Home and Community Based Waiver Programs From A to Z

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I. Why is important for Attorneys to understand Medicaid Waivers?

- Nursing home care cost Medicaid $40.6 billion in 1998, compared to $14.7 billion in 1985. More cost-effective options are needed, and the waiver program(s) are how the states, in partnership with the Health Care Financing Administration (Herein referred to as "HCFA") attempt to develop these options.
- In Michigan, if an elder or a person with a disability needs community services, in the least restrictive setting, paid for by Medicaid, they will likely need to qualify for a waiver program and the services it offers.
- Most elders and people with disabilities wish to live in the least restrictive setting possible, and attempt to avoid placement in a nursing home, institution or group home if at all possible.
- Increasing numbers of elders and people with disabilities need assistance in accessing waiver programs, and their services. They also need to know their legal rights as to these programs, just as they do with nursing homes, and other more traditional options.
- Michigan's Long Term Care Work Group's Report and Recommendations on Long Term Care Innovations, Challenges and Solutions released in June, 2000 (Herein referred to as "LTC Work Group Report"), and recent changes in the

Medicaid funding of Michigan's public mental health system, place great emphasis upon personal and family responsibility. It is important that elders, people with disabilities and their families place equal emphasis upon the public long-term care system(s) responsibility. For true partnerships to be developed to address the long-term care needs of Michigan citizens there must be equal power and control over the service decisions. It is incumbent upon the legal community to assist their clients in gaining some measure of a level playing field in accessing long-term care services.

II. What is a Medicaid Waiver?

According to the LTC Work Group Report, HCFA has statutory authority to waive particular federal laws and regulations that govern Medicaid (and Medicare). The States must make application to HCFA for a waiver. For Medicaid funding, a waiver is essential if the State intends to collect the federal share of the cost for any services provided through programs that do not follow the established rules. This match is approximately (50%) of the total cost.

III. Michigan's Waivers

A. Children's Model Waiver (Nationally known as the Katie Beckett Waiver)

This relatively small program waives parental income for Medicaid eligibility for children who qualify as "medically and physically complex" or "children with challenging behaviors". There are currently approximately 200 of these waiver slots in Michigan. The State has submitted a renewal and expansion request of this program, and currently is in negotiations with HCFA concerning the terms. This is the only remaining fee for service program administered through the CMH system, and the only Medicaid Waiver that reimburses the state one hundred percent (100%) for the services. This program is only for children under the age of 18. However, children who were receiving waiver services prior to 10/1/96 are grandfathered in until they reach the age of 26.

Access and Appeals Processes: Families should contact their local Community Mental Health Access Center. There is a rather complex process of Category Eligibility for this program, and extensive exception and appeals processes[1]. The children must meet the institutionalization level of care without waiver services.

Covered Services: In addition to regular Medicaid services, Health Assessments, Psychiatric Evaluations, Psychological Testing, Behavior Management Reviews, Case Managements, Child Therapy, Crisis Intervention, Family Therapy, Uncovered Health Services, Individual Therapy, Medication Administration, Medication Review, Occupational Therapy (Evaluation and Therapy) Occupational Therapy (Evaluation and Therapy), Physical Therapy (Evaluation and Therapy), Professional Treatment Monitoring, Periodic Review of Treatment, Speech, Hearing, and Language (Evaluation and Therapy), Respite, Home Health Care, Mental Health Services, Transportation, and Environmental Modifications.

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1. The eligibility rankings, exception and appeals processes are found in: MDCH Bulletin: CMHSP 98-01, of the Department's Community Mental Health Service Program Manual.

Generalized Profile of Families Who Qualify for this Waiver: Families who are having a difficult time caring for their child due to the level of medical attention or behavior interventions required. Sometimes single parent families or grandparent caregivers. Often children require nursing services, and significant medical attention, or personal supports due to their unique behaviors. Many families who are on this waiver have children with autistic behaviors that place the child at risk.

Pros: Significant level of service provided under this program which makes it easier for the families to transition into the adult system as their children age. If the family does not qualify for this waiver, they might qualify for other programs through the CMH until a waiver slot opens.

Cons: Services are intrusive; large numbers of individuals coming in and out of the family home; significant paperwork and hoops to jump through. Until recently the budgets had to be used through agencies, and were set at an artificially low hourly rate. Coordination with other Medicaid programs is difficult.

Creative Solution for Some Families: Self-Determination Choice Voucher allows the families to act as employer, hire their own staff or direct the services. It also allows for private/public partnership to address difficult service needs.

B. Combination Section 1915 (b) and (c) Waivers for Services through Michigan's Community Mental Health System

These two waivers are the basis for a majority of the services available through the Community Mental Health System. The State has recently submitted a renewal application to HCFA and currently is in negotiations with HCFA concerning the terms. There have been significant changes to these waivers over the last several years, they have been transitioned from a fee for service funding system to a capitated funding system where Michigan has contracted with the local Community Mental Health System to assume responsibility for all of these services. The Department sets rates in these contracts for every Medicaid eligible individual covered by the contract. There is significant concern within the advocacy community that the rates are too low, and the Community Mental Health Agencies have not been funded at a realistic level.

Access and Appeals Processes: Individuals should contact their local Community Mental Health Access Center to access these services. If they are denied services, or believe that they have not received an appropriate amount, duration or scope of services, individuals can request a Medicaid Fair Hearing. The Community Mental Health Agencies are required to provide individuals notice of their rights in writing.

Covered Services: In addition to regular Medicaid services, Health Assessments, Psychiatric Evaluations, Psychological Testing, Behavior Management Reviews, Case Managements, Child Therapy, Crisis Intervention, Family Therapy, Uncovered Health Services, Individual Therapy, Medication Administration, Medication Review, Occupational Therapy (Evaluation and Therapy) Occupational Therapy (Evaluation and Therapy), Physical Therapy (Evaluation and Therapy), Professional Treatment Monitoring, Periodic Review of Treatment, Speech, Hearing, and Language (Evaluation and Therapy), Respite, Home Health Care, Mental Health Services, Transportation, Day Programs, Applied Behavioral Services, Assertive Community Treatment, Nursing Home Mental Health Monitoring, Personal Care, Psychosocial Rehabilitation/Club House Programs, Treatment Planning, Community Inclusion and Integration Services, Family Support Ser-

vices, Housing Assistance, Prevention and Consultation Services, Specialized Behavioral Health Services for Children and Adolescents, In Patient Psychiatric Hospitalization, Community Living Supports, Environmental Modifications, Chore Services, Enhanced Pharmacy, Equipment and Supplies, Out-of-Home Non-vocational Habilitation, Personal Emergency Response Systems, Private Duty Nursing, Supportive Employment[2].

Generalized Profile of Individuals Who Qualify for this Waiver: Persons with Developmental Disabilities, Individuals and Children with Persistent and Severe Mental Illness, prioritized by severity of need. The system is allegedly no longer allowed to put people with developmental disabilities on a waiting list for services.

Pros: Significant level of flexible services can be provided under this program. The Community Mental Health System has expertise in providing services to individuals with special needs, and this flexible program can provide extensive services in the least restrictive setting.

Cons: A system that is in transition. They need to provide flexible services in a cost effective manner at a time of pent up demand. Community Mental Health System fights change; too many resist best practices proven successful in other parts of the state. As a result, advocates are reluctant to advocate for additional funding when the Community Mental Health Agencies have not proven that they are using their resources effectively, and in a person-centered manner. The agencies are required to deny approval for services if they are already provided by "natural supports", however, families are not legally required to provide these services. Coordination with other Medicaid programs is difficult.

Creative Solution for Some Individuals: Self-Determination Choice Voucher that allows the individuals to act as employer, hire their own staff, or direct the services. It also allows for private/public partnership to address difficult service needs.

C. Home and Community Based Waiver for Elders and Persons with Disabilities

Waiver most commonly known by Elder Law Attorneys, that provides services to elders and individuals with physical disabilities who would require the level of care provided in a nursing facility without waiver services. Beneficiaries must currently be Medicaid approved or Medicaid eligible. Income rules are more flexible than traditional Medicaid. The Department of Community Health contracts with local agencies to administer this program. These contracts are capitated, and the rates are set too low. They place the agencies at financial risk if they have too many high need individuals requesting services. Funding in the future is in question, as Michigan uses reimbursements from Intergovernmental Transfers to fund the State's match for this waiver. The State recently established the Medicaid Trust Fund to address this issue. The states have five years to address the intergovernmental transfer problem. Elder Law Attorneys should articulate their concerns about this waiver, as it needs to be updated, expanded and funded appropriately to effectively address the needs of elders and persons with physical disabilities.

Access and Appeals Processes: To locate the waiver agency in your community, contact the Long Term Care Health Plan Division Plan Management Section at (517) 241-8474. If individuals are denied services, or believe that they have not received an appropriate amount, duration or scope of services individuals can request a Medicaid Fair Hear-

2. A detailed list and description of these services can be found in: Department of Community Mental Health Service Program Manual, Chapter III.

ing. The Contract Agencies are required to provide individuals notice of their rights in writing.

Covered Services: In addition to regular Medicaid services, respite, home-delivered meals, homemaker services, transportation, personal emergency response systems, chore services, private duty nursing, personal care supervision, adult day care, counseling, training, medial supplies and durable medical equipment beyond those covered by regular Medicaid, and environmental services.

Generalized Profile of Individuals Who Qualify for this Waiver: Michigan elders, and people with physical disabilities who do not live in a licensed setting, who would require nursing home services without the waiver services.

Pros: Relaxed income rules for eligibility allows individuals to qualify for long-term care services in a less restrictive setting than a nursing home. An appropriate array of covered services is available.

Cons: A long-term care system that is in transition attempting to address a pent up demand. The contracts with the agencies set the rates too low. This creates an incentive for the agencies to keep the service level low. The services cannot be used in a licensed setting, which is not a nursing home (i.e., home for the aged). Coordination with other Medicaid programs is difficult. Coordination with family natural supports is difficult. The agencies are required to not approve services if they are already provided by "natural supports", however, families are not legally required to provide these services. There are a limited number of slots, and future funding is uncertain. Services must be provided through an agency. When Self-Determination Voucher was recently requested, the Administrative Hearing Officer told the author to "refrain from radical approaches".

D. Coordination with Medicaid State Plan Services & School Based Services

It is important to note that individuals who are on one of these waivers are also eligible for other Medicaid State Plan Services, including adult home help services, home health care, and school based services. Often legal advocacy is required to assure that individuals can maximize the use of these non-waiver services in combination with waiver services.

Author was recently told that there is an increase in requests for Medicaid Fair Hearings to address "turf" issues between Medicaid programs.

E. Long Term Services in The Least Restrictive Setting Olmsted v. LC, 119 S Ct 2176 (1999)

On June 22, 1999, the United States Supreme Court upheld the most important civil rights provision in the American with Disabilities Act (ADA) which requires that individuals with disabilities be offered services in the most appropriate integrated setting. In Olmstead, the Supreme Court affirmed that unjustified segregation and institutionalization of people with disabilities constitutes unlawful discrimination in violation of the ADA. As a result, HCFA has issued several letters to the state Medicaid directors to provide policy guidelines to assist in serving people in the most integrated setting. HCFA has also established a website which will post questions and answers concerning their policies to facilitate compliance with the Olmstead decision at: http://www.hcfa.gov/medicaid/olmstead/olmshome.htm.

This is an important advocacy issue if appealing an amount, duration or scope of Medicaid services if the intent of the waiver is to provide services in a setting other than a nursing home or institution. Some advocates are successfully using the least restrictive setting issue to frame class action lawsuits to address waiting lists for waiver services, and the reasonable promptness requirement in the Medicaid law. However this successful legal approach will be halted if the Supreme Court determines that the ADA is an unconstitutional exercise of congressional authority under the Eleventh and Fourteenth Amendments the question posed in the case of Garrett v University of Alabama at Birmingham Board of Trustees 193 F2d 1214 (CA 11, 1999) cert granted, 120 US 1669 (US April 17, 2000) (No. 991240[3]). Stay tuned for the Courts decision should be released shortly.

Irrespective of the outcome of Garrett, our clients will continue to need long-term care services, and most desire to live in the least restrictive setting for as long as possible. As a result, the National Academy of Elder Law Attorneys' Public Policy Committee has established a Sub-Committee to track what is happening in response to Olmstead and other cases on point. The purpose of the Sub-Committee is to set policy guidelines on the issue, and provide creative legal strategies to address this issue to Elder Law Attorneys. If you are interested in participating on this Sub-Committee please contact me at pdudek@beierhowlett.com.

3. See attachments for additional information on this topic.

Exhibit A
The Eleventh Amendment and the Threat to the Americans with Disabilities Act[4]

Disability Law

The Eleventh Amendment and the Threat to the Americans with Disabilities Act

By Mary Bomgren

Ten years ago, the Americans with Disabilities Act (ADA) was signed into law with broad-reaching protections from discrimination for all people with disabilities in the United States. Title I of the act prohibits discrimination against people with disabilities by public and private employers, Title II prohibits discrimination by state and local governments, and Title III prohibits discrimination by places of public accommodation.

The constitutionality of the protections provided under Titles I and II of the ADA have recently been challenged in several circuits across the country, and the circuits have been mixed in their holdings. Most recently, on September 18, 2000, the Sixth Circuit, heretofore uncommitted on the issue, held that Congress exceeded its authority in abrogating Eleventh Amendment immunity under Title II as it applies to the states in *Popovich v Cuyahoga County Court of Common Pleas, Domestic Relations Division*.[1]

The timeliness of the *Popovich* decision is ironic, for the issue of the constitutionality of Titles I and II of the ADA was argued before the United States Supreme Court on October 11, 2000. This article will explore the constitutional challenge to the ADA that now rests with the highest court in the land.

The challenges to the constitutionality of the ADA in the federal court system have gained impetus since January of 2000, when the Supreme Court held that the federal Age Discrimination Employment Act of 1967 (ADEA) was an unconstitutional exercise of congressional authority under the Eleventh and Fourteenth Amendments.[2] Just as the Court held in *Kimel v Florida Board of Regents* that Congress lacks the authority under the Eleventh and Fourteenth Amendments to impose on states such a broad prohibition on age discrimination through federal legislation such as the ADEA, states are now aggressively asserting that Congress similarly lacks the authority to impose such bans on disability discrimination under the ADA.

Simply stated, the Eleventh Amendment grants immunity to states from private lawsuits brought by its citizens or citizens of another state in federal court.

States have proceeded to challenge the constitutionality of Titles I and II of the ADA on similar Eleventh Amendment arguments, and three such cases have been granted certiorari by the Supreme Court. The first two cases settled before the Court heard arguments in the spring of 2000.[3] In April of 2000, the Supreme Court agreed to hear a third case, which puts forth the state's argument that the Eleventh Amendment defense upheld in *Kimel* as it pertained to the ADEA is also applicable to the ADA. That case, *Garrett v University of Alabama at Birmingham Board of Trustees*,[4] is actually a consolidation of two employment cases under the ADA.

One plaintiff, Patricia Garrett, has sued the University of Alabama on the basis that the university unlawfully discriminated against her on the basis of her breast cancer. The other plaintiff, Milton Ash, has challenged the Alabama Department of Human Services with failure to accommodate his asthma. Both plaintiffs brought claims under the ADA, the Rehabilitation Act of 1973, and the Family Medical Leave Act.

The state of Alabama proffered an Eleventh Amendment defense, claiming immunity to all three federal statutes. The 11th Circuit upheld the claim of immunity under the Family Medical Leave Act but did not find that the Eleventh Amendment protected the state from a private action under either the ADA or the Rehabilitation Act. Thus, barring any last-minute settlement agreements with the plaintiffs and the state of Alabama, *Garrett* soundly put before the U.S. Supreme Court the question of whether the Eleventh Amendment defense that the Court upheld in *Kimel* under the ADEA will also apply to the ADA.

A review of the Eleventh and Fourteenth Amendments sets forth the arguments that states are using to challenge the constitutionality of Titles I and II of the ADA. The

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Eleventh Amendment to the United States Constitution provides that "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the Citizens of another State or Subjects of any Foreign State."[5]

Simply stated, the Eleventh Amendment grants immunity to states from private lawsuits brought by its citizens or citizens of another state in federal court. The Supreme Court has carved out three exceptions where the prohibition against suing a state will not be upheld:

1) where a state has indicated its intention to waive the sovereign immunity granted to it under the Eleventh Amendment and has consented to be sued in federal court

2) where Congress has passed federal legislation that clearly abrogates a state's immunity pursuant to the Fourteenth Amendment

3) in those cases that allege violations of federal law against individual state officials seeking only prospective injunctive relief and no damages.[6]

It is the second exception that has most often come into play in defending the constitutional challenge to the ADA.

The Fourteenth Amendment to the Constitution provides substantive rights to individual citizens that may not be compromised by state legislation:

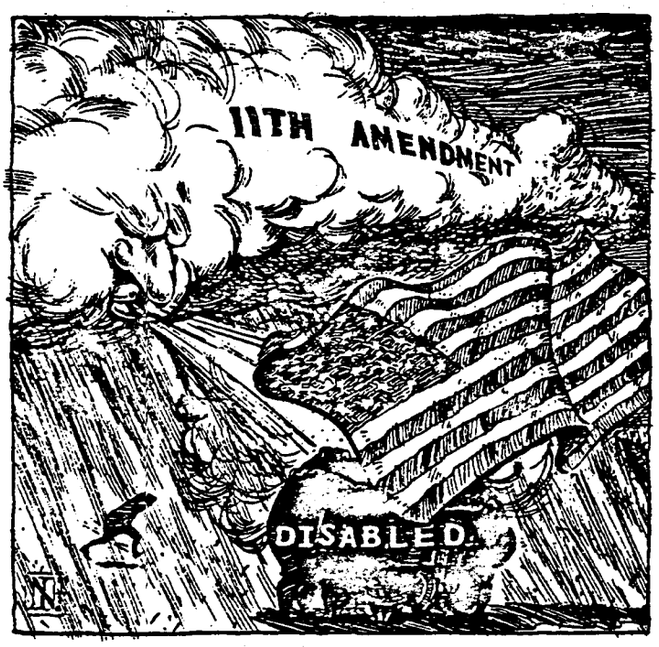
> *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*[7]
>
> *The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*[8] (Emphasis added.)

Thus, Section 5 of the Fourteenth Amendment gives Congress the power to pass federal legislation that remedies or prevents state violations of due process and provides equal protection of rights of all citizens. The Supreme Court has upheld Congress's authority to pass legislation pursuant to the Fourteenth Amendment to address discrimination but has held that such legislation will only be valid if it seeks to redress and prevent constitutional violations of the states and only if the requirements of the statute are congruent and proportionate to the violations that the statute seeks to remedy or prevent.[9]

The determination of whether a state action is unconstitutional is a judicial one. In assessing the validity of various anti-discrimination statutes enacted by Congress, the Supreme Court has used three different standards of review depending on the classification of discrimination. Where a state statute classifies by race, alienage, or national origin, the Court will employ the highest level of review, or "strict scrutiny," and will uphold the challenged actions to be constitutional only if "they are suitably tailored to serve a compelling state interest."[10] In those cases where gender or illegitimacy classifications are used by the state, a "heightened standard of review" has been employed and such a classification will fail "unless it is substantially related to a sufficiently important governmental interest."[11]

The Court in *Cleburne* addressed the issue of state classifications on the basis of mental disability, specifically, mental retardation, and declined to find that persons with mental retardation were a "quasi-suspect class."[12] (It should be noted that the Supreme Court has not addressed the appropriate standard of review for classification by disability in general or by other specific disabilities besides mental retardation.)

As such, the standard of review would not rise to the level of requiring a compelling state interest, as with classifications based on race, alienage, national origin, or



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a substantial relationship to an important governmental interest, as with those classifications based on gender or illegitimacy. Rather, when a state statute classifies by mental retardation, such legislation must only "be rationally related to a legitimate governmental purpose."[13] The Supreme Court would later also apply the "rational relationship" standard to state classifications based on age in *Kimel* in its determination of the constitutionality of the ADEA.[14]

The application of the lowest standard of review, a rational relationship to a legitimate state interest, to state classifications based on mental disability has potentially grave implications for any constitutional challenge to the ADA. States must only successfully assert that the classification in question served a legitimate state interest and that the state action is not completely irrational.

To prevail in the face of any state's Eleventh Amendment defense, the statutory provision being challenged must be held to be appropriate exercises of Congressional authority under the Fourteenth Amendment. It must be shown that Congress passed the ADA to remedy or prevent unconstitutional state discrimination based upon a classification of disability that is irrational and does not serve any legitimate state interest. To do so, examples of such unconstitutional discrimination prior to the 1990 passage of the ADA must be evidenced. In addition, as the Court required in *City of Boerne*, "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[15]

Over 54 million individuals with disabilities living in the United States today will experience a significant setback by any reduction of the protections in the ADA that have finally addressed centuries of discrimination, segregation, and exclusion.

What, then, are the possible outcomes of a decision on the *Garrett* case now before the Supreme Court? If the Court rejects the state of Alabama's Eleventh Amendment defense and holds that the passing of the ADA was a legitimate exercise of Congressional authority under the Fourteenth Amendment, the ADA remains intact.

Even if, however, the Court holds that the Eleventh Amendment grants immunity to the states from suits brought by private citizens under the ADA, it is not a death knell to the entire act. Such a finding would only bar private lawsuits brought by individuals against state employers and state programs and services under Titles I and II of the ADA. The protections against discrimination to persons with disabilities from private and local governmental employers under Title I, to local governmental entities under Title II, and from public accommodations under Title III, would remain intact.

Over 54 million individuals with disabilities living in the United States today[16] will experience a significant setback by any reduction of the protections in the ADA that have finally addressed centuries of discrimination, segregation, and exclusion. The Supreme Court's decision in *Garrett* will provide the final answer. ■

Footnotes

1. 2000 WL 1335555 (CA 6, Ohio).
2. *Kimel v Florida Board of Regents*, 120 S Ct 631 (US Jan 11, 2000).
3. See *Alsbrook v City of Maumelle*, 184 F3d 999 (CA 8, 1999), *cert granted*, 120 S Ct 1003 (US Jan 25, 2000), *cert dismissed*, 120 S Ct 1265 (US Mar 1, 2000) and *Department of Corrections v Dickson*, 120 S Ct 1236 (Feb 23, 2000).
4. 193 F2d 1214 (CA 11, 1999), *cert granted*, 120 US 1669 (US April 17, 2000) (No 99-1240).
5. US Const Amend XI.
6. See *Ex Parte Young*, 209 US 123 (1908).
7. US Const Amend XIV, Sec 1.
8. US Const Amend XIV, Sec 5.
9. *City of Boerne v Flores*, 521 US 507 (1997).
10. *City of Cleburne v Cleburne Living Center*, 473 US 432, 440 (1985).
11. *Id.* at 441.
12. *Id.* at 442.
13. *Id.* at 446.
14. See *Kimel*, 120 S Ct at 646.
15. *City of Boerne*, 521 US 507 at 520.
16. Americans With Disabilities Act—Harris Poll Survey, March 1999, p 33.