

THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY
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Mental Health Law Update
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I. Supreme Court Cases

a. Decided

Wos v. E.M.A., 568 U.S. __ (March 20, 2013) (state statute creating irrebutable presumption that 1/3 of a Medicaid recipient's tort recovery is for medical expenses preempted by federal anti-lien statute)

Ryan v. Gonzales, 568 U.S. __ (Jan. 8, 2013) (no right to be competent during federal habeas challenge of state criminal conviction)(opinion by Thomas, 9-0)

Genesis Health Care v. Symczyk, 568 U.S. __ (April 16, 2013) (in FLSA collective action proceeding similar to class certification, assuming that a Rule 68 offer by defendants which would have provided plaintiff with all the relief she sought mooted her individual action, concludes that her collective action cannot proceed)(breezy dissent by Kagan invites readers to "relegate the majority's decision to the furthest reaches of your mind") (opinion by Thomas, 5-4)

b. Cert. granted

Mount Holly N.J. et al v. Mount Holly Gardens Citizens, 133 S.Ct. 2824 (June 17, 2013) (does the Fair Housing Act include claims for disparate impact) (NOTE: the U.S. submitted a brief arguing against granting cert. which the Court ignored; there is no conflict in the circuits on this issue—all circuits have held that such a claim exists)

Kansas v. Cheever, 133 S.Ct. 1460 (Feb. 25, 2013) (can state use court-ordered psychiatric evaluation to rebut defendant's expert testimony that he lacked the requisite intent to kill due to methamphetamine intoxication?)

Ray Haluch Gravel Co. v. Central Pension Fund, 133 S.Ct. 2825 (June 17, 2013) (does district court decision on the merits leaving claim for attorney's fees unresolved constitute final decision for purposes of appeal under 28 U.S.C. 1291?)

II. Mental Health Law

a. Right to Refuse Medication

In the Matter of the Mental Commitment of Melanie L., 2013 Wisc. 67 (2013) (reversing an order of involuntary medication in the community for an individual who was willing to take one medication but thought another was unnecessary, and engaged another doctor in violation of the terms of her

commitment order; court underscored that the presumption of competence requires the county to prove incompetence, and that medical experts' testimony must be responsive to statutory standards)

United States v. Arendas, 2013 U.S. Dist. LEXIS 69790 (D. Utah May 15, 2013) (taking *Sell* requirements seriously; federal experts cited to only one study about the success of involuntary medication in restoring individuals to competence and it did not inspire confidence; defendant only had a moderate chance of dangerousness, and therefore no clear and convincing evidence of dangerousness to justify *Harper*-based forcible medication)

People v. Petty, 213 Cal.App.4th 1410 (2013) (probation requirement that individual "comply with all directions of mental health worker, including taken medications as directed" was too broad)

b. Civil Commitment

Obado v. UMDNJ, 2013 U.S. App. LEXIS 8204 (3rd Cir. March 8, 2013) (holding that the proper standard for violation of due process rights in connection with civil commitment is a "shocks the conscience" test in a non-precedential case)

Bailey v. Pataki, 708 F.3d 391 (2nd Cir. 2013) (affirming district court holding that using mental health emergency detention statute to transfer SVP prisoners at the end of their sentences to psychiatric facilities violated their procedural due process rights, and denying qualified immunity to defendants)

Kowalski v. St. Francis Hospital and Health Centers, 2013 NYLEXIS 1677 (June 26, 2013) (good case on the stringency of requirements to detain a person involuntarily in ED, dismissing suit against ED for letting intoxicated man go when "there can be no duty to do that which the law forbids", i.e. restraining him from leaving just because he was drunk)

In the Matter of the Commitment of T.K., 2013 Ind.App. LEXIS 403 (Ind.App. Aug. 21, 2013) (ongoing threats of extreme physical violence in combination with history of mental illness, diagnosis of paranoid schizophrenia, denial of mental illness and refusal to take medication sufficient to support involuntary commitment even when no violence has occurred)

In the Matter of S.C., 2013 Mt 140 (2013) (state filing for extension of commitment five days after commitment expired deprived the court of jurisdiction over the commitment; statutory deadlines on filing must be strictly enforced)

In the Matter of PAC, 298 P.3d 1166, 2013 Mt. 84 (2013) (before proceeding with a commitment hearing when respondent is not present and her attorney represents that she waived her right to be present, court has obligation to conduct some inquiry to ensure that the waiver was knowing and voluntary)

In the Interest of RB, 294 P.3d 24 (Mt. 2013) (county attorney has no right to object to hospital's discharge of person who has been involuntarily civilly committed)

c. Restraint, Seclusion, and other Uses of Force

Hatfield v. O’Neill, 2013 U.S.App.LEXIS 16728 (11th Cir. August. 13, 2013) (unpublished) (applying “shocks the conscience” test to parents’ substantive due process claims against teacher for abusing severely disabled child, and finding that while ripping flesh off the student’s lips, shoving the student’s thumb down her throat, and feeding her so forcefully that her mouth bled did not shock the conscience, hitting her head in the specific place where the teacher knew she had had brain surgery did, reversing a grant of summary judgment in favor of the teacher)

McGee v. Adams, 2013 USAppLEXIS 16039 (7th Cir. August 1, 2013) (civil detainee for sexual offenses charges that putting leg irons for transportation on his swollen and possibly cancerous legs violates due process; court interprets professional judgment standard extremely broadly, holding that it can only be violated if no minimally competent professional would have done what defendants did)

Montin v Gibson, 718 F.3d 752 (8th Cir. 2013) (claim that defendants denied unsupervised access to unsecured portion of the grounds of an institution did not state a claim for bodily restraint but rather was incident of commitment; court distinguished this claim from claim involving no access to outdoors or no access to unsecured grounds)

c. Parity and Affordable Care Act

CM v. Fletcher Allen Healthcare, 2013 U.S.Dist.LEXIS 120469 (D.Vt. April 30, 2013) (in first federal decision under the Mental Health Parity Act, court refused to dismiss claim that insurance denied medically necessary therapy four times a week by applying different coverage standards; putting burden of proof of exemption on defendant rather than plaintiff)

JT et al v. Regence Blue Shield, 2013 U.S.Dist.LEXIS 79672 (W.D.Wash. June 4, 2013) (limiting neurodevelopmental therapy to children under the age of 7 was an ‘exclusion from coverage’ rather than a ‘treatment limitation’ and was illegal under the Washington mental health parity act)

New York State Psychiatric Association v. United Health Care, No. 13-cv-01599 S.D.N.Y. complaint filed March 11, 2013)(filed as a class action against the nation’s largest health insurer, claims that UnitedHealth violates ERISA, the Affordable Care Act, the Mental Health Parity Act and state law by maintaining “unjustifiably stringent medical-necessity criteria and pre-authorization requirements for mental-health services”)

d. Cases Involving Psychiatric Treatment

United States v. King-Vassel, 2013 U.S.App.LEXIS 17989 (7th Cir. Aug. 28, 2013) (finding that expert explanation of how Medicaid system worked or to explain compendia used to determine whether various medications would be covered by Medicaid was unnecessary and reversing district court’s grant of summary judgment to doctor who prescribed off-label psychiatric drugs for child)

Pickup v. Brown, Welsh v. Brown, 2013 U.S.App.LEXIS 10868 (9th Cir. August 29, 2013) (upholding California state ban on licensed mental health practitioners practicing “sexual orientation change efforts” on individuals under the age of 18)

In re Neurontin Marketing and Sales Practice Litigation, 712 F.3d 21 (1st Cir. 2013) (upholding finding that Pfizer violated civil RICO and affirming award of over \$140 million dollars to Kaiser for damages caused by Pfizer's fraudulent marketing of Neurontin)

NOTE: This is only one of a number of First Circuit decisions involving the fraudulent marketing of Neurontin issued in 2013.

Mazzella v. Beals, (NY.Sup.Ct. Nov. 20, 2012) (jury awards 1.5 million dollars in suicide of man prescribed Paxil by doctor who did not see him face to face for ten years and who doubled his dose by phone without seeing him; Peter Breggin was expert)

III. Americans with Disabilities Act

a. Olmstead

Steward v. Perry, No. 5:10-CV-1025 (W.D.Tx. Aug. 19, 2013) (available at www.ada.gov) (interim settlement between the United States and plaintiffs and the State of Texas will provide at least 635 intellectually disabled people currently residing in nursing homes with the opportunity to live in community settings)

United States v. New York, No. 13-cv-4165 (E.D.N.Y. July 23, 2013) (available at www.bazelon.org) (settlement of *DAI* case providing for supportive housing to all adult home residents who desire such housing; fairness hearing remains to be scheduled, where representatives of adult homes can be expected to raise challenges)

United States v. Florida, (complaint filed July 22, 2013) (available at www.ada.gov) (complaint by DOJ charging that Florida violates Olmstead by failing to serve children with disabilities in the most integrated setting, forcing them into nursing homes) (see related case referenced last year).

United States v. Rhode Island, No. 1-13-cv-00442 (D.R.I. June 13, 2013) (settlement provides supported employment for at least 200 Rhode Islanders as well as employment services)

Lane v. Kitzhaber, No. 12-cv-00138 (D.Ore. May 22, 2013) (Department of Justice granted intervention in case challenging sheltered workshops as violation of integration mandate)

Benjamin v. DPW, 701 F.3d 938 (3rd Cir. 2012) (granting intervention as of right at settlement stage to organization denied intervention during merits portion of case because settlement implicated their rights in ways that litigation did not, and granting them the right to challenge class certified during the merits phase)

Pashby v. Delia, 709 F.3d 307 (4th Cir. 2013) (in case alleging risk of institutionalization because of cutbacks in personal care services, because of less onerous eligibility requirements for people in adult homes than people in their own homes, affirms that adult care homes are 'institutions'; and affirms district court's grant of preliminary injunction to maintain personal care services in individuals' homes while remanding for compliance with Rule 65) (PLEASE SEE Boring but Vital for more on this case)

Illinois League of Advocates for the Developmentally Disabled v. Quinn, 2013 U.S. Dist. LEXIS 86637 (N.D. Ill. June 20, 2013) (*Olmstead* does not create a right to stay in segregated institutions; individuals wanting to stay in institutions may make out claims under other Title II theories)

Hampe v. Hamos, 917 F. Supp.2d 805 (N.D. Ill. 2013) (denying summary judgment to both class of plaintiffs and defendants on action challenging reduced skilled nursing hours for plaintiffs who age out of EPSDT)

Clinton L. v. Delia, 2012 U.S. Dist. LEXIS 155827 (E.D.N.C. Oct. 31, 2012) (denying summary judgment to state on *Olmstead* claim that budget reductions to supported housing place plaintiffs at risk of institutionalization on basis that competing expert affidavits create fact question for jury, and refusing to dismiss director of state agency, rejecting claim that state not responsible for decisions of private agency administering care to plaintiffs funded by state dollars)

b. Other Title II cases

K.M. v. Tustin Unified School District, 2013 U.S. App. LEXIS 16228 (9th Cir. August 6, 2013) (finding that school met IDEA obligations to deaf child did not foreclose Title II action when effective communication and FAPE requirements were significantly different)

McElwee v. County of Orange, 700 F.3d 635 (2nd Cir. 2012) (man on the autism spectrum was not discriminated against when no reasonable accommodation would ameliorate following and staring behaviors that visitors and staff were not required to tolerate)

c. Employment Discrimination Cases

Mary Jo C. v. New York State and Local Retirement System and Islip Library, 707 F.3d 144 (2nd Cir. 2013) (individual who missed statutory deadline to apply for benefits because of psychiatric disability and whose brother was not permitted to apply for her stated claim under Title II of the ADA)

Owusuh-Ansah v. Coca-Cola, 715 F.3d 1306 (11th Cir. 2013) (individual need not prove disability to file claim that employer illegally subjected him to medical inquiry, but when employer has information that employee is unstable and may pose a danger – in this case employee banged fist on table and shouted “Someone’s going to pay for this!”— requiring psychiatric evaluation was business-related and consistent with business necessity)

McMillian v. City of New York, 711 F.3d 120 (2nd Cir. 2013) (emphasizing necessity of fact-based inquiry into essential functions of job, reversing district court summary judgment for employer who refused to grant accommodation to employee with schizophrenia who arrived late because of medication effects)

IV. Other Cases of National Interest

A. Guardianship

Matter of Demaris L. 38 Misc.3d 570, 956 N.Y.S.2d 848 (2012) (citing to supported decisionmaking as preferable to substituted decisionmaking, as well as the United Nations

Convention on the Rights of Persons with Disabilities, to support ending guardianship over woman with developmental disabilities)

Ross v. Hatch, Case No. CWF-120000-426P-03 (Va.Cir.Ct. August 2, 2013) (finding woman with Down’s syndrome in need of guardianship but honoring her desire to have friends with whom she could live rather than parents—who wanted her to live in a group home—as guardians)

Raven v. Department of Social and Health Services, 177 Wash. 2nd 804 (2013) (guardian’s good faith determination that her ward opposes nursing home placement cannot be the basis for a finding of neglect in light of the Legislature’s clear mandate against placing incapacitated persons against their will)

Illinois League of Advocates for the Developmentally Disabled v. Illinois Department of Human Services, 2013 U.S.Dist.LEXIS 100306 (N.D.Ill. July 13, 2013) (finding that a federal court has no jurisdiction over challenges to decision by state guardian to consent to moving individuals out of institution)

B. Malpractice: Suicide

Yurkowski v. University of Cincinnati, 2013 Ohio 242 (2013) (applying ordinary malpractice standard to failure to prevent suicide and limiting ‘professional judgment’ malpractice standard to failure to predict violence to others)

VII. Boring But Vital

a. The Reach of DeShaney

Morrow v. Balaski, 719 F.3d 160 (3rd Cir. 2013) (en banc) (extensive discussion of the reach of due process ‘special relationship’ protections in context of school failure to protect children from abuse by classmates)

Schwartz v. Booker, 702 F.3d 573 (10th Cir. 2013) (child in foster care is in special relationship with state agency and caseworkers who neglected to follow up on abuse complaints by school when child was found locked in closet and died of dehydration and starvation)

b. Intervention as of right

Benjamin S. v. Department of Public Welfare, 701 F.3d 938 (3rd Cir. 2012) (even though intervenors had been denied right to intervene at liability stage, and denial had been affirmed by appellate court, they could intervene at remedy stage because their interests were arguably affected by the settlement’s requirement that residents’ desire to remain in the hospital be ascertained every year)

c. Class Certification and Decertification

Pashby v. Delia, 709 F.3d 307 (4th Cir. 2013) (discussing two separate methods for interlocutory review of class certification decision—through Rules of Civil Procedure

and when class certification is inextricably intertwined with appealable preliminary injunction—and holding neither applied in this case)

ZD v. Group Health Cooperative, (W.D.Wash. 2012) (after initially certifying an injunctive relief class but rejecting 23(b)(3) class certification for damages for individuals denied needed neurodevelopmental therapy because they were over six years old, court certifies two subclasses)

Benjamin S. v. Department of Public Welfare, 701 F.3d 938 (3rd Cir. 2012) (even though organization had previously lost motion to intervene, class had been certified, and case had been settled, parties opposing the settlement were granted motion to intervene and, because class certification can be reconsidered at any time, new intervenors could challenge class certification)

d. Ripeness and Mootness

Pashby v. Delia, 709 F.3d 307 (4th Cir. 2013) (in Medicaid/Olmstead case, rejecting argument that plaintiff's claims were moot because they had prevailed in administrative appeals to restore personal care services because plaintiffs were challenging policy changes and defendant had not renounced policy under which those services were provided; also rejecting ripeness argument because two plaintiffs had not completed administrative appeal because plaintiffs were challenging policy, not outcomes of administrative appeal)

Illinois League of Advocates for the Developmentally Disabled v. Illinois Dept. of Human Services, 2013 USDist.LEXIS 86637 (N.D.Ill. June 20, 2013) (limiting case seeking to prevent Illinois from closing institutions to those currently planned to be closed; case not ripe as to other facilities)

Amundson v. Wisconsin DHS, 2013 U.S.App.LEXIS 13905 (7th Cir. July 10, 2013) (holding that plaintiffs can make claim for intraclass discrimination under the ADA in case involving differential cuts in rates burdening people with intellectual and developmental disabilities more than those with other disabilities; however court held that plaintiffs had not proven that challenged budget cuts in fact burdened people with intellectual and developmental disabilities more compared to other groups of people with disabilities."

e. Requirements for Preliminary Injunction

Pashby v. Delia, 709 F.3d 307 (4th Cir. 2013) (discussing distinction between requirements for mandatory preliminary injunctions and prohibitory injunction)