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Litigation for Change: Anatomy of the NH Mental Health Class Action

By: **Kristen Senz**

In the two years since the Disabilities Rights Center filed a class action lawsuit against the state, many millions of documents and dollars have changed hands, and major improvements to New Hampshire's mental health system are now on the way.

Amidst a rapidly changing political landscape, litigation forced the hand of legislation, as the NH House of Representatives last month approved funding for the first part of the \$30 million settlement agreement in the DRC's case, *Amanda D. et al v. Hassan*.

Due to the rarity of class actions in New Hampshire and the involvement of both public interest and public sector parties, as well as private law firms, Bar News decided to take a closer look at this case, which not only outpaced the decade-long MTBE case in the sheer volume of discovery, but also required the biggest transfer ever of sensitive state documents to privately owned servers.

Originally filed in February 2012 as *Lynn E. et al v. Lynch*, the lawsuit accused the state of violating the federal Americans with Disabilities Act by unnecessarily institutionalizing people at New Hampshire Hospital and the Glenclyff Home. The US Department of Justice helped fuel the plaintiffs' case after its independent investigation found severe deficiencies in the state's system, which was once held up as a national model.

The state in 2008 released a 10-year plan to improve mental health care, but subsequent funding cuts slowed implementation. Thousands of people in crisis were cycling in and out of New Hampshire Hospital, as well as courthouses, jails, emergency rooms and homeless shelters across the state. The 10 community mental health centers, which contract with the state to provide care under Medicaid, were closing programs as funding dried up, leaving most of their patients with nowhere to turn as they couldn't afford private care. Many of these patients contacted the DRC, asking what could be done to prevent institutionalization and improve community-based services.



NH Attorney General's Office Chief of Staff Anne Edwards (left) stops for a photo at the State House with Amy Messer, legal director at the Disabilities Rights Center. The two were opposing lead counsel in the mental health class action lawsuit that recently settled after two years.

The Class

The six named plaintiffs, one of whom died before the case was settled, were New Hampshire residents who had been admitted multiple times to the state-run NH Hospital and/or the Glenclyff Home, a facility in Benton, NH, for adults with mental health conditions and developmental disabilities. Some of them spoke out in public, urging support for systemic change.

Amy Messer, legal director at the DRC, said obtaining certification for the plaintiffs' representative class "was really critical to ensure that not just individual named plaintiffs but everybody in their circumstances would be served through a community-based system."

The state, represented by the Attorney General's Office and attorneys from Sheehan Phinney Bass + Green, fought hard against class certification, arguing that some patients require institutional care and would therefore not be part of the class. Co-lead counsel John-Mark Turner of Sheehan Phinney said the class issue "further complicated the case, which was one reason we decided to fight it." Similar systems challenges have been fought and won on behalf of individual plaintiffs, said Anne Edwards, chief of staff at the Attorney General's Office and lead counsel for the state.

The DRC filed its first motion for class certification in March 2012. The state immediately moved to strike, requesting a stay of six months for discovery.

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"We exchanged and reviewed hundreds of thousands of pages of documents on class certification alone," said Messer.

In what was fast becoming one of the biggest cases in the DRC's history, the legal advocacy group also hired six non-lawyer experts to examine various aspects of the state's mental health system.

US District Court Judge Steven McAuliffe had several criteria to consider when deciding whether to certify the class, including whether the lawyers involved were qualified and had sufficient resources to conduct class-action litigation. "It's pretty significant," said co-lead plaintiffs' attorney Dan Will of Devine Millimet. "And that's before you get into anything on the merits."

The Law

Amanda D. et al v. Hassan hinged on the US Supreme Court's 1999 decision in *Olmstead*, which states that people suffering from mental illness have a right to receive treatment in their communities when "the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." The decision clarified that segregation through mental health treatment in unnecessarily restrictive settings qualifies as discrimination under the ADA.

The state's defense was that instituting the enhanced community-based care the plaintiffs were seeking would "fundamentally alter" the nature of the state's mental health services and programs (28 CFR § 35.130(b)(7) (1998)). The underlying federal regulation states that if a government entity can demonstrate that increased integration of people with disabilities would result in a fundamental alteration of services, the government could not be forced to implement the less restrictive policies and procedures. In *Olmstead*, the US Supreme Court recites the regulation "with the caveat that we do not here determine [its] validity."

Olmstead has served as the backdrop for similar civil rights cases around the country, many of which have ended in settlement. Over the past five years, the US Department of Justice has stepped-up its enforcement, conducting independent investigations and joining forces with plaintiffs, as it did in New Hampshire when it became an intervener in the case. John Kacavas, US Attorney for the District of New Hampshire, said the increased enforcement was a direct result of new leadership in the civil rights division at the DOJ.

Due to the complex factual and legal issues in the case, both sides sought litigation support from private firms. The state hired Sheehan Phinney; Devine Millimet, without the expectation of payment, agreed to assist the DRC, starting in 2010. The DRC also received support from two advocacy groups, the Bazelon Center for Mental Health Law in Washington, DC, and the Center for Public Representation, based in Newton, Mass. Dozens of lawyers, from New Hampshire and elsewhere, worked on the case.

There was some disappointment, on both sides, that the case didn't make it to trial.

"We were about to get into the fun stuff," said Turner, of Sheehan Phinney. "There were some good arguments, and it's an interesting area of the law."

Will, of Devine Millimet, said that through working on the case and spending time with the plaintiffs, he gained a better understanding of people who suffer from mental illness. "They are people who have a lot to offer and also have a lot of need, and they're often overlooked," he said, adding: "This is not part of our daily routine, and as a lawyer, professionally, it's incredibly rewarding to be able to be part of something like this. It's inspiring."

Discovery on a Different Scale

"Inspiring" was not a word any of the lawyers who worked on the case used to describe the long process of electronic discovery.

Imagine a football field filled with rows of banker's boxes, stacked 11 high. That's the analogy one IT expert used to describe the immense volume of electronic data produced in the course of litigating *Amanda D. et al v. Hassan*.

"Terabytes" was what we were using to describe it, and that was the first time we had heard state documents described that way," said Edwards, of the NH Attorney General's Office.

The plaintiffs and the United States sought extensive discovery, with requests covering New Hampshire's mental health and long-term care institutions, as well as information regarding community mental health services, homelessness, housing, Medicaid, and budget and financial information. Messer, of the DRC, said the broad scope of discovery was essential to showing that people wanted community-based services and could receive them, without a fundamental alteration of the state's system. The defense viewed the discovery requests differently. "Their strategy was to ask for everything under the sun," Turner said.

It took more than a year for the parties to decide how electronic discovery would be collected, exchanged, stored and searched.

There was so much data that it could not be stored on state servers. The in-house litigation support specialist at Sheehan Phinney, Charlie Stewart, worked with software vendors to craft a custom, \$80,000 software program capable of indexing, tagging and searching the vast collection of documents.

State technical experts worked with the IT staff at Sheehan Phinney to transfer the documents from state servers to new servers at the firm's Manchester offices, where they will remain until the case is dismissed. It was the first

time a collection of sensitive state documents – hundreds of millions of pages of emails, patient notes, treatment plans, Medicaid records and much more – has ever left state control.

“It took months of the two IT staffs working together to figure out how to move them,” Edwards said, “and we could not make a mistake, because these are people’s mental health records.”

The US Department of Justice assisted the DRC and litigation partner Devine Millimet with storing and searching the electronic discovery, Messer said.

The plaintiffs identified more than 200 custodians and made more than 200 requests for production and interrogatories. It was impossible for every electronic document to be reviewed, so the state relied on a claw-back provision in the electronic discovery stipulation and good faith on both sides to ensure no privileged information was released to the plaintiffs.

The files of former governor John Lynch and Gov. Maggie Hassan had to be stored on separate servers due to the special confidentiality rules related to executive privilege. Those files “could only be searched in certain ways by certain people,” Turner said.

“It was a very confusing process,” said Edwards, who explained that executive privilege is often challenged in litigation with the state. “We don’t really have a good Supreme Court case on executive privilege in New Hampshire.”

Not all of the discovery material in the mental health case was electronic. There were hundreds of boxes of paper files from the NH Department of Health and Human Services, New Hampshire Hospital and the Glenclyff Home. Those boxes were crammed into rooms at NHH, where a group of attorneys pored over them for weeks, using Post-It notes to categorize them, and scanning them into the monstrous discovery database.

“Every single piece of paper got attorney’s eyes on it,” Turner said.

Reaching Agreement

The federal court granted the plaintiffs’ highly contested motion for class certification in September 2013, but by that time, a new round of settlement negotiations had already begun. After the Legislature added \$24 million back into the state budget for mental health services last summer, the phone rang in NH Attorney General Joseph Foster’s office.

“US Attorney John Kacavas reached out to Attorney General Foster,” Edwards said. “He was not interested in watching people in his office and people in our office go to trial in a case where a settlement would have been better for everyone.”

New Hampshire had a new governor, political control had shifted in the State House, and the cost of litigation was mounting. Kacavas said he made the phone call, but that “the credit, in my view, goes to [Attorney General] Joe Foster’s office and the governor’s office.” The parties were newly motivated, “not just to resolve it from a litigation standpoint, but to start to remediate the problem of a lack of community resources for mental health care,” he said.

Accepted by the court in February, the settlement agreement, which requires the state and local mental health centers to institute a variety of community-based treatment programs, is contingent on legislative appropriations. The NH House last month approved a combination of state and federal funds totaling about \$11 million for the remainder of the current biennium. The agreement also requires the state to pay plaintiffs’ attorneys fees totaling \$2.4 million and to pay the DRC and an expert monitor to ensure state compliance over the next four years.

“I think the important thing is what’s not in the agreement,” said Edwards. The state fought against the reduction of funding for acute care and reducing the number of dedicated mental health emergency beds. “Closing beds has been a requirement of DOJ settlements in other states,” she said.

Although attorneys for the state believed they had some strong arguments, Edwards said, state officials wanted to avoid a settlement agreement that wouldn’t suit New Hampshire, which could have been the result, if the state lost at trial. “We knew we had vulnerabilities with the state system, because there had been cuts,” she said. “We were concerned that the outcome be New Hampshire-centric, not a cookie-cutter settlement.”

Both sides agreed that the New Hampshire attorneys who worked on the case were as collegial as possible, given the complex circumstances and what was at stake, but out-of-state lawyers who stepped in brought out-of-state practices with them, changing the tone.

The so-called “New Hampshire way” of practicing law involves a degree of collegiality aimed at moving the case along, rather than strategies that seek tactical advantage. While many attorneys here have found a balance that enables this type of practice – and not at the expense of vigorous advocacy for the client – lawyers in other places do things differently. That became apparent in this case, Edwards said.

“We were trying to do this in the New Hampshire fashion,” she said. “Sometimes it sounds a little hokey to say that, but it really is true.”

A Big Step

Although the litigation is over for now, in many ways the settlement marks the beginning of a new phase of the case – implementation and monitoring compliance.

The complexities of health care administration in New Hampshire, compounded by the move to managed care, the rollout of the Affordable Care Act and the debate over Medicaid expansion, led to many major benchmarks in the settlement agreement being pushed out to 2015 and 2016, though some changes must be complete by the end of June.

The settlement agreement will cost the state more than \$30 million between now and the end of the next biennium, but the enhancement of community-based mental health services, which are expected to keep people in their homes and out of institutions, has the potential for substantial cost savings over the long-term.

“People don’t necessarily realize the cost of the system when it’s in dysfunction,” Dan Will said. “It’s a big cost.”

Messer and Edwards said they want to hear from people within the mental health system as implementation occurs, and the DRC will set up a mechanism for collecting feedback.

After four years of implementation, if the state can show that has been in compliance with the settlement agreement for a full year, it can petition the court to dismiss the case. Despite the work that lies ahead, Kacavas said, it’s gratifying to see a plan in place that will improve conditions for people suffering with severe mental illness in New Hampshire.

“It’s a first step, but it’s a big first step,” he said.



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