

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS LEAGUE OF ADVOCATES FOR THE)
DEVELOPMENTALLY DISABLED, et al.,)

Plaintiffs,)

-vs-)

ILLINOIS DEPARTMENT OF HUMAN)
SERVICES, et al.,)

Defendants.)

No. 13 C 1300

Chicago, Illinois
May 30, 2013
10:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARVIN E. ASPEN

APPEARANCES:

For the Plaintiffs: SHEFSKY & FROELICH LTD.
111 East Wacker Drive
Chicago, Illinois 60601
BY: MS. JUDITH SCHWARTZ SHERWIN

For the Defendants: ILLINOIS ATTORNEY GENERAL'S OFFICE
100 W. Randolph Street, 13th Floor
Chicago, Illinois 60601
BY: MR. THOMAS A. IOPPOLO
MS. LAURA MARIE RAWSKI
MS. MARNI M. MALOWITZ

COLETTE M. KUEMMETH, CSR, RMR, FCRR
OFFICIAL COURT REPORTER
219 South Dearborn Street
Room 2328A
Chicago, Illinois 60604
(312) 554-8931

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1 (Proceedings heard in open court:)

2 THE COURT: Good morning. We're here on the
3 plaintiff's motion to extend the TRO that Judge Castillo
4 entered, and there's also a motion regarding the time to file
5 the answer.

6 Those are the two matters before us?

7 MS. MALOWITZ: Your Honor, if I may correct you,
8 there was no TRO entered last week. The defendants merely
9 agreed that they would stipulate.

10 THE COURT: I'm sorry. You're absolutely correct.
11 There was an agreement.

12 MS. SHERWIN: And if I could just respond, we are
13 here to extend the order that was entered last week, whatever
14 the character of that order was.

15 THE COURT: Yes, okay. You're both correct.

16 MS. SHERWIN: That's unusual.

17 THE COURT: Yes. That's the only really happy
18 event we're going to have. Okay.

19 MS. SHERWIN: Your Honor, with respect to the
20 motion that was filed requesting more time, I've advised
21 Ms. Malowitz we have no objection. So unless the Court has
22 an objection, we have no objection.

23 THE COURT: You mean to file the answer?

24 MS. SHERWIN: Yes.

25 THE COURT: All right. Which is 20 days after the

1 ruling on the preliminary injunction, is that correct?

2 MS. MALOWITZ: That's correct, your Honor.

3 THE COURT: All right. That motion will be
4 allowed.

5 Okay. Let's deal with the emergency TRO. I've
6 looked at all your papers, and if the plaintiff wants to
7 address the issue orally, relatively briefly.

8 MS. SHERWIN: Good morning, your Honor. Judith
9 Sherwin on behalf of the plaintiffs.

10 Your Honor, I will be brief. We believe that this
11 is a -- I don't want to rehash what has already been sent to
12 you. I think that the clearest point of the argument is
13 contained in our reply brief in terms of what is at stake
14 here. The federal question which we raised in the lawsuit
15 has to do with the services to which developmental disability
16 patients in the State of Illinois are entitled under federal
17 law and under state law with respect to Medicaid rules and
18 regulations and Medicaid state law.

19 We brought to your attention in our reply brief an
20 incident which took place on Sunday night, this past Sunday
21 night over Memorial Day weekend, which we believe illustrates
22 both the danger to the residents, which we pointed out in our
23 initial pleading on the motion for temporary restraining
24 order, and clearly sets before this Court the federal
25 question, which is the issue that we raise here; namely, the

1 two persons involved in the incident that took place on
2 Sunday night ended up in a dangerous situation which required
3 one of them to be hospitalized and the other one almost
4 arrested, because the services that were available to them in
5 the Murray Developmental Center, which is only one of the
6 state-operated developmental centers on which we have applied
7 to this Court for relief, but it is the place where the State
8 is currently acting to remove residents, we believe that the
9 services to which they are entitled and which they were
10 receiving at Murray would have prevented any sort of incident
11 like this from occurring that occurred on Sunday night.

12 And the services which I would like to identify,
13 among others, are the services to be evaluated properly, to
14 be placed properly, and once they're in their new placement,
15 wherever it is, to receive the equivalent services that
16 provide for their safe care and continued safety in their new
17 placement. And we believe that that was deprived to them by
18 the process, the hasty process which has been in place since
19 the beginning of May.

20 Your Honor, when we filed this lawsuit --

21 THE COURT: What is the type of non-hasty process
22 which --

23 MS. SHERWIN: Yes. Your Honor, the Murray facility
24 has in place and has had in place for many years something
25 called a standard operating procedure No. 181. It is

1 attached to our original motion for emergency TRO. And that
2 process is very detailed and very careful in terms of how
3 people are placed into the community.

4 That process has not been followed. We have
5 submitted 14 affidavits of staff people who are quite
6 familiar with the process, who have been concerned because
7 the process hasn't been followed, and, indeed, have predicted
8 the kind of situation that occurred on Sunday night. They
9 have been -- the staff at Murray have come forward, I believe
10 at great jeopardy to themselves and with great worry, but
11 because of their commitment to their residents and their
12 commitment to their profession, they have come through with
13 these affidavits where they indicate that the process is
14 completely wrong, that they're being cut out of the process,
15 their concerns are being overlooked, and that it is extremely
16 difficult --

17 THE COURT: Okay. Many of these --

18 MS. SHERWIN: -- to protect the residents.

19 THE COURT: Many of these issues we're going to
20 deal with, I assume, in the preliminary injunction.

21 MS. SHERWIN: Absolutely, your Honor.

22 THE COURT: So you don't have to go into that kind
23 of detail at this point.

24 MS. SHERWIN: I understand. It's just the
25 emergency that we have right now, because moving 40 to 50

1 residents out of this facility, counsel has filed a reply
2 saying oh, no, it's not the end of May, it's now going to be
3 the end of June; well, that's almost as bad. That requires
4 moving almost two people out every day, going through a
5 process that does not follow the facility's procedure, that
6 cuts the staff out, and that does not provide the protection
7 necessary.

8 THE COURT: Is the preliminary injunction fully
9 briefed?

10 MS. SHERWIN: Yes, it is, your Honor. It's been
11 fully briefed since April 18th. These issues that have
12 developed since May 1st, May 5th, are not necessarily
13 involved in there, but I think they certainly could be added
14 to the preliminary injunction hearing.

15 THE COURT: Okay. And are you asking for oral
16 argument on your preliminary injunction?

17 MS. SHERWIN: Yes, we are. And I think an
18 evidentiary hearing would be useful as well, your Honor.

19 THE COURT: All right. Let me deal with that very
20 quickly. Okay?

21 Fine. We will have both oral argument and an
22 evidentiary hearing; however, however, unless there are any
23 key witnesses whose very presence is essential to your
24 presentation, I want you to submit it by affidavit. All
25 right?

1 MS. SHERWIN: Be happy to do that. We have a
2 number of affidavits.

3 THE COURT: As a matter of fact, submit all your
4 witnesses by affidavit, have them available, and you can
5 cross-examine -- the State can cross-examine.

6 And the same with your witnesses. Okay?

7 MS. SHERWIN: Cross-examine by affidavit, your
8 Honor?

9 THE COURT: No, no, no.

10 MS. SHERWIN: Okay.

11 THE COURT: We'll have the direct testimony by
12 affidavit.

13 MS. SHERWIN: Oh, okay. I'm sorry, your Honor.

14 THE COURT: Cross-examine and redirect in the
15 traditional manner.

16 MS. SHERWIN: Yes, okay. That's fine. That's
17 good.

18 THE COURT: Okay? And the same with the
19 Government's witnesses. We're going to do it efficiently,
20 succinctly, and you'll get everything that you want.

21 In addition to that, I want you to meet within at
22 least 20 days before a hearing date and, No. 1, suggest a
23 mutually convenient date for a hearing; and No. 2, I want you
24 to prepare an agreed statement of facts, and I want no
25 evidence presented on matters to which you have agreed.

1 Okay. Now that we've had the little detour, is
2 there anything you have to say before I ask the State to
3 respond?

4 MS. SHERWIN: No, your Honor. I assume I'll get a
5 chance to reply?

6 THE COURT: Yes.

7 MS. SHERWIN: Or at least I hope I will. Thank you
8 very much.

9 MS. MALOWITZ: Good morning, your Honor.

10 THE COURT: Good morning.

11 MS. MALOWITZ: Marni Malowitz on behalf of the
12 State defendants.

13 I'd like to address a couple points brought up by
14 the plaintiffs. First, there was an incident on Sunday,
15 which was unfortunate, in which one individual attacked
16 another. Fortunately no one was seriously hurt. But I would
17 like to point out that at Murray center these people have
18 very, very serious if not profound developmental
19 disabilities, mental disabilities. In the past year at
20 Murray there have been 65 incidents of patient-on-patient
21 violence, two of which have resulted in broken bones and
22 fractures that required treatment.

23 It's a very unfortunate thing, it's something that
24 needs to be addressed with staffing and has been addressed
25 with staffing. It's something that's taken into account in

1 developing a person's person-centered plan which is then used
2 to find a community provider to place that individual into
3 the community.

4 So in other words, the State professionals who are
5 entitled to deference have the opportunity to review a
6 record, a person's record, and to ensure that if that person
7 has issues with violence, their community placement takes
8 that into account and they're given additional staffing as
9 needed.

10 But to address the merits of this issue, I'd like
11 to make three main points. One is standing. No class has
12 been certified in this case. Plaintiffs are the Murray
13 Parents Association, the guardians of several private wards,
14 and ILAD, which is basically a group consisting of the
15 various parent associations of the various SODCs which are
16 the state-operated developmental centers throughout the
17 State.

18 What plaintiffs are asking for is the wards of the
19 Office of the State Guardian, who they do not represent,
20 should be enjoined from transferring where they have been
21 evaluated by professionals, and where their guardian, legally
22 appointed by the State of Illinois, the Office of the State
23 Guardian, has consented to the transfer. These individuals
24 have the right to transfer when they have been found suitable
25 for these homes and they have consent under Olmstead and

1 under the ADA.

2 Which sort of leads me into my next point, which is
3 essentially that plaintiffs have no likelihood of success on
4 the merits of their claims. Plaintiffs raise that they
5 believe they have rights redressible here under State
6 Medicaid-related laws. As your Honor knows, those claims are
7 barred by the Eleventh Amendment. There are only three
8 statutes that are at issue here that are properly before the
9 Court. One is the Medicaid Act in the federal sense,
10 Americans with Disabilities Act, and Rehabilitation Act. And
11 those latter two statutes are interpreted basically in
12 conjunction with each other and are held to protect virtually
13 the same rights. And the rights that those protect are the
14 right to not be discriminated against.

15 Under Olmstead, as -- I'm sorry, your Honor. Under
16 Olmstead the plaintiffs -- not the plaintiffs, but any
17 individual who is developmentally disabled has a right to
18 community integration. Our society had a tradition of
19 institutionalizing and warehousing individuals with
20 developmental disabilities, and that is the purpose of the
21 ADA.

22 I don't know if your Honor has had the opportunity
23 to review the statement of interest filed by the United
24 States in this matter, but they supported the defendants'
25 position that the ADA simply doesn't protect the types of

1 issues that plaintiff is bringing here. You know, it's not
2 to say there aren't rights, but those rights are not
3 federally-protected rights, and we are not in the right court
4 on this matter.

5 And then finally --

6 THE COURT: That's what they all say.

7 MS. MALOWITZ: Understood, but we take our Eleventh
8 Amendment rights seriously.

9 And then finally, there is a balancing of harms
10 here that is not tipping in the plaintiffs' favor, your
11 Honor. They're asking us to operate a half-empty institution
12 at an incredible budgetary expense. It's not half-empty yet.
13 People have begun to transition out of the institution. It's
14 a huge, sprawling campus, 100 acres, with groundskeepers, and
15 chefs, and there are over 500 employees. And what they're
16 asking is something that's very expensive and something that
17 the State cannot afford at this juncture.

18 And coupled with that, individuals who are
19 consenting to can be given community placement, have a right
20 under the ADA, and any TRO that this Court would enter would
21 be violating those plaintiffs' -- not the plaintiffs, but
22 those individuals' Olmstead rights and ADA rights to
23 integrate. And that's even giving plaintiffs the credit that
24 if they had a standing to seek representation or really
25 contact those individuals, which really they don't.

1 So overall, your Honor, this matter is not one for
2 a federal court. They have no likelihood of success on the
3 merits of the Medicaid Act, the ADA, or the Rehabilitation
4 Act, and we ask that the TRO be denied.

5 THE COURT: Okay. Any brief response?

6 MS. SHERWIN: Very brief, your Honor.

7 Your Honor, as a sort of opening question, we
8 actually have in court this morning a recording from the 911
9 tape which I had offered in our reply brief for you to play
10 in camera, but now that they put it on the internet, we don't
11 need it to be played in camera. If you want to hear for
12 yourself how serious or not serious this incident was, this
13 911 tape is very indicative of exactly how serious it was.

14 THE COURT: All right. You'll give us the internet
15 site?

16 MS. SHERWIN: Yes, we can give you the file. Okay.
17 Thank you, your Honor.

18 Your Honor, with respect to our standing, a lot has
19 been made of the fact that these are OSG residents who are
20 the first people who have been moved out of the facility, and
21 they claim that they have the consent of the Office of the
22 State Guardian.

23 Well, the Office of the State Guardian has a
24 representative of Murray by the name of Frieda Uhlmer
25 (phonetic). I thought it was very indicative of whether or

1 not we really do have her consent by the fact that she has no
2 affidavit attached to the State's response. Surely if she
3 had a whole-hearted belief that this was the right thing to
4 do we would have had such a response. Secondly -- so the
5 question of their objection is really an open question.

6 The other thing, your Honor, which I think the
7 Court needs to take into account is that the State Guardian,
8 like any guardian, is supposed to act in the best interests
9 of their ward. And I understand that the Office of the State
10 Guardian is probably overwhelmed by the number of guardians
11 that they have, but my information is that there are
12 approximately 29 OSG residents at the facility right now.
13 Hopefully they're not all going to be moved out at one time.
14 But our affidavits which we have filed indicate that the
15 State Guardian has indicated that she is not going to go
16 visit sites because she's not being paid to go. So she
17 doesn't have any idea where these people are going. She
18 doesn't have the time to really get into this, and she only
19 does what they tell her to do. So who they are, I have no
20 idea. Maybe that will come out in an evidentiary hearing.
21 But she does not appear to me, based on my experience in
22 dealing with guardians and wards, look like she's really
23 acting in their best interests.

24 So the fact that they claim to have a consent, I'm
25 not sure what kind of consent it is. It appears to us to be

1 one hand from the State saying this is a terrific thing, and
2 the other half of the State saying yeah, that's great, don't
3 send them there. And I don't think it's working out too well
4 as we can see by what has happened.

5 Secondly, whenever this sort of case comes before
6 the court with the issue of community placement, Olmstead
7 is trotted out as the reason why it is important that the
8 State pursues this policy. Judge Ginsberg's opinion in
9 Olmstead is clear that it is not right to keep people in
10 institutions who do not belong there. That's the first half
11 of the sentence. The second half of the sentence is: But if
12 they need the services that are provided in the institution,
13 you shouldn't be sending them out into the community in
14 dangerous and improper situations.

15 Indeed, Justice Kennedy, writing, I believe, either
16 a concurrence -- I think a concurrence, indicated that it
17 would be a tragedy if the Olmstead case were used to relieve
18 the states of the obligation to provide institutional care,
19 and if the states did them only in some misguided idea that
20 they're going to prevent lawsuits by doing so.

21 And finally, I'd like to address this issue about
22 we don't have the money to do this. It seems --

23 THE COURT: Well, I don't think that's an issue
24 that I'm concerned with at this time.

25 MS. SHERWIN: Okay. Thank you, your Honor, because

1 I don't think it's an issue that we should be concerned with.

2 THE COURT: All right. I didn't say we should
3 never be concerned; I said at this time.

4 MS. SHERWIN: At this time. And I agree with you.
5 At this time.

6 So, your Honor, I believe we have standing. These
7 are putative class members, and they need protection. If the
8 State's argument were to be believed, then people in this
9 situation who are putative class members could never get any
10 relief from any court. And I certainly don't think that
11 that's what the law wants or what the law is.

12 So once again, we renew our motion for an emergency
13 order to prevent the discharge of residents from this
14 facility.

15 Oh. Your Honor, I'm reminded that the basis of our
16 claim under the ADA and the Rehabilitation Act is tied to
17 discrimination. The staff -- the way these evaluations are
18 going is creating what we believe are two categories of
19 residents in the SODCs. And the State seems to believe that
20 they can just move these people around like they are pieces
21 of furniture. And they're not.

22 So your Honor, once again, I would respectfully
23 request this Court enter an order preventing any other
24 residents going out of the Murray facility, which is where
25 the State is currently conducting its operations on the

1 closures, pending being able to have the full evidentiary
2 hearing that the Court indicated we could have on the
3 preliminary injunction.

4 THE COURT: Thank you.

5 MS. SHERWIN: Thank you, your Honor.

6 THE COURT: In my view, there are serious
7 questions, both as to standing and subject matter
8 jurisdiction, which cannot be decided at this point in a TRO,
9 but do require an evidentiary hearing. So I am not prepared
10 at this time to deal with these matters in a manner that they
11 need to be dealt with. Which is precisely why the standards
12 for a TRO and particularly an emergency TRO are not the same
13 as that for a preliminary injunction.

14 I am going to enter the -- allow the motion for an
15 emergency TRO. I think that if the plaintiffs are successful
16 that there is much serious harm that can be done unless we
17 keep the status quo until the Court has ample opportunity to
18 address the serious issues in a considered manner. And that,
19 as I said, can only be done at the preliminary injunction.

20 It's a limited order, and I'm going to ask that you
21 prepare the language and show it to the defendants, and if
22 you can't agree on the language, I'll use my own language.
23 And we'll enter the order.

24 MS. SHERWIN: We'll get something out this
25 afternoon.

1 THE COURT: Okay. Thank you.

2 MS. SHERWIN: Thank you, your Honor.

3 MS. MALOWITZ: Thank you, your Honor.

4 (End of proceedings.)

5 C E R T I F I C A T E

6

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled case on
9 May 30, 2013.

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13 /s/Colette M. Kuemmeth

Court Reporter

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