NASDDDS

PERSPECTIVES

Serving the Nation's DD Community for More Than 25 Years...

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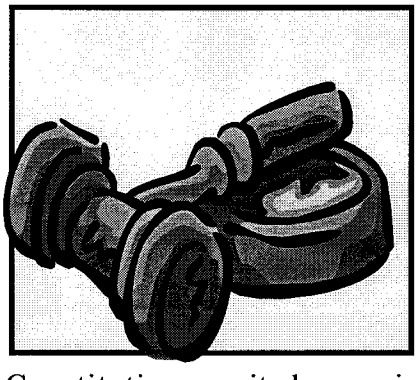
Supreme Court Bans Death Penalty for Convicts With Mental Retardation

In a landmark 6-3 decision, the Supreme Court last month ruled the execution of convicted murderers with mental retardation unconstitutional. The court's majority opinion in ***Atkins v. Virginia***, a case involving a Virginia man diagnosed with mental retardation and sentenced to death for fatally shooting a man, found that applying the death penalty to someone with mental retardation constitutes "cruel and unusual punishment" and therefore violates the Eighth Amendment to the Constitution.



The high court last ruled on this issue in 1988 when it determined by a 5-4 vote, in a majority opinion written by Justice Sandra Day O'Connor, that "there is insufficient evidence of a national consensus" that applying the death penalty to individuals with mental retardation offends national standards of decency. Justice O'Connor, who proved to be a pivotal vote in the Atkins case, stated in her 1988 opinion that the court must examine state laws to assess whether national standards of decency have been violated. At the time of the ruling, only two of the 38 states that allowed the death penalty prohibited its application to individuals with mental retardation. That number has now increased to eighteen states, a factor which the majority opinion in the Atkins case cited as a significant reason for the decision.

The court's ruling gives significant latitude to states to determine standards for mental retardation. The majority opinion contains no guidelines for the creation of such standards. Although the opinion does generally support the qualifications used by the eighteen states that already except those with mental retardation from the death penalty, those qualifications differ significantly from state to state. As a result, legal experts anticipate a series of battles in state legislatures over the definition of mental retardation.

FMI: To read the majority opinion or the dissenting opinions, go to http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=00-8452&friend=washingtonpost.

- Inside This Issue -

HHS Issues Patient's Rights for Medicaid Recipients

Health and Human Services (HHS) Secretary Tommy G. Thompson has issued a final regulation which he says would give Medicaid beneficiaries enrolled in managed care plans the same types of protection that participants in private plans would receive under patient rights' legislation now under consideration in Congress. The regulation, which builds on protections for Medicaid beneficiaries that were created under the Balanced Budget Act of 1997, guarantees Medicaid beneficiaries access to emergency room care, a second opinion when needed, a timely right to appeal adverse coverage decisions and other patient protections. The new regulation leaves decisions about the implementation of these patient protections to states, although it will require states to submit to HHS clear plans for providing beneficiaries with high quality care and to measure the quality of the care that is actually provided. The regulation becomes effective Aug. 13, 2002, and states and health plans must come into full compliance within a year.

FMI: The final regulation was published in the ***Federal Register*** today and will be available online at http://www.hcfa.gov/medicaid/omchmpg.htm.■

HIPAA Readiness Checklist Available From CMSO

The Center for Medicaid and State Operations (CMSO), part of the Centers for Medicare and Medicaid Services (CMS), has created a tool that states and agencies can use to evaluate their progress toward compliance with the Health Insurance Portability and Accountability Act (HIPAA). The "Electronic Data Interchange Transaction: HIPAA Readiness Checklist" was designed by experts to assist states in cataloguing the actions they have taken, and those they plan to take, to become HIPAA compliant. A self-assessment tool, it provides a series of yes or no questions centered on specific benchmarks for compliance.

FMI: For an electronic copy of the checklist, send an e-mail to dberland@nasddds.org with "requesting checklist" in the subject line.■

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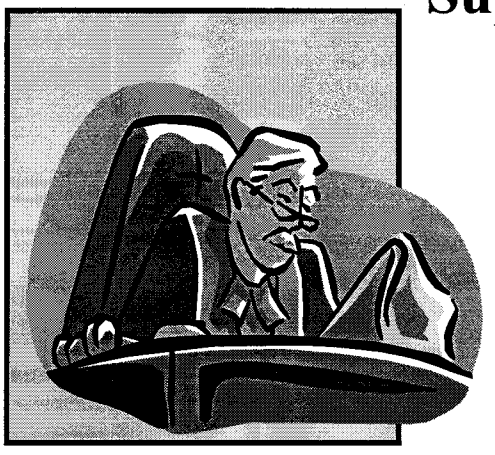
Supreme Court Further Limits ADA



The Supreme Court last month handed down a decision in another case that will affect the scope of the Americans with Disabilities Act (ADA). The court ruled unanimously that an employee with disabilities can be denied a position if the employer feels it would threaten their lives or health. Justice David H. Souter, writing the unanimous court decision, said the U.S. Equal Employment Opportunity Commission, which enforces anti-bias law, has long maintained businesses may reject disabled applicants for jobs that would be a threat to their own health and safety. He added that employers may not use broad "stereotypes" to reject disabled applicants. Their decisions must be based on "a reasonable medical judgment ... of the individual's present ability to safely perform the essential functions of the job."

Mario Echazabal, 56, an employee of an independent contractor at a Chevron refinery in California since 1972, applied for a regular Chevron position in a coker unit and was accepted pending a physical. When the physical revealed liver problems, the job offer was withdrawn, due, Chevron says, to concerns that the coker environment would exacerbate Echazabal's health problems. Echazabal later was diagnosed with chronic hepatitis C. He sued Chevron under the ADA provision that prohibits discrimination against a "qualified individual with a disability." In the 9th U.S. Circuit Court of Appeals, Chevron claimed that Echazabal's condition posed a "direct threat" to the health or safety of people in the workplace, which under the ADA would allow Chevron to deny him the position. The 9th Circuit found for Echazabal, characterizing Chevron's motives as "paternalistic."

The decision is the seventh in the past four years to interpret the job bias portions of the ADA. All seven have resulted in victories for employers and defeats for the workers claiming a disability.

NASMD Unveils Medicaid Web Site

The National Association of State Medicaid Directors (NASMD) and its special project, the Center for Workers with Disabilities, has activated a Web site intended to provide users with an overview of Medicaid Aged, Blind and Disabled Eligibility rules. The Web site also contains state-by-state information, including an overview of Medicaid eligibility rules, standards and methodology and a complete glossary of eligibility lexicon. The site will allow states to compare their Medicaid eligibility policies with the policies of other states.

The state-specific information is stored in searchable database. Users may build queries using an array of search criteria; instructions on using the database search engine are available at the Web site. There also is an array of static tables based on frequently asked eligibility questions received by NASMD staff. NASMD and the Center will be updating the database on an annual basis.

FMI: To view and use the site, go to http://www.masterpiecepublishers.com/eligibility/

NASDDDS Submits Comments to CMS on Self-Directed Service Waivers

The National Association of State Directors of Developmental Disabilities Services (NASDDDS) responded to the Centers for Medicare and Medicaid Services' (CMS) call for comments on the newly released Independence Plus self-directed services waivers with a letter to Thomas Hamilton, Director of the Disabled and Elderly Health Program Group in the Medicaid section of CMS. The letter welcomes CMS' efforts to streamline the process of preparing, submitting and gaining approval of self-directed waiver requests while expressing concern with a number of policies embedded in the new waiver templates which, according to NASDDDS Executive Director Robert Gettings, "will thwart efforts to expand self-directed service opportunities at the state and local level."

The letter expresses concern over the requirement expressed in the explanatory material accompanying the waiver templates that a states use these electronic application formats to request the renewal of any existing HCBS waiver or a research and demonstration program in which self-directed services are to be furnished to at least of a portion of program participants.

According to Gettings, forcing states to use the S/D template in order to renew their existing Section 1915(c) waiver programs is likely to lead some states to either drop self-direction as a program option or carve self-directed services out of their existing waiver programs and set up separate, "boutique" S/D waiver programs instead. If self-directed service options are walled off in a separate program, he says, it will prevent state/local service systems from supporting consumers as they make the gradual transition to increased independence, in the pattern typically followed by the rest of society (i.e., assuming new responsibilities in concert with the development of new skills). Gettings suggests that CMS require states to use the S/D waiver template only when the proportion of total program enrollees that will self-direct at least a portion of the services authorized under their plans of care is expected to exceed a specified threshold level (e.g., 75%).

Gettings also takes issue with language in the templates indicating that individuals residing in foster homes, apartment units or other types of non-congregate living arrangements where control of the property rests with a service agency or an unrelated individual would be ineligible to enroll in a self-determined waiver program. This interpretation, he says, appears to be at odds with CMS' stated intent that "[f]amilies and individuals ... [be granted] "full discretion to manage all of the[ir] plan [of care] or only parts of it." Thus, for example, an individual may reside in an agency controlled group home or apartment while directing his or her own daytime supports. The letter suggests new language that would clearly describe S/D services as intended to help an individual avoid placement in an institution or in "a group living arrangement of greater than four persons."

As Gettings points out, no provision is made in the proposed template for capping expenditures at a level below the average cost of institutional care, an option that CMS has made available to states under the existing Section 1915(c) streamlined waiver application format. Gettings believes that failure to give states the flexibility to target self-directed services to selected portions of the overall target population – including the authority to tailor expenditure caps to the aims of a particular waiver program –will thwart the growth of self-directed services. For this reason, the NASDDDS letter recommends that a provision allowing the requesting state to specify an individual expenditure limit of less than the average per capita cost of institutional services be included in the revised Section 1915(c) self-directed waiver template.

FMI: A copy of the NASDDDS letter to CMS is attached.■

New FMAP Increase Bill Earns Support of NGA

The National Governor's Association (NGA) is supporting yet another legislative attempt to increase the Federal share of Medicaid funding (FMAP). The new bill, sponsored by Senators Susan Collins (R-Maine) and Ben Nelson (D-Nebraska), would increase the FMAP by one percent for all states. Similar provisions were passed by both the House and Senate in versions of an economic stimulus package earlier this year, but were removed from the final version of the bill before President Bush signed it into law. In March, Senator Jay Rockefeller from West Virginia proposed legislation to increase the FMAP by 1.5 percent, but the bill failed to move in the Senate. The chances of this new legislation being passed do not seem much stronger, the NGA conceded, although Michigan Governor and NGA Chairman John Engler (R) told reporters, "I think we've got a shot at this."

FMI: To read the bill or check its status, go to http://thomas.loc.gov/home/thomas.html, and in the "bill number" box enter S2570.■

CMS Creates Office of Operations Management

The Centers for Medicare and Medicaid Services (CMS) has announced the creation of a new Office of Operations Management (OOM). Among other responsibilities, OOM will evaluate and present recommendations on project management alternatives, and planning, leadership, implementation, and policy issues concerning modifications to existing and proposed operating policies to the Deputy Administrator/Chief Operating Officer (COO) of CMS. OOM will also become the central office for CMS activities related to the Health Insurance Portability and Accountability Act (HIPAA), providing education and outreach to the public and internal CMS staff, coordinating a public relations campaign, delivering presentations and speeches on HIPAA, and responding to inquires on HIPAA issues. The new office will also provide technical coordination regarding development of HIPAA tools, including transaction testing. No staff for the new office has been announced.

FMI: The ***Federal Register*** announcement of the new office can be found at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_register&docid=02-14949-filed.■

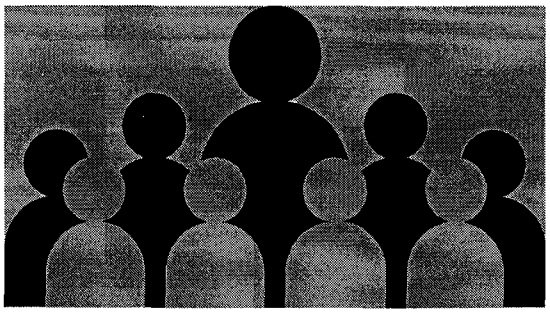
CMSO Announces Creation of Medicaid National Institutional Reimbursement Team

The Center for Medicaid and State Operations (CMSO) last month announced the creation of a new team responsible for the review of all Medicaid institutional reimbursement State plan amendments (IR-SPAs). The Medicaid National Institutional Reimbursement Team (NIRT) will provide the Director of CMSO with recommended action on each Medicaid IR-SPA, and will provide technical assistance to states on Medicaid institutional reimbursement issues. The nine-member team, comprised of individuals from both the CMS central office and regional offices, will focus on assuring consistent and timely application of Medicaid institutional reimbursement policies nationally. The NIRT will institute an electronic Medicaid IR-SPA submission process beginning July 1, 2002.

- *Inside Washington* -

NGA Testifies Before Congress on Medicaid Long-Term Care Costs. Vermont Governor Howard Dean represented the National Governor's Association (NGA) last month in testimony before a Senate Special Committee on Aging. Governor Dean's testimony, available at http://www.nga.org/nga/legislativeUpdate/1,1169,C_ISSUE_BRIEF^D_3940,00.html, focused on the costs of long-term care under the Medicaid program. Expressing concern over increasing costs, the Governor suggested a "new paradigm" in which public policy would shift away from providing institutional care and more towards home based services, and the state and federal partnership for long term care and the Medicaid program would dramatically change. According to Dean, expensive nursing home care is often the first option in the current system. In his testimony, he suggests that Medicaid programs "treat nursing homes and other institutional care as the last option, after all other options have been tried and failed." He argues that Medicaid can "serve many more people with the same funding, and serve them in the setting they prefer, [by] keep[ing] them at home and avoid[ing] institutional costs." Dean further proposes that the federal government take over the financing of all long term care services. He believes that this change could help the states, in partnership with the federal government, manage the costs of long term care while, through flexibility and innovation, shift the paradigm to home and community based services. In return, he suggests, the states would accept responsibility for the Medicaid and health insurance costs for other constituents, especially children. According to Dean, "This new partnership would help all parties. Responsibilities would be clear, and not murky and contradictory as they often are today. Savings in a given arena would devolve to the governmental entity responsible for them. Programs and services would be unified and better coordinated."■

White House Announces New NFI Liaison. The Bush Administration has announced that Troy R. Justesen recently become the Associate Director for Domestic Policy, the key New Freedom Initiative (NFI) position on the White House staff. Justesen will assist the Offices of Domestic Policy and Public Liaison with the President's New Freedom Initiative and other issues important to people with disabilities. He has served as Deputy Executive Director of the President's Commission on Excellence in Special Education, as a policy analyst in the Director's Office of the Office of Special Education Programs at the U.S. Department of Education, and in the Disability Rights Section of the U.S. Department of Justice working on enforcement issues under the Americans with Disabilities Act of 1990. He also worked at the Utah State University affiliated Center for Persons with Disabilities on issues involving children and youth with disabilities, including assistive technology, personnel preparation, and special education. Justesen's new position was most recently held by Jennifer Sheehy. Justesen may be reached at 202-456-5228 or via e-mail at Troy_Justesen@opd.eop.gov.■



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