the waiver, and people moved from the waiting list in about a year, which was not unreasonable.)

Fisher v. Maram, 2006 U.S.Dist.LEXIS 64084 (N.D.Ill. August 28, 2006)(person with multiple disabilities requiring 24-hour in-home care aged out of Medicaid program which had been funding such care; agency determined she could only receive such care in nursing home setting. Court refused to dismiss plaintiff's *Olmstead* claim that she was entitled to care

Brown v. Bush, 2006 U.S.App.LEXIS 23356 (11th Cir. Sept. 11, 2006)(see also Boring But Vital, VII (A)—Intervention)(attempt of parents' group to intervene in a settlement of *Olmstead* litigation involving institutions for persons with developmental disabilities in Florida which called for the closure of two out of four of Florida's institutions was rejected as untimely when made orally at the settlement hearing even though parents had notice of the settlement hearing for over a month, and actual notice in some cases exceeding three months.

Ligas v. Marum, 2006 U.S.Dist.LEXIS 10856 (N.D.Ill. March 7, 2006)(see VII Boring but Vital Class Certification)(granting class certification to a class of mentally retarded and/or developmentally disabled persons in Illinois raising *Olmstead* claims who are either institutionalized in private ICF-DDs with nine or more residents or living in a home-based setting and are at risk of institutionalization because of their need for services)

Alexander v. Rendell, 2006 U.S.Dist.LEXIS 3378 (W.D.Pa. January 30, 2006)(parents and guardians seeking a TRO to prevent the closure of Altoona Center, an institution for people with mental retardation, and transfer of its residents to the Ebensburg Center, another institution for people with developmental disabilities, claiming a violation of the Altoona Center's rights under *Olmstead* because Altoona was more "integrated" than Ebensburg.

Nelson v. Milwaukee County, 2006 U.S.Dist.LEXIS 7513 (E.D.Wisc. Feb. 7, 2006)(court upheld against motion to dismiss claims challenging failure by the defendant to pay providers of community services for people with psychiatric disabilities less than it paid providers for comparable services for non-mentally disabled people, and less than other counties paid for community services for people with mental disabilities as discriminatory, including an administrative methods claim and an Olmstead claim that underpayment would drive people into institutions (a similar claim failed in the 9th Circuit in *Sanchez v. Johnson*)

b. Other Title II cases

Green v. City of New York, 465 F.3d 65 (2d Cir. 2006) (man with ALS was transported to the hospital over his refusal (communicated through eye blinks and computer) patient's estate and wife sued city of New York, the paramedic who responded to the scene and the private hospital where the patient was transported alleging violations of Title II of the ADA and other claims (see Right to Refuse Treatment). Claims against paramedic dismissed because Title II does not apply to individuals and against the hospital because it was not a Title II public entity , but vacated dismissal of ADA claims against the city, finding that a jury could find that the plaintiff was improperly denied access to the city's system for evaluating refusals to accept medical assistance on the basis of his disability (he could not speak, but could communicate via eye blinks and a computer) because of the failure of city personnel to follow city guidelines, and discriminatory intent could be inferred from circumstantial evidence that onsite personnel had a stereotypical view of the capacity of severely handicapped individuals.)

Toledo v. Sanchez, 454 F.2d 241 (1st Cir. 2006)(holding that Congress acted constitutionally in abrogating state immunity from actions for damages under Title II of the ADA for claims involving the right of access to a public education; in this case student at Puerto Rico School of Architecture alleged failure to provide reasonable accommodations to his psychiatric disabilities)

Wis. Cmty. Servs. v. City of Milwaukee, 2006 U.S. App. LEXIS 24259 (7th Cir. Sept. 26 2006)(en banc) (in this highly disturbing decision, the 7th circuit held that the city of Milwaukee did not have to modify its city zoning standards accommodate a mental health services clinic seeking to locate within the city. The court held that under §504 the Rehabilitation Act of 1973, the FHAA and title II of the ADA, the requested modification of city zoning ordinances was not necessary, because the clinic failed to establish that "but for the disability", the clinic would have been able to prevail - in the judgment of the court, the clinic's inability to meet the zoning requirement was based on their status as a nonprofit health clinic rather than a taxpaying commercial tenant, not on the client's disability, and thus the clinic failed to establish the necessity of an accommodation).

Klinger v. Director, Department of Revenue, 455 F.3d 888 (8th Cir. 2006)(while requirement that people with disabilities pay $2.00 for handicapped parking placard violates ADA and plaintiff class are entitled to declaratory and injunctive relief, they are not entitled to damages because the placard fee does not impair the exercise of fundamental rights, and the provisions of Title II are not congruent and proportional to the rights sought to be enforced as they apply to the placard fee).

Hogan v. City of Easton, 2006 U.S.Dist.LEXIS 65628 (E.D. Pa. Sept. 14, 2006)(see also Criminal/Police Cases, below)(man with psychiatric disabilities shot by police in his own home sued city for failing to accommodate his psychiatric disorders; court holds that police services fall under Title II and a claim for failure to properly train police officers for encounters with people with disabilities is actionable under the ADA, but that reasonable accommodations are not required "prior to the officer's securing of the scene and ensuring that there is no threat to

human life" and no liability under ADA where officers did not know of plaintiff's mental disorders when they arrived on the scene, and by the time they knew, "exigent circumstances were present." Case suggests following accommodations for people with psychiatric disabilities by police: do not use flashing lights, do not shout and use expletives, use family members or a psychologist to talk to him, do not lie regarding presence of police dogs, make inquiries into the nature of mental health issues before confronting him.

Guttman v. Khalsa, 2006 U.S. App. LEXIS 9737 (10th Cir. April 19, 2006) (Case involved an ADA challenge to revocation of plaintiff doctor's medical license. On remand from the US Supreme Court, the Court of Appeals found that in light of *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), the Rooker-Feldman doctrine not applicable because Guttman filed his federal claim before the state court proceedings had concluded, thus federal court had subject matter jurisdiction. Court went on to affirm the district court's finding that two of the defendants were entitled to absolute immunity because they were serving in quasi-judicial and prosecutorial roles in an administrative proceeding. However, the court reversed the grant of summary judgment for the state of New Mexico, holding that under the new interpretations of the law set forth in *Tennessee v. Lane and United States v. Georgia*, States were no longer automatically granted sovereign immunity from ADA claims. Court remanded the case for hearings to determine if 1) plaintiff actually alleged a violation of title II, and 2) whether the claims was barred by res judicata or collateral estoppel, and 3) whether the ADA abrogates state sovereign immunity in this context, based on the under the new interpretations of the law set forth in *Tennessee v. Lane* and *United States v. Georgia*, which held the ADA can abrogate sovereign immunity in cases of "(1) actual violations of the Constitution and (2) at least some classes of conduct that do not facially violate the Constitution but are prohibited to 'prevent and deter unconstitutional conduct'" (at 1034)).

c. Other Discrimination Cases under Title I

EEOC v. Heartway Corp., ___ F.3d ___, 2006 WL 3030562, (10th Cir. Oct. 26, 2006) (EEOC brought ADA claim against a nursing home over the termination of a cook with hepatitis C. EEOC argued that the cook had been fired because she had Hepatitis C, while the nursing home argued they had fired her for falsifying information on her job application about her medical condition. District court granted judgment a matter of law for the nursing home on the question of punitive damages, but held that a reasonable jury could find that plaintiff was actually fired because of her disability, based on arguably ambiguous statements made by plaintiff's supervisor at the time of the firing. The case went to the jury which found for the EEOC, awarding compensatory damages and back pay. EEOC appealed, saying the question of punitive damages should not have been withheld from the jury, and nursing home cross appealed for judgment as a matter of law on the discrimination claim. Court of appeals upheld the district court's judgment that the nursing home was not entitled to judgment as a matter of law on the discrimination claim because there was sufficient evidence for a reasonable jury to find that the defendant regarded the plaintiff's hepatitis as significantly limiting her ability to perform a class of jobs, that plaintiff had a disability that qualified under the ADA, and that the plaintiff was terminated because of her disability. The court of appeals reversed the district court with regards to punitive

damages, saying that there was a sufficient evidentiary basis for a jury to find that t nursing home management acted with the knowledge that they were violating the ADA, which would enable the jury to award punitive damages. Court remanded the case for a new trial on the issue of punitive damages).

Josephs v. Pac. Bell, 443 F.3d 1050 (9th Cir. 2006) and 432 F.3d 1006(plaintiff wins discrimination suit because jury can reasonably find that he is safe to enter people's homes although he committed a violent act sixteen years previously, pled not guilty by reason of insanity fifteen years previously, and was released from a mental institution twelve years previously, since he has had stable and unproblematic employment for ten years).

IV. Medicaid Cases

Gasper v. DSHS, 132 Wn. App. 42 (Wash. Ct. App. 2006) (Finding that Washington State's policy of automatically reducing reimbursable home care hours by 15% when the caregiver resides with the client violated the federal comparability requirement, because the automatic reduction failed to consider individual care needs. Although DSHS had received a federal comparability waiver, court ruled that boilerplate waiver does not cover this rule) (currently on appeal to the Washington Supreme Court, consolidated with Supreme Court No. 78652-6 - *David J. Jenkins v. State of Washington, Department of Social and Health Services*, see *Gasper v. Wash. State Dep't of Soc. & Health Servs.*, 2006 Wash. LEXIS 624 (Wash. 2006))

Jensen v. Missouri Department of Health and Senior Services, No. WD65158, slip op. (Mo. Ct. App., March 28, 2006) (holding that state rule making it more difficult for Medicaid beneficiaries living with caregivers to prove financial eligibility for state-paid in-home assistance violated federal Medicaid law, which only allows consideration of the resources of the beneficiary and his or her spouse or parents if beneficiary is under the age of 21 in determining financial eligibility for home care benefits.)

Rosie D. v. Romney, 410 F. Supp. 2d 18 (D. Mass. 2006) (Court found that Massachusetts violated the Medicaid Act's EPSDT (42 U.S.C. §§ 1396a(a)(10)(A) - (a)(43), 1396d(r)(5)-(a)(4)(B)) and reasonable promptness (42 U.S.C. §1396a(a)(8)) provisions, and that plaintiffs properly invoked 42 U.S.C. § 1983 to enforce the rights created by these provisions. However, court found that plaintiffs did not satisfy their burden of proof for the claim that the state violated the equal access provision of the Medicaid act, (42 U.S.C. §1396a(a)(30)(A)) and found for the defendants on this claim).

Katie A. v. Bont, 2006 U.S.DistLEXIS 37257 (C.D.Ca. March 14, 2006)(preliminary injunction requiring mental health services for thousands of children in foster care to avoid institutional placement, including wraparound services).

V. Police/Jail/Prison Cases

Estate of Charles Agster v. Maricopa County, ($9 million awarded to family of a mentally retarded man who died after being improperly strapped into a restraint chair at the county jail. $7 million of the judgment were compensatory damages, and $2 million were punitive damages. see http://www.phoenixnewtimes.com/Issues/2006-03-30/news/news.html) . In the wake of the decision, which was the second multi-million dollar verdict against the county involving use of the restraint chair in less than a decade, the use of the restraint chair will be discontinued.

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Hadix v. Caruso, *No. 4:92-CV-110 (W.D.Mich. Nov. 13, 2006)(*

VI. State Law Cases

Turner v. AAMC, specifically relying on California's broader definition of both "disability" and "discrimination" in challenging failure to grant accommodations on the MCAT to a student with a learning disability. Defendant specifically follows ADA definition of disability, which would probably not have permitted plaintiffs in this case to receive the accommodations they desired. The court finds that California's Unruh Act applies, and orders defendants to reconfigure their process of reviewing requests for accommodations accordingly. Court ducks important question of who "comparison class" is when aspiring medical students apply for accommodations—other medical school applicants or average citizens—in determining whether an individual is disabled. Opinion contains good discussion of what "learning disability" means and how to test for it.

Matter of Rhodanna C. B. v. Pamela B., 2006 NY Slip Op 7870 (N.Y. App. Div. 2006) (New York trial court granted Guardianship of a non-institutionalized middle-aged mentally ill woman to her adult children, which under New York Law gave the children the right to consent on behalf of their mother to involuntary administration of psychotropic medicines and electroconvulsive therapy without automatic further judicial review of the patients capacity. Citing *Rivers v Katz* the court notes that while the New York law at issue here has a constitutionally adequate inquiry into initial capacity at the time a guardian is declared, the law fails to provide for automatic judicial reassessment of capacity when involuntary treatment is proposed in the future, instead requiring the incapacitated person to affirmatively seek judicial review and request removal of her guardian if she objects to such therapy. Moreover, there is also no adequate mechanism in the New York law for judicial determination that the treatment is narrowly tailored enough to protect the liberty interests of an incapacitated patient. The court reversed the order of the lower court granting the guardians the right to administer involuntary treatment without judicial review, inserting a provision ordering the guardians to obtain the consent of the incapacitated person or an order of the court before administering treatment. The court expressed especial concern in this case, where the guardianship is likely to be long-term due to the relative youth of the incapacitated person.)

Myers v. Alaska Psychiatric Inst., 138 P.3d 238 (Alaska 2006) (Vacating a lower court's order of nonconsensual administration of psychotropic medications in a non-crisis situation to plaintiff, a committed psychiatric patient. Court held that the Alaskan Constitution guarantees fundamental

rights to liberty and privacy, which includes freedom from nonconsensual treatment with psychotropic medications, and thus, before a court can authorize nonconsensual administration of medication, it must make a judicial determination, based on clear and convincing evidence, that involuntary medication is in the patients best interest and no less intrusive treatment is available. Court also discusses best-interest criteria, and affirms that clear and convincing evidence is the standard for the best-interest determination. Finally, court also rejected argument that plaintiff's release rendered case moot.

Comm'r of Corr. v. Turner, 20 Mass. L. Rep. 437 (Mass. Super. Ct. 2006) (Denying commissioner of prison's request for a preliminary injunction to compel a prisoner to accept follow up medical care from a stroke, holding that the prisoner's right to refuse treatment outweighed the commissioner's interest in maintaining life and orderly prison administration. Court based it judgment on the fact that 1) there was insufficient evidence to show that Turner faced an imminent risk of death or serious physical harm, 2) compelling treatment could actually have the effect of worsening Turner's condition, 3) it would be difficult to effectively compel Turner to take medication in any case, and 4) Turner's refusal of treatment is based on his belief that he would receive better treatment elsewhere, not because he wishes to be transferred to another facility, and thus does not implicate prison security or discipline.)

Patrick v. New York, 806 N.Y.S.2d 849 (2005)(court finds state liable in restraint death of individual with mental retardation in the community because of 1) failure to appropriately train people who were conducting restraints; 2) failure to take into consideration known medical risks of restraining this particular individual. Notably, court dismisses defendant's argument about cause of death, finding that if individual died during restraint procedure as a result of restraint procedure, disagreements about what actually caused the death are immaterial. Also case is notable for the detailed, step by step testimony of plaintiff's expert witness, who taught restraint and deescalation in the course required by defendant for its employees, about what went wrong, and also the fact that police investigating the death got employees to reenact the circumstances on videotape.

VII. <u>Boring But Vital</u>

a. Intervention

Brown v. Bush (11th Cir. 2006)(family members opposed to institutional closure sought to intervene to prevent settlement of litigation by asking orally to intervene at settlement hearing. Court held that because they had had notice for between 7 weeks and five months, they had time to file written motion with appropriate papers and found intervention untimely).

b. Attorney's Fees

Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health, 447 F.3d 1021 (8th Cir. 2006) (PAMII preempts Missouri peer review privilege law, department of mental health services compelled to release Mortality and Morbidity report after the death of a patient at the Missouri

state hospital. Attorneys fees denied because the fact that PAMII preempted state law was not clear)

c. Rooker-Feldman

Guttman v. Khalsa, 2006 U.S. App. LEXIS 9737 (10th Cir. April 19, 2006) (Case involved an ADA challenge to an administrative decision and state court review that affirmed the revocation of Guttman, a disabled doctor's, medical license. On remand from the US Supreme Court, the Court of Appeals found that in light of *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), the Rooker-Feldman doctrine does not apply because Guttman filed his claim before the state court proceedings had concluded, and thus the federal district court does have subject matter jurisdiction. Court went on to affirm the district court's finding that two of the defendants were entitled to absolute immunity because they were serving in quasi-judicial and prosecutorial roles in an administrative proceeding. However, the court reversed the grant of summary judgment for the state of New Mexico, holding that under the new interpretations of the law set forth in Tennessee v. Lane and United States v. Georgia, States were no longer automatically granted sovereign immunity from ADA claims. Court remanded the case for hearings to determine if 1) Guttman actually alleged a violation of title II, and 2) if the claim is not barred by res judicada or collateral estoppel, and 3) whether the ADA abrogates state sovereign immunity in this context, based on the under the new interpretations of the law set forth in Tennessee v. Lane and United States v. Georgia, which held the ADA can abrogate sovereign immunity in cases of "(1) actual violations of the Constitution and (2) at least some classes of conduct that do not facially violate the Constitution but are prohibited to 'prevent and deter unconstitutional conduct'" (at 1034)).

d. Class Certification

Elizabeth M. v. Montenez, 458 F.3d 779 (6th Cir. 2006), vacating class certification of all residents of three Nebraska psychiatric institutions and 1) refusing to permit past residents of institutions to serve as named plaintiffs in an action seeking only injunctive relief; 2) finding that only present residents of institution can serve as representatives of the class of present and future residents of the institution; 3) refusing to permit the remaining two institutionalized plaintiffs to represent residents of any institution but their own and for any claim but their claims; and 4) that claims to inadequate post-discharge treatment had to be separated from claims regarding inadequate institutional treatment and safety).

Ligas v. Maram, 2006 U.S.Dist.LEXIS 10856 (N.D.Ill. March 7, 2006)(certifying class of MR/DD with *Olmstead* claims over vigorous opposition by defendants and calling the "commonality" part of class certification "a close question" (*10) but finding that because all class members are challenging standard policies of defendants, including the failure to provide institutionalized persons with information about community placements, to systematically evaluate institutionalized persons to determine whether they qualify for community placement, to place those who are eligible in the community, and to maintain a waiting list, commonality requirements are met. Also rejects defendant's argument that because the class definition involves eligibility for community services the court would have to engage in individual

determinations to decide whether someone is a class member by holding that it is sufficient to rely on defendant's own professionals).

e. Preemption

Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health, 447 F.3d 1021 (8th Cir. 2006) (PAMII preempts Missouri peer review privilege law, department of mental health services compelled to release Mortality and Morbidity report after the death of a patient at the Missouri state hospital. Attorneys fees denied because the fact that PAMII preempted state law was not clear) (also listed under "Access to records" and "Attorney's Fees")

Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006) (finding that Medicaid's reasonable standards provision, 42 U.S.C. §1396a(a)(17), does not give patients a private right of action to challenge denial of durable medical equipment, but finding for plaintiffs on supremacy clause grounds)

f. Federal Rights Enforceable Under Section 1983

Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006) (finding that Medicaid's reasonable standards provision, 42 U.S.C. §1396a(a)(17), does not give patients a private right of action to challenge denial of durable medical equipment, but finding for plaintiffs on supremacy clause grounds).

Harris v. Olszewski, 442 F.3d 456 (6th Cir. 2006) (finding that the Medicaid "freedom of choice" provision, 42 U.S.C. § 1396a(a)(23), was a private right enforceable under §1983, with a good discussion of the Blessing/Gonzaga test and the enforcement of regulations. Court ruled against plaintiff, however, holding that the state did not actually violate the freedom of choice provision).

Katie A. v. Bont, 433 F. Supp. 2d 1065 (D. Cal. 2006) (finding a private right of action in 42 U.S.C. §§ 1396a(a), 1396d(a) and 1396d(r), provisions of the Medicaid act dealing with the EPSDT requirements) (citing *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006), which had held that Section 1396a(a)(10) creates a private right of action 6 weeks before Katie A. was decided)

Bio-Medical Applications of N.C., Inc. v. Elec. Data Sys. Corp., 2006 U.S. Dist. LEXIS 4398, (D.N.C. 2006) (Holding that 42 U.S.C.S. §§ 1396a(a)(4)(a), 1396a(a)(30)(A), 1396a(a)(37) and 1396a(a)(8) did not create private rights enforceable under 42 U.S.C. § 1983. These provisions all involve procedures and methods of administration that state plans must have in order to ensure efficiency, and only §1396a(a)(8) mentions individuals)

Katz v. Sherman, 2006 U.S. Dist. LEXIS 27506 (D. Mo. 2006) (finding that §673(a)(3) of the Adoption Assistance Act creates a federal right under §1983. Citing ASW v. Oregon, 424 F.3d 970, 975-78 (9th Cir. 2005), which also found a private right in §673(a)(3)).

Rosie D. v. Romney, 410 F. Supp. 2d 18 (D. Mass. 2006) (Court found that Massachusetts violated the Medicaid Act's EPSDT (42 U.S.C. §§ 1396a(a)(10)(A) - (a)(43), 1396d(r)(5)-

(a)(4)(B)) and reasonable promptness (42 U.S.C. §1396a(a)(8)) provisions, and that plaintiffs properly invoked 42 U.S.C. § 1983 to enforce the rights created by these provisions. However, court found that plaintiffs did not satisfy their burden of proof for the claim that the state violated the equal access provision of the Medicaid act, (42 U.S.C. §1396a(a)(30)(A)) and found for the defendants on this claim).

g. Ineffective Assistance of Counsel

Kenny A. v. Perdue, earlier decision at 356 F.Supp.2nd 1353 (N.D.Ga. 2005)(settlement of a case alleging ineffective assistance of counsel for children involved in abuse and neglect proceedings, settlement requires creation of independent office of attorneys to represent children, initially limits case load to 130 cases per attorney (!), with a study to be conducted to determine what case load level is required to provide effective assistance of counsel).

h. Protection and Advocacy Access to records

Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health, 447 F.3d 1021 (8th Cir. 2006) (PAIMI (the appropriate initials are a long story—even if the court says PAMII, which it probably does, just use PAIMI—thanks) preempts Missouri peer review privilege law, Department of Mental Health Services compelled to release Mortality and Morbidity report after the death of a patient at the Missouri state hospital. Attorneys fees denied because the fact that PAIMI preempted state law was not clear) (also listed under "Preemption" and "Attorney's Fees)

Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs., 448 F.3d 119 (2d Cir. 2006) (court held that PAIMI preempts state law and grants protection and advocacy programs access to peer review records, but found no actual conflict between PAIMI and state law, and ordered the Connecticut Department of Mental Health and Addiction Services to produce peer review records)

Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ., 464 F.3d 229 (2d Cir. 2006) (court held that Connecticut Protection and Advocacy had the right to access both the facility and student directory information without parental consent at a non-residential school for severly emotionally disturbed children under the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), 42U.S.C. §10801-10851, the Developmental Disabilities Assistance and Bill of Rights Act (DD Act), 42 U.S.C. §§15001-15115, and the Protection and Advocacy of Individual Rights Act (PAIR), 29 U.S.C. §794e.)