

OLRS Ombuds Section Investigates Abuse, Neglect, and Rights Violations

OLRS administers an Ombuds program created by state statute to resolve complaints through mediation, conciliation, or negotiation. The Ombuds section investigates complaints about abuse and neglect, and violations of their human, civil, and legal rights.

“While the Ombuds section often gets egregious cases involving one person, Ombuds staff are skilled at finding underlying issues that give rise to the more obvious problems,” remarked Cathy Royster, Supervisor of the Ombuds section. “Ombuds investigations often lead to systemic change that benefits more than one person,” added Royster.

The following case summaries illustrate the OLRs Ombuds section’s advocacy on behalf of individuals with disabilities.

County Board Prompted to File Report on Neglect

An investigation by the OLRs Ombuds section prompted the Wood County Board of Mental Retardation and Developmental Disabilities (WCBMRDD) to file a Major Unusual Incident (MUI) report of neglect on the death of an individual with a disability. The individual resided in a residential facility and died while left unattended in a bathtub.

OLRS Ombuds Adonna Wilson-Baney requested that an MUI report of alleged neglect be filed based on conflicting information in the individual’s program plan and other documentation. The Ombuds requested the latter after reviewing the initial MUI report, which listed the death as unexpected, but that neglect was not suspected. Program

documentation showed that the individual should have been checked every 15 minutes while in the bathtub, but the police report stated that the person appeared to have been dead for 2 hours.

WCBMRDD filed the MUI report on the alleged neglect. The Ohio Department of Health investigated and issued a condition level citation to the agency. The Ombuds investigator also requested that the Ohio Department of Mental Retardation and Developmental Disabilities, Division of Legal and MUI Services conduct an investigation, and is awaiting a response.

Reporting Requirements Enforced; Agency Provides Client Services

Another Ombuds investigation found that a mental health (MH) agency failed to file an MUI report of an allegation of sexual abuse of an individual receiving services from the agency’s psychiatrist. The county MH board and Ohio Department of Mental Health (ODMH) were not notified of the alleged abuse because an MUI was not filed.

OLRS Ombuds Pat Washburn notified the county MH board and ODMH that the agency failed to comply with MUI reporting requirements. As a result, the MH agency was required to correct the failure to report, and to train staff on proper reporting. The Ombuds also negotiated for the MH agency to provide the individual with disabilities with all appropriate services.

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Confidentiality of Records Maintained

Negotiations by the Ombuds section resulted in the right of an individual with a disability to maintain the privacy and confidentiality of his medical records. The individual did not want to release certain information from his neurologist's records to the local MH agency from which he was getting services. The agency threatened to terminate the individual's services based on his refusal to release the information.

The OLRS Ombuds advised the agency that the individual would invoke his due process rights to file a grievance if the agency terminated his services involuntarily, and reminded the agency that the grievance process requires that services be maintained until the grievance and appeal processes are done.

The agency met with the individual and the Ombuds. After reviewing the medical chart and finding little documentation regarding the need for the information, the MH agency agreed to continue providing services and medication without requiring the individual to release information from his records.

Jail Addresses Mental Health Care

The Ombuds section investigated a complaint by an individual who was repeatedly denied medication for her mental illness while in jail.

The OLRS Ombuds requested a review of the situation by the agency providing services to inmates. The MH agency took action to assure the individual received medication for her mental illness.

Facility, State Agencies Address Dietary and Medical Issues at Fairfield Center

Fairfield Center, an intermediate care facility for the mentally retarded (ICF/MR), established a new protocol to address dietary issues in response to an Ombuds report documenting concerns about medical care. The Ombuds report contained findings and recommendations as a result of its investigation into the death of a resident who died of a perforated bowel. The facility had a history of difficulty addressing bowel-related issues, and another resident had died of a bowel obstruction a year before (see box).

The Ombuds report also recommended that the Ohio Departments of Health (ODH) and Mental Retardation and Developmental Disabilities (ODMRDD) conduct investigations of the death, and that ODMRDD review current care and services provided to all Fairfield residents. Both state agencies responded with investigations. ODH reportedly cited the facility. ODMRDD reported to the Ombuds section that the facility has taken several steps to improve medical care and reporting. ■

Fairfield Center Class Action Moves Forward

OLRS attorneys Jane Perry and Kevin Truitt are moving forward with a complaint seeking federal class certification on behalf of residents of Fairfield Center, *D.M. v. Butler County Board of Mental Retardation and Developmental Disabilities*. The lawsuit is aimed at assuring residents' right to live in the community under the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973.

Defendants Butler County Board of Mental Retardation and Developmental Disabilities, which owns the Center, and Empowering People, Inc., the company that manages the Center filed motions in late March. Both argued that neither party is responsible for the residents' placements, and that the issues in the case have already been resolved through the settlement of *Martin v. Strickland*, a separate class action lawsuit brought by OLRS. Perry and Truitt are currently preparing a response to the motions.

OLRS Acknowledges Outgoing Chair, Commissioner

OLRS acknowledged, at the OLRS` Commission's April meeting, the contributions of two outgoing Commissioners, Chair William Crum and William Bauer.

Chair William Crum

Crum, who completed the second of his two terms as Commission Chair in April, was instrumental in leading OLRS to a new level of advocacy service, according to Michael Kirkman, OLRS Executive Director.

“OLRS thanks Bill Crum for his dedicated and passionate commitment to people with disabilities and the mission of Ohio Legal Rights Service. Through his leadership, he has led the agency to enhance and expand its service to Ohioans with disabilities. Bill was also instrumental in ensuring that people with disabilities were appointed to the Commission, and in creating linkage between the Commission and the PAIMI Advisory Council. His legacy will be long-lasting,” said Kirkman.

Under Crum, the Commission firmly asserted its statutory role as OLRS' governing body, and developed policies and by-laws for its governance and activities. In particular, Crum oversaw the development of two important policies: the first, a statutorily required process by which OLRS selects and approves cases for litigation, and for class action consent by the Commission; the second, a policy for handling grievances by OLRS clients.

Crum was also instrumental in directing the agency to engage in strategic planning. Through this planning, OLRS will define the focus of the agency to improve organizational capacity,



William Crum (right) accepts a plaque of appreciation from Michael Kirkman.

to accomplish its goals, and achieve its overall mission.

William Bauer

OLRS also recognized Commissioner William Bauer, who also completed his service to the OLRS Commission in April. Bauer served on the Commission from 2004 - 2007, and facilitated development of an OLRS project to reach out to unserved and underserved individuals with disabilities and their families in southeastern Ohio.

Bauer is a tenured Associate Professor in the Department of Education at Marietta College. He was Chair of the Ohio Governor's Council on People with Disabilities under two governors.

“Bill Bauer's insights into the issues facing people with disabilities have been invaluable in helping the agency identify important gaps. We will miss his contributions,” said Kirkman. ■

EPSDT Class Action - Update

OLRS is engaged in active mediation of *G.D. v. Riley*, a class action lawsuit OLRS filed in 2005 against the Ohio Department of Job and Family Services (ODJFS). OLRS alleges that ODJFS violates federal law because it does not have a system in place that allows Medicaid eligible children to apply for and receive necessary treatment services from Medicaid's Early and Periodic Screening Diagnosis and Treatment (EPSDT) program.

OLRS is meeting regularly with ODJFS staff to try to reach agreement on the issues in the case. The proposed class action includes over a million Ohio children who are eligible for, but being denied the benefits of the EPSDT program.

For background information about EPSDT and OLRS' class action lawsuit, visit OLRS' website at www.olrs.ohio.gov/asp/EPSDT.asp . ■

OLRS Participates on Advisory Committees at Ohio Supreme Court

OLRS staff has been asked by the Ohio Supreme Court to participate on several advisory committees or subcommittees in areas where they have developed broad expertise in the legal areas under consideration.

Supervising Attorney Freddie Weeks is OLRs' representative to the Advisory Committee on Mental Illness and the Courts (ACMIC). This committee is made up of a broad array of people with psychiatric disabilities, their advocates, family groups, lawyers, and law enforcement, and shares information on the various initiatives funded by the Court and others to better serve people with mental illness in the criminal justice and court context, including the special mental health courts now established throughout Ohio.

Managing Attorney Sue Tobin serves on the Juvenile Justice subcommittee of the ACMIC. This subcommittee considers various aspects of children's issues, including ways to close off the school to juvenile court pipeline.

Executive Director Michael Kirkman is involved with the Adult Guardianship Subcommittee of the Advisory Committee on Children, Families & the Courts (AGS). The AGS is currently implementing a grant from the American Bar Association Commission on Law and the Elderly to evaluate the need in Ohio for better monitoring of guardianships, data collection related to guardianships, and standards for non-family (paid or volunteer) guardians. The AGS is an outgrowth of forums held by the Ohio Department of Mental Health and the Ohio Probate Judges Association several years ago. ■

OLRS Advocacy Supports the Right to Live in the Community

OLRS advocates for people's rights and opportunities to participate fully in community life, such as the right to live in the place of their choice. The following cases are examples of individuals fulfilling their desire to live in a home in their community.

Legal Advocacy Assures Individual's Move into the Community

OLRS advocated for an individual living in Tiffin Developmental Center to move to the community, in accordance with his wishes. At an administrative appeal, OLRs attorney Jane Perry successfully argued that he met the level of care necessary to get the Individual Options (IO) waiver that would make it possible for him to live in the community. The Ohio Department of Mental Retardation and Developmental Disabilities (ODMRDD) previously determined that he did not meet the eligibility requirements for an IO waiver.

The individual received a *Martin* IO waiver from his county board of MRDD and moved into an apartment in his community.

OLRS also represented the individual in a Probate Court proceeding, vigorously opposing the county board of MRDD's request that the Probate Court order the guardian not to approve the individual's placement in the community. That proceeding ultimately settled when the county board obtained a *Martin* IO waiver for the client.

Reasonable Accommodation Makes Housing a Reality

OLRS Disability Rights Advocate George Cronheim successfully represented an individual at an informal hearing process of a Metropolitan Housing Authority (MHA), assuring he was granted a reasonable accommodation that enabled him to get a Section 8 Housing Voucher.

At the hearing, the individual appealed the MHA's denial of his request for a reasonable accommodation to attend an orientation session on the Section 8 Housing Voucher program. The MHA ejected the individual from a first orientation session because he fell asleep during a required movie and the MHA director claimed he smelled

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Ohio Supreme Court Rules Defendant with Mental Retardation May Not Be Executed

The Supreme Court of Ohio overturned trial and appellate court decisions that would have subjected Clifton White, an individual with mental retardation, to the death penalty. The trial court previously found that Mr. White's adaptive behavior skills were not sufficiently impaired to establish him as a person with mental retardation protected from execution by the United State Supreme Court's ruling in *Atkins v. Virginia* (2002), 536 U.S. 304. The appeal was brought by the Ohio Public Defender.

OLRS attorney Jane Perry, representing both OLRs and The Arc of Ohio, filed an amicus curiae (friend-of-the-court) brief in August 2006 to urge the Supreme Court to overturn the lower courts' decisions. OLRs and The Arc of Ohio argued that the trial court disregarded the scientifically-based conclusions of mental health professionals, and further applied its own stereotypical assumptions about the ways people with mental retardation behave.

"The trial judge basically concluded that Mr. White did not fit the 'profile' of a person with mental retardation because he had many skills and could do many things," said Perry, commenting on the Supreme Court's ruling. "But the Ohio Supreme Court rejected that stereotypical view and reflected an enlightened view that people with mental retardation cannot and should not be looked at as people without competencies, skills, and talents."

The trial court presumed from testimony of Mr. White's reported popularity in school and his ability to do many activities, that he, therefore, could not be a person with mental retardation sufficient to invoke the constitutional protection of *Atkins*.

The [trial] judge's statement reflects a fundamental misconception about people with mental retardation.

There is simply no such thing as a "profile" of a person who is mentally retarded.

From the Brief of Amicus Curiae, Ohio Legal Rights Service and The Arc of Ohio in State of Ohio v. White

OLRS and The Arc of Ohio, in their brief, informed the Ohio Supreme Court that people with mental retardation can cook, clean, buy clothes, live in apartments or homes in the community, fall in love, work, and pay the rent, as Mr. White did. To apply the trial court's reasoning that these capacities can not possibly be associated with mental retardation, and therefore Mr. White could not be protected under *Atkins*, was an abuse of the court's discretion and a demonstration of its stigmatizing beliefs.

The Ohio Supreme Court agreed, focusing on expert testimony that people with mental retardation, "may look relatively normal in some areas and have significant limitations in other areas." The court concluded that, "[m]ildly retarded persons can play sports, write, hold jobs, and drive ...[i]n determining whether a person is mentally retarded, one must focus on those adaptive skills the person lacks, not on those he possesses." *State v. White*. ■

OLRS Advocacy Supports (continued)

alcohol. The individual had to complete the orientation session in order to be eligible for the voucher.

The individual asserted that, prior to attending the first orientation session, he had been homeless in his car and unable to bathe for two weeks, was on prescribed psychiatric medication which caused drowsiness, and had mood swings

from bipolar disorder. The individual, supported by psychiatrist's and psychologist's written statements, asked for readmission to another orientation session with more time to complete forms and to watch the movie.

At the hearing, the MHA Hearing Officer reversed the denial of the accommodation request and ordered the MHA to proceed with the required orientation process for the individual. ■

OLRS Files Briefs in Cases Brought by Parents for Violations of Children’s Rights

OLRS filed briefs as amicus curiae (friend-of-the-court) in two cases brought by parents against school districts seeking legal redress for violations of their children’s rights.

OLRS Urges Court to Consider Responsibility of School District

In *Doe v. Marlinton Local School District*, OLRs filed an amicus brief in the Ohio Supreme Court urging that a lawsuit against a school district for injuries to a child with a disability be allowed to go forward. A lower court found that the school district was immune from suit under state law.

OLRS attorney Harry B. Keith argued that Ohio has a strong public policy reflected in numerous statutory provisions to prevent abuse and neglect of people with disabilities and children, and urged the Court to consider “the responsibilities of school districts to ensure that children with disabilities are kept free from harm while in school, as well as while going to and from school. These issues affect children with disabilities throughout Ohio.”

OLRS Asks Court to Interpret School District Attorneys’ Fees Provisions Narrowly

Attorney Kevin Truitt, on behalf of OLRs, filed an amicus brief in a case involving a school district suing the family’s special education attorney for attorneys’ fees.

In the case of *Amherst Exempted Village School District Board of Education v. Calabrese, et. al.*, the school district filed a motion for summary judgment on February 18, 2008. OLRs filed its brief on March 12, 2008, asking for a narrow interpretation of the Individuals with Disabilities Education Improvement Act (IDEA) provisions that permit a school district to seek an award of attorneys’ fees from a family or its attorney.

Attorneys’ fees are generally awarded to parents who succeed in an action under the IDEA, but in 2004 Congress added additional provisions which would permit an award of

attorneys’ fees to school districts which succeed and where the parents’ claim was frivolous or brought for an improper purpose.

Congress made it clear in enacting these new provisions that attorneys’ fees should be awarded against parents and their attorneys rarely and only in the most extreme cases. Furthermore, OLRs argued that any expansive interpretation of the attorneys’ fees provision would harm families, who already experience great difficulty in locating available and affordable counsel to pursue claims under the IDEA. ■

OLRS Negotiates for Accommodation in School Transportation Case

OLRS Disability Rights Advocate Monica Burgi negotiated for an accommodation to have a school bus pick up a preschool child in front of her home, rather than at a bus stop half a mile away. The child lives in a mobile home park and the park’s manager refused to allow the school bus to enter the park. Rather, the bus could only stop at the entrance to the park. The child’s disabilities prevented her from safely getting to the bus stop unescorted.

The manager claimed that the bus was tearing up the road and that the child did not have a disability. OLRs investigated and found that the preschool bus was a van-sized bus, and that other larger vehicles went in and out of the park regularly.

OLRS argued that the small size of the bus would not cause damage to the park roads. The family also provided documentation of the child’s disability.

The park agreed to the accommodation request, and the bus now picks the child up in front of her home. ■

OLRS Files Complaint to Enforce Rights of Students who Need Surrogate Parents

The Ohio Department of Education (ODE), Office for Exceptional Children, in response to an OLRs complaint, determined that a community/charter school violated the surrogate parent requirements of the Individuals with Disabilities Education Improvement Act (IDEA), and determined a corrective action plan to address the violations.

Supervising Attorney Kristin Hildebrandt filed the complaint with ODE alleging that the Electronic Classroom of Tomorrow (ECOT), a community/charter school that provides on-line educational services, failed to provide surrogate parents to its students with disabilities who live in a residential treatment center. The IDEA requires the appointment of a surrogate parent for any student with a disability who does not have an involved parent to enforce their special education rights. Most of the students at the residential treatment center are in state custody and their children's services case worker signed their Individualized Education Program (IEP) as the child's parent; a clear conflict of interest and violation of law.

The corrective action plan requires ECOT to have policies and procedures that meet the surrogate requirements, and to provide assurances to ODE that a surrogate will be appointed for all students who need one.

OLRS Asks ODE for Effective Monitoring

OLRS also asked ODE to develop a plan that effectively monitors and enforces compliance of surrogate parent requirements for children in state custody who live outside of their resident school district. OLRs contends that ODE's current system of focused monitoring and review of complaints, such as ECOT, is not adequately addressing a state-wide problem with the appointment of surrogate parents. Students with disabilities who are in foster care are particularly at risk because they often move from one school district to another, are sometimes unserved by any school district, and rarely have an involved parent to file a complaint on their behalf. ■

Accommodations Enable Individuals to Maintain Employment

OLRS administers the federally mandated Client Assistance Program (CAP). CAP provides, in part, assistance to people with disabilities who are having employment related issues. The following cases illustrate the importance of OLRs' advocacy for two workers trying to keep their jobs.

OLRS Represents Individual to Get Vehicle Modifications

OLRS provided legal representation to an individual receiving services from the Bureau of Vocational Rehabilitation (BVR). The individual, who uses a wheelchair, requested approval from BVR for modifications for a new car that he needed to purchase. His current vehicle, which he used to travel to work, was malfunctioning badly. He had missed over five weeks of work while it was in the repair shop.

BVR refused the individual's request because its regulations require that new modifications be performed only after seven years and 70,000 miles of use; in this case only six and one-half years had passed, although the individual's vehicle had over 70,000 miles. The consumer appealed, asking for a waiver of the final one-half year. OLRs Supervising Attorney Ron Smith represented the individual at an informal hearing, but the request was still denied. Smith then successfully negotiated with the general legal counsel of the state VR agency, Ohio Rehabilitation Services Commission (RSC), to waive the final one-half year of waiting, seek immediate bids for modifications, and carry out the modification process without delay. RSC is also changing its regulation to permit modifications after either seven years or 70,000 miles.

OLRS Negotiates for Flexible Work Hours

In another case, OLRs attorney Barbara Corner negotiated for an employer to adjust the work schedule of an individual who is blind and used paratransit to get to work. The paratransit system did not follow a fixed schedule, and because she was having difficulty getting to work on time, the supervisor threatened to fire her.

The employer agreed to adjust the individual's schedule to allow for variations in her arrival time that were due to paratransit. ■

Ohio Disability Vote Coalition Plans Presidential Forum

The Ohio Disability Vote Coalition (ODVC) will hold a presidential forum in Columbus this summer, to celebrate the anniversary of the Americans with Disabilities Act.

The non-partisan event, which will focus strictly on disability policy, will be the only one of its kind in the country, according to Sue Hetrick, ODVC co-chair, and director of advocacy at The Ability Center of Greater Toledo. "This unique opportunity lets voters with disabilities learn firsthand from the candidates themselves what their positions are on disability issues and national policy that affect so many today," said Hetrick. "We are expecting 1,000 people, hopefully most coming from Ohio but likely from other states as well. This is not an Ohio event but rather one with national significance and interest," added Hetrick.

ODVC is partnering with national organizations to produce the event, including their primary partner, the American Association of People with Disabilities (AAPD). AAPD sponsored the first national, cross-disability presidential candidate forum, held in New Hampshire last November, and webcast to a live audience around the country. (To read a transcript of the forum, go to www.aapd.com/News/election/peac2008.php .)

Other partners include the National Council on Independent Living, The Arc of the United States, United Cerebral Palsy, Self Advocates Becoming Empowered, Association of University Centers on Disabilities, Disability Rights, Education and Defense Fund, ADAPT, National Coalition of Mental Health, National Spinal Cord Injury Association, and VSA Arts., Inc.

The event is Saturday, July 26, 2008, from 12:30 p.m. to 3:30 p.m. at Veterans Memorial in Columbus, Ohio. Admission is free, however registration is required. For information, contact Sue Hetrick by email at shetrick@abilitycenter.org . ■

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- ▶ Client Assistance Program (CAP) - Rehabilitation Act of 1973 (PL 93-112) as amended; Office of Special Education and Rehabilitative Services of the United States Department of Education.
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- ▶ Protection & Advocacy for Assistive Technology (PAAT) - Assistive Technology Act of 1998 (PL 105-394); Office of Special Education and Rehabilitative Services of the United States Department of Education.
- ▶ Protection & Advocacy for Individuals with Mental Illness (PAIMI) - Protection and Advocacy for Individuals with Mental Illness Act of 1986 (PL 99-319); Center for Mental Health Services United States Department of Health and Human Services.
- ▶ Protection & Advocacy for Beneficiaries of Social Security (PABSS) - Ticket to Work and Work Incentives Improvement Act of 1999 (PL 106-170).
- ▶ Work Incentives Planning and Assistance (WIPA) program - Office of Employment Support Programs Social Security Administration.
- ▶ Protection & Advocacy for Individual Rights (PAIR) - Rehabilitation Act of 1973 (PL 93-112) as amended; Office of Special Education and Rehabilitative Services of the United States Department of Education.
- ▶ Protection & Advocacy for Individuals with Traumatic Brain Injury (PATBI) - Children's Health Act of 2000 (PL 106-310); Maternal Child and Health Bureau of the United States Department of Health and Human Services.
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