THE LEGAL LANDSCAPE: ADVOCACY STRATEGIES REGARDING SERVICES FOR PEOPLE WITH DISABILITIES.

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I. Family Care Lawsuit I – Can provider rates be challenged?

In 2004, some residential providers had residents in the same home from both Family Care pilot counties and legacy-waiver counties. Family Care rates were lower than the legacy waiver rates and the discrepancy was especially large for ID/DD clients. Two providers notified the Milwaukee County MCO that residents from that MCO would be discharged due to insufficient rates. Provider referred residents/guardians to counsel. Counsel met with DD provider groups and prepared lawsuit on behalf of residents.

-Both County MCO and Judge said State DHS must be brought into the case.
-Defendants said that rate disputes could not be the subject of a fair hearing.
-Plaintiffs filed motion for preliminary injunction and Judge asked MCO to keep residents in place if provider could accept existing rates during the litigation.
-Discovery focus - rate-setting process and residential provider financial health.

Nelson v. Milwaukee County, 2006 WL 290510 (E.D. Wis. 2006) motions to dismiss
Bzdawka v. Milwaukee County, 238 F.R.D. 469 (E.D. Wis. 2006) class action motion

Is discrimination between groups of people who all have disabilities actionable?

> "[T]o the extent that plaintiffs allege that defendants are treating them worse than persons with less severe disabilities, they may proceed as such claims allege differential treatment by reason of disability. *See Jackson v. Fort Stanton Hosp. & Training Sch.,* (stating that "[t]he severity of plaintiffs' [disability] is itself a [disability]" which is protected by the ADA and the RA); *see also Messier v. Southbury Training Sch.,* (listing cases in which courts have held that the ADA and the RA prohibit discrimination based on the severity of a disability). *Nelson*, at *5."

Nelson/Bzdawka resulted in court-approved settlement agreement – the MCO promised changes in the residential rate-setting process, and DHS issued a contract interpretation memo saying provider rates could be subject of a fair hearing.

II. Family Care Lawsuit II – Provider rate crisis.

Three MCOs had issued large residential providers rate cuts at the end of 2011. MCOs took the position that the residents and their guardians couldn't do anything about the rate cuts because they were a contract issue between the MCO and the providers. Also, the MCOs told providers they shouldn't talk to residents/guardians about rate issues and shouldn't get involved in any grievances. Counsel's response:

-Advocacy sessions presented in areas of the state with rate disputes.
-Youtube videos on Family Care advocacy techniques.
-Memo about providers' role in Family Care disputes and anti-retaliation laws.
-Group requests for Medicaid fair hearings that were withdrawn later.
-Filed lawsuit against 3 MCOs and State Dept. of Health Services in August 2012.
-Case was dismissed and appealed to the 7th Circuit Court of Appeals.

Amundson v. Wisconsin Dept. of Health Services, 721 F.3d 871 (7th Cir. 2013).

The 7th Circuit agreed with District Court that the case, as pleaded, was properly dismissed, but issued rulings on issues that would be helpful in future cases:

+ District Court said ruling on rate issue would be assessing damages against State:

> "For example, an injunction might require the state to treat developmentally disabled persons no worse than persons with other disabilities—for example, by making the same reductions across the board. That is not what plaintiffs seek (they would prefer to have their 2011 benefits restored), but it would eliminate discrimination. Or a district judge might spell out the minimum housing required by federal law and leave it to Wisconsin to determine how to fulfill its obligations. That compliance with an injunction requiring performance, rather than payment, may turn out to be costly has never been an objection to the command to implement federal law."

+ District Court said intra-disability discrimination was not actionable;

> "If Wisconsin buys the best available care for persons with visual impairments, but pays only for mediocre care for the developmentally disabled, then plaintiffs have a theory of discrimination even though all of them remain in group homes. *Grzan* [earlier 7th Circuit case] thought that "discrimination" requires a comparison to the treatment of someone outside the protected class; *Olmstead* holds otherwise."

- District Court said the integration/threat-of-institutionalization claim was not ripe:

> "None of the plaintiffs has been placed in an institution. Indeed, plaintiffs do not allege that *any* [DD] person in Wisconsin has been moved, involuntarily, from group to institutional care."

Practical outcomes: (1) no huge rate cuts in 2013 or 2014, (2) MCO consolidation, and (3) good Medicaid fair hearing decisions about rate cuts and service reductions.

III. Post-*Amundson* Federal Court Cases

Illinois League of Advocates for Developmentally Disabled v. Illinois Dept. of Human Services, 60 F.Supp.3d 856 (N.D. Ill. 2014). Cited both *Amundson* and *Nelson* for the principle that differential treatment within a class of people who all have disabilities is discrimination but plaintiffs had not shown how they were treated more harshly.

Davis v. Shah, 821 F.3d 231 (2nd Cir. 2016). Individuals who needed orthopedic footwear and stockings were a discrete group under *Olmstead* and *Amundson*.
-Genuine risk of institutionalization is sufficient to state an integration claim.
-State "cannot deny such services only to certain disabled beneficiaries."

Steimel v. Wernert, 823 F.3d 902 (7th Cir. 2016). State of Indiana moved many I/DD clients from uncapped waiver program to one with $16,545 annual cap.
-*Amundson* does not require person to actually become institutionalized.
-Integration right extends to differences between community settings.
-"The plaintiffs seek services that exist and are already provided to others."

Ball v. Kasich, 2017 WL 1102688 (S.D. Ohio - March 23, 2017). 13-year waiting list for I/DD clients. Risk of future institutionalization is sufficient. Court also relied on *Steimel* to apply *Olmstead* principles to people who are capable of participating in the community with appropriate services and supports but are isolated in their homes.

CLIENT RIGHTS IN THE WISCONSIN FAMILY CARE PROGRAM

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I. The Family Care regulations require CMOs and contracted service providers to provide information to clients and guardians about potentially adverse actions.

DHS 10.12 Applicability. This chapter applies to all of the following:
(1) The department and its agents.
(2) County agencies designated by the department to determine financial eligibility for the family care benefit.
(3) All organizations seeking or holding contracts with the department to operate an aging and disability resource center or a care management organization.
(4) All persons applying to receive the family care benefit.
(5) All persons found eligible to receive the family care benefit.
(6) All enrollees in a care management organization.
(7) Certain private pay individuals who may purchase certain services from a care management organization.
(8) Hospitals, nursing homes, **community−based residential facilities, residential care apartment complexes and adult family homes** that are required to provide information to patients, residents and prospective residents and make certain referrals to an aging and disability resource center.

DHS 10.13 Definitions. In this chapter:
(1) "Action" means any of the following:
(a) Any of the following acts taken by an aging and disability resource center or county economic support unit:
1. Denial of eligibility under s. DHS 10.31 (5) or 10.32 (4).
2. Determination of cost sharing requirements under s. DHS 10.34.
3. Determination of entitlement under s. DHS 10.36.

(b) Any of the following acts taken by a care management organization:
1. **The denial or limited authorization of a requested service, including the type or level of service.**
2. **The reduction, suspension, or termination of a previously authorized service.**
3. **The denial, in whole or in part, of payment for a service.**
4. The failure to provide services and support items included in the individualized service plan in a timely manner, as defined in the health and community services contract.
5. The failure to act in a timely manner as specified in subchapter V of this chapter to resolve grievances or appeals.
6. **The development of an individualized service plan that is unacceptable to the member because any of the following apply: a. The plan is contrary to an enrollee's wishes insofar as it requires the enrollee to live in a place that is unacceptable to the enrollee. b. The plan does not provide sufficient care, treatment, or support to meet the enrollee's needs and identified family care outcomes. c. The plan requires the enrollee to accept care, treatment or support items that are unnecessarily restrictive or unwanted by the enrollee.**
7. Termination of the family care benefit or involuntary disenrollment from a CMO.

(12) "Complaint" means any communication made to the department, a resource center, a care management organization **or a service provider** by or on behalf of a client expressing dissatisfaction with any aspect of the operations, activities or behaviors of the department, resource center, care management organization or service provider related to access to or delivery of the family care benefit, regardless of whether the communication requests any remedial action.

DHS 10.51 Client rights. Clients shall have the rights in family care that are outlined in the applicant information materials they receive when contacting a resource center and in the member handbook they receive prior to enrollment in a care management organization. The organization shall review and approve the statement of client rights and responsibilities in each

resource center's applicant information materials and in each CMO's member handbook. Client rights shall, at a minimum, include an explanation of client rights in the following areas:

(1) RIGHTS OF CLIENTS. Clients have the right to all of the following:

(a) **Freedom from unlawful discrimination in applying for or receiving the family care benefit.**

(b) Accuracy and confidentiality of client information.

(c) Prompt eligibility, entitlement and cost−sharing decisions and assistance.

(d) **Access to personal, program and service system information.**

(e) Choice to enroll in a CMO, if eligible, and to disenroll at any time.

(f) **Information about and access to all services of resource centers and CMOs within standards established under this chapter to the extent that the client is eligible for such services.**

(g) **Support for all clients in understanding their rights and responsibilities related to family care, including due process procedures, and in providing their comments about resource centers, CMOs and services, including through grievances, appeals and requests for department review and fair hearings.** Resource centers, CMOs and county agencies under contract with the department shall assist clients to identify all rights to which they are entitled and, if multiple grievance, review or fair hearing mechanisms are available, which mechanism will best meet client needs.

(h) **Support for all clients in the exercise of any rights and available grievance and appeal procedures beyond those specified in this chapter.**

Note: Examples of other rights and procedures available to clients include those afforded to persons who receive treatment or services for developmental disability, mental illness or substance abuse under ch. 51, Stats. and ch. DHS 94, and those afforded to persons who reside in a nursing home, community−based residential facility, adult family home or residential care apartment complex, or who receive services from a home health agency under statutes and rules of those programs.

(2) RIGHTS OF ENROLLEES. Enrollees have the right to all of the following:

(a) Support from the CMO in all of the following:

1. Self−identifying long−term care needs and appropriate family care outcomes.

2. Securing information regarding all services and supports potentially available to the enrollee through the family care benefit.

3. Actively participating in planning individualized services and making reasonable service and provider choices for achieving identified outcomes.

(b) Receipt of services identified in the individualized service plan.

(3) APPLICATION OF OTHER RULES AND REGULATIONS. Nothing in this chapter shall limit or adversely affect the rights afforded to clients in accordance with other state or federal laws or regulations. To the extent that provisions in this chapter differ from provisions affording a client rights under other state or federal laws or regulations, the provision that does most to promote the rights of the client shall be controlling.

DHS 10.52 Required notifications.

(1) NOTIFICATION OF GENERAL CLIENT RIGHTS AND RESPONSIBILITIES. . . .

(2) NOTIFICATION OF ELIGIBILITY OR ENTITLEMENT. . . .

(3) NOTIFICATION OF INTENDED ACTION. Clients shall be given written notice of any intended adverse action at least 10 days prior to the date of the intended action.

(a) Notification shall be provided as follows:

1. By the county agency in every instance in which a client's eligibility or entitlement for family care will be discontinued, terminated, suspended or reduced, or in which the client's maximum cost sharing requirement will be increased.

2. By the CMO in every instance in which the CMO intends to reduce or terminate a service or deny payment for a service.

(b) The notification of intended action shall include an explanation of all the following, as applicable:
1. The action the county agency, resource center or CMO intends to take, including how the action will affect any service that the client currently receives.
2. The reasons for the intended action.
3. Any laws that support the action.
4. The client's right to file a grievance or appeal with the resource center, county agency or CMO, to request a department review and to request a fair hearing.
5. How to file a grievance, or request a department review or a fair hearing. 5m. The circumstances under which expedited resolution of a grievance or appeal is available and how to request it.
6. That if the client files a grievance, he or she has a right to appear in person before the county agency, the resource center or CMO personnel assigned to resolve the grievance.
7. The circumstances under which an enrollee's current services provided through the family care benefit will be continued under s. DHS 10.56 pending the outcome of a grievance, department review or fair hearing.
8. The availability of independent advocacy services and other local organizations that might assist a client in a grievance, department review or fair hearing.
9. That the enrollee may obtain, free of charge, copies of client records relevant to the grievance, department review or fair hearing, and how to obtain the copies.

(4) NOTIFICATION OF DUE PROCESS AND FAIR HEARING RIGHTS. Clients shall be provided timely and adequate written notification of client rights, including the right to a fair hearing in accordance with s. DHS 10.55, an offer of assistance in preparing a written grievance or fair hearing request and information about the availability of advocacy services to assist the client. Resource centers, county agencies and care management organizations shall provide written notification of due process rights, within timelines established in department contracts, in each instance in which:
(a) A county agency makes a determination or redetermination of eligibility for the family care benefit that results in more limited eligibility or entitlement or increased cost sharing for the client.
(b) A CMO requests or the department approves involuntary disenrollment of an enrollee.
(c) **A CMO reduces or discontinues a service or item received by an enrollee without the enrollee's consent.**
(d) **A CMO denies a service or item requested by an enrollee.**
(e) **The client registers any grievance or appeal with** the department, resource center, county agency, CMO or **any contracted service provider**.

DHS 10.57 Cooperation with advocates.

(1) DEFINITIONS. In this section:
(a) "Advocate" means **an individual or organization whom a client has chosen** to assist him or her in articulating the client's preferences, needs and decisions.
(b) "Cooperate" means:
1. To provide any information related to the client's eligibility, entitlement, cost sharing, care planning, care management, services or service providers to the extent that the information is pertinent to matters in which the client has requested the advocate's assistance.
2. **To assure that a client who requests assistance from an advocate is not subject to any form of retribution for doing so.**

(2) COOPERATION WITH ADVOCATES. The department and each resource center and CMO **shall cooperate with any advocate selected by a client.** Nothing in this section allows the unauthorized release of client information or abridges a client's right to confidentiality.

II. The Wisconsin Patients' Rights statute and regulations require the provision of legal rights and information, and also prohibit retaliation.

DHS 94.04 Notification of rights.

(1) Before or upon admission or, in the case of an outpatient, before treatment is begun, the patient shall be notified orally and given a written copy of his or her rights in accordance with s. 51.61 (1) (a), Stats., and this chapter. Oral notification may be accomplished by showing the patient a video about patient rights under s. 51.61, Stats., and this chapter. The guardian of a patient who is incompetent and the parent of a minor patient shall also be notified, if they are a able. Notification is not required before admission or treatment when there is an emergency.

Note: The statute does not make distinctions among types of treatment facilities when it comes to protecting patients' rights. Some rights may be more applicable to patients in inpatient facilities than to patients in less restrictive facilities such as sheltered workshops or outpatient clinics. When informing patients of their rights, facility directors may emphasize those rights that are most applicable to the particular facility, program or services but s. 51.61, Stats., requires notification that other rights exist and may, under some circumstances, apply in a given situation.

(2) Before, upon or at a reasonable time after admission, a patient shall be informed in writing, as required by s. 51.61 (1) (w), Stats., of any liability that the patient or any of the patient's relatives may have for the cost of the patient's care and treatment and of the right to receive information about charges for care and treatment services.

(3) **Patients who receive services for an extended period of time shall be orally re−notified of their rights at least annually and be given another copy of their rights in writing if they request a copy or if there has been a statutory change in any of their rights since the time of their admission.**

(4) If a patient is unable to understand the notification of rights, written and oral notification shall be made to the parent or guardian, if available, at the time of the patient's admission or, in the case of an outpatient, before treatment is begun, and to the patient when the patient is able to understand.

(5) All notification of rights, both oral and written, shall be in language understood by the patient, including sign language, foreign language or simplified language when that is necessary. A simplified, printed version of patients rights shall be conspicuously posted in each patient area.

DHS 94.06 Assistance in the exercise of rights.

(1) Each service provider shall assist patients in the exercise of all rights specified under ch. 51, Stats., and this chapter.

(2) No patient may be required to waive any of his or her rights under ch. 51, Stats., or this chapter as a condition of admission or receipt of treatment and services.

DHS 94.28 Right to file grievances.

(1) A patient or a person acting on behalf of a patient may file a grievance under s. DHS 94.29 procedures with the administrator of a facility **or other service provider** or with a staff member of the facility or other service provider **without fear of reprisal** and may communicate, subject to s. 51.61 (1) (p), Stats., with any public official **or any other person without fear of reprisal.**

(2) **No person may intentionally retaliate or discriminate against any patient, person acting on behalf of a patient or employee for contacting or providing information to any official or to an employee of any state protection and advocacy agency, or for initiating, participating in or testifying in a grievance procedure or in any action for any remedy authorized by law.**

(3) No person may deprive a patient of the ability to seek redress for alleged violations of his or her rights by unreasonably precluding the patient from using the grievance procedure established under s. DHS 94.29 or from communicating, subject to any valid telephone or

visitor restriction under s. DHS 94.05, with a court, government official, grievance investigator or staff member of a protection and advocacy agency or with legal counsel.

Wis. Stat. §51.61(5)(d)

No person may intentionally retaliate or discriminate against any patient or employee for contacting or providing information to any official or to an employee of any state protection and advocacy agency, or for initiating, participating in, or testifying in a grievance procedure or in an action for any remedy authorized under this section. Whoever violates this paragraph may be fined not more than $1,000 or imprisoned for not more than 6 months or both.

Wis. Stat. §51.61(7)(m)

Whoever intentionally deprives a patient of the ability to seek redress for the alleged violation of his or her rights under this section by unreasonably precluding the patient from doing any of the following may be fined not more than $1,000 or imprisoned for not more than 6 months or both:

(a) Using the grievance procedure specified in sub. (5).

(b) Communicating, subject to sub. (1)(p), with a court, government official or staff member of the protection and advocacy agency that is designated under s. 51.62 or with legal counsel.

III. Professional ethics codes may also require the provision of information about potentially adverse actions.

Code of Ethics of the National Association of Social Workers (revised 2008)

Ethical Principle: Social workers challenge social injustice.
Social workers pursue social change, particularly with and on behalf of vulnerable and oppressed individuals and groups of people. Social workers' social change efforts are focused primarily on issues of poverty, unemployment, discrimination, and other forms of social injustice. These activities seek to promote sensitivity to and knowledge about oppression and cultural and ethnic diversity. Social workers strive to ensure access to needed information, services, and resources; equality of opportunity; and meaningful participation in decision making for all people.

Ethical Standards Some of the standards that follow are enforceable guidelines for professional conduct, and some are aspirational. The extent to which each standard is enforceable is a matter of professional judgment to be exercised by those responsible for reviewing alleged violations of ethical standards.

1.01 Commitment to Clients

Social workers' primary responsibility is to promote the well-being of clients. In general, clients' interests are primary. However, social workers' responsibility to the larger society or specific legal obligations may on limited occasions supersede the loyalty owed clients, and clients should be so advised. (Examples include when a social worker is required by law to report that a client has abused a child or has threatened to harm self or others.)

3.09(d) Commitments to Employers

Social workers should not allow an employing organization's policies, procedures, regulations, or administrative orders to interfere with their ethical practice of social work. Social workers should take reasonable steps to ensure that their employing organizations' practices are consistent with the *NASW Code of Ethics*.

4.02 Discrimination

Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical disability.