

# **Disability Rights Louisiana Report to the Louisiana Developmental Disabilities Council October 2021**

## **BRIEF SUMMARY OF ACTIVITY RELATED TO COVID 19**

The Covid-19 crises continues to impact the work of the agency in several significant ways. The following is a list of some of the more important issues with which we continue to deal with. In several instances, these issues are discussed in more detail in the section discussing our case work.

- Many children with disabilities have been denied any education at all during this crisis and even when offered some services myriad factors make it difficult, if not impossible, to benefit from such services. We are working with several organizations, and having internal discussions, to identify strategies for obtaining securing appropriate services for these children and compensation, when appropriate.
- We have numerous employment related complaints related to the need for accommodations and other supports for persons who are vulnerable to Covid-19 due to the nature of their disabilities. We have stepped up our response to these calls providing, at a minimum, technical assistance regarding the EEOC process, how to obtain and ask for reasonable accommodations, and the so-called “interactive process” contemplated by the ADA and other anti-discrimination laws.
- Persons in congregate settings, including jails, ICF/DDs, prisons, and nursing homes have been exposed to the virus out of proportion to the general possibility, resulting in the denial of rights, illness, and sometimes, death. We have begun negotiating with the state regarding the situation at ELMHS, have sought access to documents and individuals at various correctional facilities, have been reviewing and responding requests for assistance from prisoners at David Wade, and have been consulting with legal services other organizations to assess and address issues in nursing homes. Currently, we are monitoring facilities to ensure equal access to the vaccine so individuals may choose whether they want it or not.
- Due to loss of income, many persons with disabilities are being or may be subjected to eviction proceedings. We have been working with community organizations in writing to the Louisiana Supreme Court and demanding that the courts develop and implement procedures for accommodations that will provide such individuals with meaningful access to the courts.
- While many people have chosen to be vaccinated, some are still hesitant or have encountered

## BRIEF SUMMARY OF CURRENT LITIGATION

### AA, et al. v. Gee

We, along with, Southern Poverty Law Center (SPLC), the National Health Law Program (NHeLP); the National Center for Law and Economic Justice (NCLEJ), and the law firm of O'Melveny & Myers LLP filed a civil rights lawsuit in the U.S. District Court of the Middle District of Louisiana on behalf of the children and their parents. The class action lawsuit asserts that the Louisiana Department of Health has failed to provide mental health services to Medicaid-eligible children and families in the state. The suit seeks a court order requiring the state to fulfill its obligation under law to provide the necessary services for children with mental health needs and to prevent the unnecessary risk of institutionalization. It also asks for a grant class certification to include all Medicaid-eligible children and youth under the age of 21 with a psychiatric illness, including children with severe emotional disturbances.

In May, U.S. District Court Judge Brian A. Jackson ruled that a lawsuit challenging Louisiana's failure to provide intensive home and community based mental health services, as required by law, to Medicaid-eligible children can proceed as a class action lawsuit on behalf of tens of thousands of children across the state. The lawsuit, filed in November 2019 following a multi-year investigation, describes how the state's failure to provide these services forces children to unnecessarily cycle in and out of hospitals, psychiatric facilities and the juvenile justice system for extended periods of time, often far away from the places they call home.

If we are successful, the state will be obligated to greatly improve the scope and level of mental health services to children with disabilities and significantly reduce institutionalization as a result of those disabilities. We are currently in the process of assisting SPLC in gathering information for the experts.

### AJ, et al. v. Gee

We, along with the National Health Law Project filed class action lawsuit on behalf of four medically fragile children who are beneficiaries of Medicaid. The case sought declaratory and injunctive relief to enforce their rights under the Early and Periodic, Screening, Diagnosis and Treatment (EPSDT) program and the reasonable promptness mandate of Title XIX of the Social Security Act (Medicaid Act), as well as those rights guaranteed by the Integration Mandate of the Americans with Disabilities Act (ADA), 42 U.S.C. §12132 and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794(a). As a result of negotiations, Defendants agreed to an enforceable Settlement Agreement that will be in place for five years and

enforceable by the court during that time. The terms of the agreement require the Louisiana Department of Health, among numerous other things, to take all necessary steps to provide the named Plaintiffs with all medically necessary EHH or IN services and establish a Crisis Response Team whose primary responsibility shall be arranging for EHH or IN services when such services are unavailable through existing Medicaid home health agencies within their administrative region.

We continue to monitor the implementation of the settlement agreement to determine whether the implementation is effective. The issues posed by Covid-19 and the impact on provider agencies across the state has created an additional barrier to enforcement of this settlement and we are currently reviewing the situation. If necessary, we will file an enforcement action to ensure children continue to receive life-saving nursing services.

**US Dept of Justice Complaint Regarding Overuse of Nursing Homes and Other Institutional Settings for Persons with Mental Illness**

Enforcement of Settlement Agreement filed in federal court between Louisiana and the US Department of Justice requiring the Louisiana Department of Health (LDH) to provide community-based mental health services to persons in or at risk being placed in nursing homes. The State has just begun working to develop an Implementation Plan. We are monitoring implementation of the Settlement Agreement to ensure implementation. We have reviewed the court appointed expert's report and identified areas of concern. We have been meeting with the DOJ to raise our concerns and working together to figure out how to best address them. Discussions are ongoing as are our monitoring efforts.

**Collaboration with AARP to Investigate Lack of Services in the Community to Allow Residents to Leave Nursing Homes**

We have been collaborating with AARP to look at Louisiana nursing homes and the lack of available services in the community to allow these individuals to leave the nursing homes. This investigation is expanded from the DOJ complaint that specifically considers individuals with mental illness. We are currently looking into what the barriers are for individuals leaving nursing homes so we can determine the best path forward to address the problem. We have been working to identify individuals that may be impacted to better understand the barriers. We have also updated the detailed list of nursing homes in Louisiana to include changes to names and addresses as well as the most recent star ratings for each. We are continuing to gather and analyze the data and are continuing to work with AARP to determine the best course of action.

**Tellis v. Leblanc, Civil No. 18-161**

We, along with the ACLU and MacArthur Justice Foundation filed an action in federal court on February 18, 2018 contending that prison authorities at David Wade Correctional Center (DWCC) are violating the rights of prisoners under the Eighth Amendment to the US Constitution, the ADA, and Section 504 by failing to provide adequate mental health treatment and engaging in abusive behavior. The action was filed after the Advocacy Center conducted an investigation and found probable cause to believe that Defendants are subjecting prisoners with disabilities at David Wade Correctional Center (DWCC), some with mental illness and others with significant physical health related disabilities, to neglect and abuse related to the conditions of solitary confinement and the availability of mental health services. The expert discovery was completed at the beginning of April, including depositions of the experts on both sides. The attempts at settlement were unsuccessful. We are currently preparing to move forward with trial beginning January 10, 2022 which is currently scheduled for 3 weeks. The litigation was granted class action status in September of 2021. We have begun reaching out to partner organizations in this field to recruit pro bono assistance with both trial preparations as well as with trial itself.

**Walcott v. Louisiana Department of Health**

We are representing Mr. Walcott in an appeal to the Louisiana First Circuit Court of Appeals. Mr. Walcott, a resident of Eastern Louisiana Mental Health System (“ELMHS”), filed a Pro Se Petition in district in Feliciana against the Louisiana Department of Health and Valley Catering alleging that they had violated his First Amendment right to freedom of religion, his Eighth Amendment right against cruel and unusual punishment, and his Fourteenth Amendment right to due process. The court dismissed the case on the grounds that Mr. Walcott lacked Procedural Capacity. We contend that this decision is incorrect and should be reversed for a number of reasons, including the facts that it is inconsistent with the plain language of Louisiana Code of Civil Procedure Article 684 and that a finding of Incompetent to Stand Trial in a criminal case serves a very different function than the issue of capacity in a civil case, where the person has been found to be “unable consistently to make reasoned decisions regarding the care of his person and property, or to communicate those decisions, and whose interests cannot be protected by less restrictive means.” Finally, and perhaps more importantly, denying a person the access to the courts to protect his civil rights is unconstitutional. The principle that a plaintiff must be able to access the courts to seek redress for rights violations is foundational to our legal system. The First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Americans with Disabilities Act all guarantee an individual access to the courts. Currently, we are awaiting a scheduling order from the court regarding briefing and oral argument in the appeal.

**Timothy Hunter v. CPlace Timberwood SNF, LLC.**

Timothy Hunter, a resident of the Carrington Place nursing facility, has filed an action in Orleans Parish District Court for declaratory, injunctive, and permanent relief and damages against the nursing facility, CPlace Timberwood SNF, LLC (hereinafter, "Carrington Place"). He is also defending an appeal filed in the 19<sup>th</sup> Judicial District Court in Baton Rouge of an Administrative Law Judge's stay order finding that the efforts to terminate his nursing home placement were unjustified.

In the Orleans Parish action, Mr. Hunter contends that Carrington Place violated his rights under La R.S. 40:2010.9, La R.S. 49:964, and La. Civ. Code. Arts. 2315 and 2682 when it (1) failed to permit him to return to the nursing home in which he resides following a hospitalization; (2) failed to take steps to discharge him to a safe location; and (3) failed to abide by numerous decisions rendered by the ALJ staying the discharge, ordering that Mr. Hunter be permitted to return to the nursing home, and finding the discharge was not proper.

Mr. Hunter seeks an order enjoining Carrington Place from refusing him the right to return to Carrington Place as required by the orders issued by the ALJ. He also seeks monetary damages under Louisiana Civil Code articles 2315 and 2682, respectively, for harms caused to him by Carrington Place's acts of abuse of process, conversion, intentional infliction of emotional distress, and extrajudicial eviction. Currently, we are dealing with discovery disputes before we can proceed on the merits.

**Disability Rights Louisiana v. Courtney N. Phillips**

This is an access suit that was filed following Louisiana Department of Health's refusal to provide records we are entitled to receive under our access authority pertaining to an ongoing investigation at Westside Habilitation Center, an intermediate care facility for individuals with developmental disabilities (ICF/DD) located in Alexandria, LA. DRLA has been involved with investigations and attempts to address conditions for several years. In March, DRLA requested updated records that had been requested and received years prior and LDH has continued to refuse production. The Complaint was filed July 23, 2021 and Defendants have requested an extension of time to file an answer until September 7, 2021. We are hopeful they will choose to settle and provide the documents.

**Cooper v. Gee, Secretary LA DHH and Jackson v. Gee, Secretary LA DHH**

Are two consolidated by the federal court on behalf of individuals found Not Guilty by Reason of Insanity and individuals found incompetent to stand trial. The Advocacy Center was named in these cases as an associational plaintiff, asserting the rights of unnamed individuals who are similarly situated. Plaintiffs alleged that Defendants failed and refused to promptly accept

physical custody of individuals found NGRI and Incompetent to Stand Trial who have been ordered to be admitted to an inpatient psychiatric facility for care and treatment. Plaintiffs alleged that Defendants' refusal to accept physical custody has resulted and is resulting in prolonged and unconstitutional confinement in parish jails, in violation of Plaintiffs' rights to due process under the United States Constitution, Title II of the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973.

On November 16, 2016, the court signed an enforceable settlement agreement with the court. Under the settlement agreement, which will be enforceable by the court for at least 4 years, the state has agreed, among other things, to provide all NGRI or Incompetent Individuals a Behavioral Health Assessment, as defined above, within five (5) calendar days of notification of an order for inpatient treatment or order of commitment to determine if they need emergency treatment; admit all new NGRI or Incompetent Individuals with Emergency Mental Health Needs to a Mental Health Facility within two (2) business days following completion of a Behavioral Health Assessment; admit all NGRI or Incompetent Individuals to the forensic unit at ELMHS or other mental health facility, or to an appropriate community-based program within fifteen (15) calendar days following receipt of an Order, except that if Defendants demonstrate that unusual and exigent circumstances make it impossible for them to admit an NGRI or Incompetent Individual within fifteen (15) calendar days, Defendants may have up to thirty (30) calendar days to admit the NGRI or Incompetent Individual; and develop a plan for providing less restrictive placement options in which NGRI and Incompetent Individuals can, with the appropriate permission of the criminal court, receive clinically appropriate competency restoration or mental treatment placement options.

Unfortunately, because of the Covid-19 crises and the high rate of infection at ELMHS, the State has fallen out of compliance with the Settlement. Accordingly, we filed a motion to reopen discovery and requested a hearing for Defendants to show why they should not be held in contempt of court to enforce and extend the Settlement Agreement on June 12, to which Defendants Opposed and we replied. We are awaiting the Court to rule and possibly set a hearing date.

#### **Chisholm v. Gee**

This case was originally filed 1997 to address the failure of Louisiana's Medicaid system to provide necessary services to children from 3-21 years old, who have developmental disabilities who are on a waiting list for services. Prior to the filing of this case, these children were on a waitlist for services for years without necessary help in the meantime. Over the years, this case has been the vehicle for obtaining great strides for children with disabilities, expanding access to services including behavioral health services. We continue to review data regarding the

LDH's compliance the timely provision of ABA services. We are also reviewing compliance with other provisions of the Settlement, particularly those that require them to provide mental health services to class members. It is possible that we will be filing a new enforcement Motion, addressing failures regarding the provision of these services. In furtherance of filing such a motion, we have begun a program of outreach on social media and to partner autism related organizations to help inform parents of their rights to receive prompt evaluations and prompt access to ABA services. Response so far has led to increased client contact in those topic areas, but so far not from people who meet all requirements for membership in the Chisholm class.

#### **Dupont Investigation**

A.D. is a 10-year-old child with severe behavioral and cognitive disabilities, including autism. A.D. regularly engages in self-harm, inappropriate stimming behavior, screaming, and attempting to eat or drink inedible items. A.D. is qualified for waiver services and special education, but has not been receiving appropriate services on either front. DRLA is currently investigating this situation and advocating for enhanced services in school and from Medicaid. The goal is for the enhanced services to serve as a model for school-based provision of services from Medicaid. Given the inadequacy of current services, litigation and expert expenses are possible. LDH has entered into a MOU with LDOE regarding services for children. DRLA is working to clarify how that MOU will work and to accelerate the provision of services and diagnostic testing.

#### **COMMUNITY LIVING OMBUDSMEN PROGRAM**

DRLA's CLOP Ombudsman visit to the approximately 518 publicly funded, privately run ICF/DD group homes in Louisiana housing approximately 3,300 people with developmental disabilities. In the aftermath of Hurricane Ida, these Ombudsmen located and visited impacted residents to ensure their safety.

During this period, CLOP Ombudsman have continued to successfully advocate for residents in an informal manner on a wide variety of issues surrounding health, wellness, and access to HCBS Waiver services of ICF/DD residents. As an example, one Ombudsman helped advocate so that a client could attend mass and visit with her husband.

Since August 1, 2021, the Ombudsmen have also filed 9 complaints with LDH's Health Standards Section, which is in charge of licensing and compliance, about the conditions in these facilities. These complaints included the following reports and observations regarding the ICF/DDs during this period:

- Staff verbally abusing residents

- Staff bullying residents
- Staff not assisting clients in wearing prescribed protective equipment for safety
- Active COVID cases without having staff or residents wearing masks
- Severe injuries, including burns to a resident
- Return from hurricane evacuation to a home where there was one toilet and no operable shower/tub, despite a resident having a staph infection; and two residents had to sleep in recliners instead of beds due to damage to their bedrooms.
- Failure to notify family of evacuation
- Evacuation staff being unaware of resident health and behavior needs or medical insurance
- Physical injuries including rashes, bites, and extreme weight loss
- Failure to bring resident to emergency room due to lack of staff
- Extreme staffing shortages, in one case leading to the sole staff working a 22 hour shift
- Failure to provide medical care
- Soiled adult diapers, dirty linens, dirty clothing, and trash on the floors of the ICF/DD
- Physical restraint in a chair
- Residents not wearing pants or underwear
- Staff failure to know a resident behavioral plan or de-escalation techniques
- Residents wearing clothing so large it was falling off of them, exposing their bare buttocks and genitals, as they were not wearing underwear as they had no clean underwear available
- Having residents stay for an extended period sitting in a van without proper cooling due to staffing shortages
- Resident having feces on his legs, shirt, and shorts
- Piles of feces on the floor
- Smeared feces on the walls
- A resident running naked outside without supervision
- Strong smells of urine and feces in common areas, bathrooms, and bedrooms

#### **House Bill 255/HR 109 - Banning Abortion and Sterilization of Interdicted Individuals**

Under current Louisiana law, an individual who is a curator of another individual who is interdicted may consent to an abortion or sterilization of the interdicted person with prior court authorization. The procedure for this is essentially a rubber stamp, and likely violates the Constitutional rights of the interdicted person. Legislation was introduced to completely ban

abortion and sterilization for interdicted individuals. This is also problematic, both medically and Constitutionally.

Working with one of DRLA's attorneys, who has represented a client under the current law, DRLA worked with the bill sponsor and organizations that are opposed to and in support of abortion rights to draft amended language. The intent of the language was to create a process that accounts for the medical necessity of these procedures, protects the civil rights of the interdicted individual, provides legal representation for the interdicted individual, and respects the interdicted individual's wishes. The sponsor was willing to consider our language, but was hesitant to amend legislation that deals with such a complex and sensitive topic in such a short period of time. Instead, he preferred to send the legislation to the Louisiana State Law Institute for review, and likely reintroduce it in a subsequent legislative session. The Law Institute will likely begin discussing this issue at its next meeting, which is scheduled for this Friday, October 22. DRLA staff will be participating.