**Section 101.75 Conduct of hearings and appeals for Bogard et al. v. Bradley et al. consent decree (88 C 2414, U.S.D.C., N.D. IL) (June 2, 1993)) class members**

a) Applicability

This Section shall apply to decisions concerning the transfer and discharge from community residential settings of Bogard et al. v. Bradley et al. class members. If there is a conflict between this Section and 59 Ill. Adm. Code 115 and 59 Ill. Adm. Code 120 concerning discharge and transfer that apply to class members, this Section will govern.

b) Definitions

For the purposes of this Section, the following terms are defined:

"Administrative law judge (ALJ)." The person appointed by the Secretary to preside at the formal administrative hearing and is synonymous with any other term used to refer to the person conducting such hearings.

"Agency." An entity that operates a community residential setting.

"Appellant." The person who requests a hearing.

"Class members." All persons 18 years of age or older with developmental disabilities who, on or after March 23, 1986, resided in an intermediate care or skilled nursing facility in Illinois as a Medicaid recipient for a period of more than 120 days in the aggregate. No person shall be excluded from the class because he or she has a primary diagnosis that is not mental retardation or a related condition, provided that such person also has a condition which meets the definition of developmental disability. However, no person first admitted to a nursing facility on or after April 1, 1994, will be a member of the class.

"Community residential setting." One of a variety of living arrangements as long as no more than eight people reside together and the setting is designed to promote independence in daily living, community integration, and economic self-sufficiency. Community residential settings include existing categories such as community integrated living arrangements, community residential alternatives, assisted residential care, supported residential care and adult foster care and may also include newly developed settings which are consistent with these principles.

"Contested case." Has the meaning ascribed to it in Section 1-30 of the IAPA [5 ILCS 100/1-30].

"Days." Working days unless otherwise specified.

"Department". Department of Human Services.

"Developmental disability." A disability that is attributable to mental retardation, regardless of the need for specialized services or a related condition. A related condition meets all of the following conditions:

Is attributable to: cerebral palsy, epilepsy or autism, or any other condition (other than mental illness) found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with mental retardation and requires treatment or services similar to those required for such individuals;

Is manifested before the person reaches the age of 22;

Is likely to continue indefinitely; and

Results in substantial functional limitations in three or more of the following areas of major life activity: self-care, language, learning, mobility, self-direction, or capacity for independent living.

"Discharge." The termination of all services provided to an individual in the community residential setting in which the individual resides.

"IAPA." The Illinois Administrative Procedure Act [5 ILCS 100].

"Individual services coordinator." A person employed by a pre-admission screening and annual resident review agent, who is a qualified mental retardation professional, as defined in the Department's rules at 59 Ill. Adm. Code 103, and who acts as an agent of the State in assuring that each class member has an appropriate individualized service plan and that the service plan is implemented.

"Intermediate care facility." Any long-term facility licensed by the Illinois Department of Public Health under the Nursing Home Care Act [210 ILCS 45] as an intermediate care facility.

"Medicaid." The medical benefits program administered by the Illinois Department of Public Aid pursuant to Title XIX of the Social Security Act. (42 USC 1396a (1998))

"OBRA Management Unit." A group of individuals charged with coordinating implementation activities under the Bogard et al. v. Bradley et al. consent decree. There is one person designated from each of the Department's Offices of Developmental Disabilities and Rehabilitation Services and one person designated from each of the Departments of Public Aid, Aging and Public Health to serve on the Unit.

"Omnibus Budget Reconciliation Acts of 1987 and 1990 (OBRA) (42 USC 1396n (1998))." Federal law requiring that an individual with a mental illness or developmental disability have pre-admission screening before placement in a nursing facility. The law also requires an initial and annual assessment of all nursing facility residents having a mental illness or developmental disability to determine if they require the level of care provided by a nursing facility and whether they require specialized services related to their disability.

"Pre-admission screening." A two-phase process of assessing individuals seeking admission to nursing facilities. The first phase identifies individuals suspected of a possible severe mental illness or developmental disability. The second phase requires an assessment and determination of the individual's need for the level of services provided by a nursing facility and need for specialized services.

"Pre-admission screening/annual resident review (PASARR) agents." Entities selected by the Department to carry out the pre-admission screening and resident review services required by OBRA.

"Resident review." A two-phase process to assess individuals residing in nursing facilities. The first phase identifies individuals suspected of a possible mental illness or developmental disability. The second phase requires an assessment and determination of the need of the individual with severe mental illness or a developmental disability for the level of services provided by a nursing facility and the need for specialized services.

"Secretary." The Secretary of the Department of Human Services.

"Skilled nursing facility." Any long-term facility licensed by the Illinois Department of Public Health under the Nursing Home Care Act as a skilled nursing facility.

"Specialized services." A continuous program for each individual. These services include aggressive, consistent implementation of a program of specialized and generic training, treatment health services and related services that are directed toward the acquisition of behaviors necessary for the individual to function physically, intellectually, socially, and vocationally with as much self-determination and independence as possible; and the prevention or deceleration of regression. Specialized services does not include services to maintain generally independent individuals who are able to function with little supervision or in the absence or a continuous specialized services program.

"Substantial evidence." Such evidence as a reasonable person can accept as adequate to support a conclusion.

"Transfer." When an individual ceases to be served by one agency and begins to be served by another agency under the same community residential setting without interruption of services.

c) Decisions subject to appeal

Decisions by agencies to discharge or transfer class members shall be appealable pursuant to this Section, except when the agency ceases to provide a particular type of community residential setting.

d) Representation

The appellant and the agency may be represented during the hearing and appeals process by an attorney or any other person who the appellant or agency chooses. The appellant may also represent him or herself; the agency may represent itself.

e) Notice

1) Notice of an agency decision to discharge or transfer a class member shall be given not less than 30 calendar days before the proposed date of the transfer or discharge. The notice of the decision shall contain:

A) A statement of the reason for the transfer or discharge;

B) The effective date of the proposed transfer or discharge;

C) A statement which reads: "You have a right to appeal the agency's decision. If you think you should not have to leave this program, you must ask the agency to reconsider its decision. If the agency does not change its decision, you may file a request for a hearing with the Department of Human Services within 20 days after receiving this notice. You should send a letter saying why you shouldn't leave the program and asking for a hearing to: Bureau of Administrative Hearings, 100 South Grand Avenue East, Springfield IL 62762. If you request a hearing, you will not be transferred or discharged while the appeal is going on unless the individual services coordinator decides that a delay in transfer or discharge would imminently imperil you or others. If you have any questions, call the Department of Human Services, Bureau of Administrative Hearings."

D) The name, address and telephone number of the person charged with the responsibility of supervising the transfer or discharge.

2) The notice of the hearing sent by the Department shall contain:

A) A statement of the nature of the hearing;

B) A statement of the time and place of the hearing or if a pre-hearing conference is scheduled by the Department, the time and place of the conference;

C) A reference to the particular Sections of the statute and rules involved;

D) A statement of the legal authority under which the hearing is held;

E) A concise statement of the matters asserted;

F) A statement of the consequences of failing to respond to the notice;

G) The official file number;

H) The names and addresses of the administrative law judge and the parties involved; and

I) A statement of the right to be represented by the person of the appellant's choice, at his or her expense.

3) All notices under this Section shall be served either personally or by certified mail on the class member and guardian, if any, the class member's individual service coordinator and the agency. If the agency knows that the class member cannot read English, the notice shall be explained to him or her orally in his or her primary language, including sign language.

4) The Department shall send a notice of hearing and notice of pre-hearing conference within five days after receipt of the request for a hearing. The administrative law judge shall schedule the hearing to be held no later than 10 days from the date of the notice.

f) Exhaustion of agency remedies

The class member shall use any agency procedure for appealing the decision before requesting a hearing from the Department.

g) Transfer or discharge pending a hearing

No transfer or discharge shall proceed pending the Secretary's decision, except as provided for in subsection (h) of this Section.

h) Emergency discharges

When the physical safety of the class member or others is imminently imperiled and appropriate services are not available at the agency, the class member shall be discharged as soon as arrangements can be made for admission to another facility only if the individual service coordinator, after reviewing the class member's record, gathering the necessary clinical information, and meeting with the class member, determines that a delay in discharge would imminently imperil the physical safety of the class member or others and has documented that in the class member's record. In that case notice shall be given in accordance with subsection (e) of this Section as soon as possible but in no case later than 48 hours after the discharge. The hearing shall be held within the time specified in subsection (e)(4) of this Section at the receiving facility, unless the administrative law judge determines that either of the parties would not be able to completely present its case at the receiving facility within the specified time. The discharging facility shall hold the class member's bed open until the appeal is resolved.

i) Qualifications of administrative law judge

Administrative law judges shall meet the qualifications set out in the Department's rules at 89 Ill. Adm. Code 508.

j) Disqualification of administrative law judge

At any time prior to the issuance of the hearing officer's recommended decision, the appellant or the agency may move to disqualify the administrative law judge on the grounds of bias or conflict of interest. Such a motion shall be made in writing to the Secretary, with a copy to the administrative law judge, setting out the specific instances of bias or conflict of interest. An adverse decision or ruling, in and of itself, is not grounds for disqualification. The administrative law judge's employment or contract as an administrative law judge by the Department is not, in and of itself, a conflict of interest. The appeal shall be suspended until the Secretary rules on the motion. The Secretary may decline to disqualify the administrative law judge, appoint another administrative law judge to hear the case or decide that the appeal should be granted.

k) Pre-hearing conferences

1) The administrative law judge may schedule a pre-hearing conference at his or her discretion. This conference shall be held prior to the hearing and shall be for the purpose of considering:

A) A clarification of the issues;

B) The possibility of obtaining admissions of fact and of documents that would avoid unneccessary proof or testimony;

C) The possibility of a resolution of the case without a hearing; and

D) Any other matters that may aid in the disposition of the appeal.

2) The administrative law judge shall invite the class member, the class member's guardian, if any, and a representative of the agency to attend the pre-hearing conference. Other persons may attend at the discretion of the administrative law judge. If the class member's guardian or the agency's representative invite other persons, they shall notify the administrative law judge of the invitee's identity at least 24 hours before the pre-hearing conference.

3) If the pre-hearing conference results in a resolution of the appeal by agreement of the parties, the administrative law judge shall issue an order reciting the agreement and dismissing the appeal. Copies of the order shall be sent to the appellant, the agency and the Department's representative from the OBRA Management Unit. The appellant's and agency's copies shall be sent by certified mail.

l) Discovery

1) Discovery such as interrogatories and depositions as provided for in the Rules of the Illinois Supreme Court (S. Ct. Rule 1 et seq.) is at the discretion of the administrative law judge. Requests to take discovery shall be made in writing to the administrative law judge with notice to all parties. Discovery may only be taken with the prior permission of the administrative law judge and is subject to the provisions of the Mental Health and Developmental Disabilities Confidentiality Act [740 ILCS 110].

2) Each party shall, on request by another party or the administrative law judge, serve on all other parties a list of potential witnesses who may be called on to testify at the hearing. Such list shall include the address or place of employment of each witness and shall be served within seven days after the receipt of the request.

3) The appellant shall, on request, be allowed to inspect and copy any documents which the agency intends to submit at the hearing. Such request shall be made at least two days before the hearing.

m) Conduct of hearings

1) All hearings shall be closed to the public. However, individuals who request to attend a hearing may do so with the appellant's consent.

2) The administrative law judge:

A) Shall regulate the course of the hearing;

B) Shall dispose of procedural requests;

C) May continue the hearing from time-to-time when necessary;

D) May examine witnesses; and

E) Shall rule on the relevancy of evidence.

3) At the hearing, both parties may present written and oral evidence. The agency shall have the burden of proving that there was substantial evidence to support its decision. After the agency's presentation, the appellant may present written and oral evidence. Written opening or closing arguments, legal memoranda, trial briefs or similar documents shall be permitted on motion granted or if the parties so stipulate. This requirement shall not prohibit the administrative law judge, sua sponte, from requesting that certain issues be briefed by the parties.

4) Standards

A) A class member may not be transferred unless the transfer is consistent with the class member's service needs.

B) A class member may not be discharged unless the discharge is consistent with the class member's service needs or unless the class member does not meet the program's eligibility criteria.

5) Evidence

A) The rules of evidence and privileges as applied in the circuit courts of this State shall apply in these hearings. However, evidence not admissible under such rules shall be admitted if it is of a type commonly relied on by reasonably prudent persons in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence shall be excluded.

B) A party may conduct cross-examination of a witness subject to the evidentiary requirements in subsection (m)(5)(A) of this Section.

C) Notice may be taken of matters of which the circuit court of this State may take judicial notice. In addition, notice may be taken of generally recognized scientific or technical facts within the Department's specialized knowledge. Parties shall be notified before or during the hearing of the material noticed and shall be given an opportunity to contest the material so noticed.

6) The hearing shall be either taped or stenographically recorded at the hearing officer's discretion. The Department shall retain the tape or a copy of the transcript. If the appellant or the agency appeals the Secretary's decision, a copy of the tape or the transcript shall be provided to the appellant and the agency on request.

n) Administrative law judge's recommended decision

Within 20 days after the hearing, the administrative law judge shall issue his or her recommended decision to the Secretary. The decision shall contain findings of fact, conclusions of law, the reasons for the decision and a recommended disposition of the case. Copies of the decision shall be sent to both parties by certified mail. A copy shall also be sent to the Department's representative from the OBRA Management Unit.

o) Post-hearing briefs

1) Both parties shall be given the opportunity to submit a brief to the Secretary in response to the administrative law judge's recommended decision. The appellant or the agency must notify the Secretary within five days after receipt of the recommended decision if the appellant or the agency intends to submit a brief. Briefs shall be submitted no later than 20 days after receipt of the recommended decision, unless the administrative law judge grants a party's request for additional time. Briefs shall be no longer than 10 pages unless the administrative law judge grants a party's request to submit a longer brief. A copy of the brief shall be sent to the other party.

2) If either party submits a brief, the other party may submit a reply brief to the Secretary. The appellant or the agency must notify the Secretary in writing within five days after receipt of the brief if it intends to submit a reply brief. Reply briefs shall be submitted no later than 10 days after receipt of the brief.

p) The record

The record for a hearing shall include:

1) All notices, motions and rulings;

2) All evidence received and admitted;

3) A statement of matters officially noticed;

4) Any offers of proof, objections and rulings;

5) The administrative law judge's recommended decision; and

6) Any ex parte communication prohibited by Section 10-60 of the IAPA [5 ILCS 100/10-60].

q) Secretary's decision

1) The Secretary shall be provided with the record and all briefs, if any. Within 20 days after receipt of the record or the post-hearing brief (if any), whichever is later, the Secretary shall issue a final decision adopting, modifying or reversing the recommended decision. The decision shall include findings of facts and conclusions of law. The Secretary shall adopt the recommended decision if he or she determines that the recommended decision was supported by substantial evidence. Copies of the final decision shall be sent to the appellant, the agency, the Department's representative from the OBRA Management Unit, and the administrative law judge. The appellant's and agency's copies shall be sent by certified mail.

2) The Secretary's decision shall constitute a final administrative decision in accordance with the Administrative Review Law [735 ILCS 5/Art. III] and shall include a statement to that effect.

r) Miscellaneous

1) Ex parte communications

Unless all parties are given notice and an opportunity to participate, the administrative law judge or the Secretary shall not, after notice of hearings or other on-the-record proceeding, communicate directly or indirectly, in connection with any other issues, with:

A) Any party;

B) His or her representative; or

C) Any other person interested in the outcome of the proceeding.

2) Intra-Departmental communications

A Department employee may communicate with other employees of the Department, and the administrative law judge or Secretary may have the aid and advice of one or more personal assistants.

3) Waiver

Compliance with this Section or with any or all provisions of the IAPA regarding contested cases [5 ILCS 100/10-25] may be waived by written stipulation of all parties.

(Source: Amended at 23 Ill. Reg. 11118, effective August 24, 1999)