

DUE PROCESS RIGHTS AND NEW JERSEYANS WITH MENTAL ILLNESS: A STUDY IN DICHOTOMY

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OP-ED

Former Acting Governor and current State Senate President Richard Cody and his wife have made a powerful contribution with their public position in support of the rights of New Jerseyans and all Americans with mental illness. Nevertheless, the civil rights of mentally disabled persons in New Jersey continue to be violated. As has been stated in previous papers, the state and federal laws that would protect these rights are not being enforced. The Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and the New Jersey Law Against Discrimination (LAD) are not being applied with the purpose for which the United States Congress and the New Jersey State Legislature intended.

Perhaps the most egregious of these civil rights violations involve New Jerseyans with mental disabilities that have been confined to residential institutions and hospitals long after their diagnoses and treatment dictate a discharge. In some cases, these individuals have been locked in dangerous wards where they have been brutally attacked by other patients. The primary reason for the delay in discharging these patients may be due to over-worked psychiatric staff and ineffective record keeping. In fact, it has been suggested that some patients have remained as wards of the State long after a discharge was warranted simply because the doctor in charge failed to process the appropriate paperwork, believing that the patient had already left the residential facility and was back in the community. In other cases, appropriate living arrangements within the community have not been established, further delaying a warranted discharge.

Most interesting, it is far more expensive to keep these individuals in a State financed residential institutions than it would to place them in community settings. One State official has suggested that it is at least "ten times more costly" to have the client remain in hospitals or residential facilities.

New Jersey Protection and Advocacy, Inc. filed litigation in 2005 against the State in order to have these patients released. According to New Jersey Protection and Advocacy's 2005 press release, there is an immediate need for the discharge of scores of patients:

Lawsuit Charges State with Illegal and Unnecessary Segregation of Residents in Psychiatric Institutions

"On April 5, 2005, New Jersey Protection and Advocacy, Inc. (NJP&A) filed a lawsuit in federal district court against James Davy, Commissioner of the Department of Human Services for the State of New Jersey. The lawsuit seeks the release of hundreds of New Jersey residents from unnecessary confinement in state psychiatric institutions.

“Nearly half of all individuals in state psychiatric hospitals remain confined needlessly because the State of New Jersey has failed to develop suitable community residences and programs to support their return to the community. The Conditional Extension Pending Placement (CEPP) status was created by the State Supreme Court in the 1983 S.L. case [In re S.L., 94 N.J. 128 (1983)] to give the State time to develop community placements before discharging individuals. Now, however, CEPP status is used by the State to retain those individuals long past their need for hospitalization.

“Sarah Mitchell, NJP&A’s Executive Director/President, states that, ‘We applaud Acting Governor Codey for his long time commitment to addressing the needs and concerns of people with mental illness. The work of the Mental Health Task Force is certainly further evidence of this. But we read nothing in the Task Force’s recently released report to suggest that the rights and needs of the individuals we represent in this lawsuit will be addressed anytime soon. New Jersey has long been on notice about its unnecessary confinement of large numbers of individuals on CEPP status, without developing the placements and supports necessary for their transfer to less restrictive community placements. The State is in violation of both the letter and the spirit of the law we know as the Americans with Disabilities Act. The U.S. Supreme Court in the *Olmstead v. L.C.* case, 527 U.S. 581 (1999), discusses such unnecessary segregation as illegal discrimination based on disability. The individuals on CEPP status that the State has kept waiting in institutions long past their need for such restrictive settings deserve more than recognition that the CEPP situation is a problem. They deserve an immediate plan that details, within a reasonable time frame, when they can expect to return to the community.’

“Carol C., a 60-year-old woman who was committed to a state psychiatric hospital in 1993, is but one of hundreds who was illegally confined. Less than one month after her commitment, the court determined that Carol could be discharged. Twelve years later she remained hospitalized despite her desire to return to the community. For years she remained hospitalized on a restrictive and volatile ward where she endured assaults from other patients. Such assaults frequently required emergency medical treatment.”

In clear violation of the Equal Protection Clause of the Fourteenth Amendment, these individuals with mental illnesses are denied the basic Due Process rights that would be afforded to criminal defendants in court proceedings. Often, their testimony is never heard by a judge, as the only witnesses will be State employed forensic psychiatrists who provide expert testimony that only supports the position of their employer. As the consumers of the medical treatment that they will receive, these patients are given no decision making power. The State is required to adhere to *Olmstead v. LC* (1999), a United States Supreme Court decision that mandates that the client be treated in the alternative environment that is the least restrictive according to the patient’s unique needs and degree of disability. Unfortunately, adherence to *Olmstead* is often

not applied. The State also has an obligation to prove that the patient is “dangerous’ to his/herself or others.

This failure to adhere to the Equal Protection clause applies to criminal defendants in New Jersey Courts, as well as those facing commitment proceedings in civil courts. A growing disparity exists in the due process rights of criminal defendants who are not considered to be mentally ill and those with documented psychiatric disabilities. The New Jersey Supreme Court, in *State v. Krol* (1975) determined that the same rules should be applied to defendants who are found guilty by reasons of insanity (NGRI). Furthermore, mentally ill criminal defendants should be treated with the same procedural rules and standards as other persons who are faced with involuntary civil commitment. The Krol Court also determined that when the defendant is NGRI, the defendant should:

“be confined in a suitable mental institution for a period of 60 days for observation and examination.”

Additional requirements were imposed by the State Supreme Court in *State v. Fields* (1978), when it was decreed that defendants who are NGRI were entitled to periodic review of their appropriateness of their commitment. Furthermore, the State would bear the burden of proof during each review.

It is my view that the Krol Court was more prepared to grant due process rights to individuals with mental illness and would have made it more difficult to transfer an inmate from a prison to a mental hospital. Furthermore, the Krol Court was also prepared to create a greater burden of proof for those who proposed an involuntary civil commitment.

Many of the patients remain in involuntary civil commitment settings because they have not been afforded basic Due Process rights. Others remain committed simply because they have been forgotten. However, if history has taught us nothing else, it has taught us they either everyone has rights or no one has rights.

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