

## ***News Update: Ball v. Kasich***

### **Court denies most of state defendants' motions to dismiss**

Summary: On Thursday, March 23, 2017, Chief Judge Edmund A. Sargus, Jr. of the U.S. District Court for the Southern District of Ohio issued a ruling denying nearly all of the state defendants' motions to dismiss the *Ball v. Kasich* lawsuit. The defendants, which include Gov. John Kasich and three state department directors who were named in their official capacity, had argued that the court could not hear the case because it did not have legal merit in several key areas. Because the court disagreed with nearly all of the defendants' motions, the case now moves forward to the next stage of the process: determining whether or not the case can proceed as a "class action" lawsuit on behalf of all people with developmental disabilities in the state.

#### ***What does this ruling mean for the defendants representing the State of Ohio?***

By filing motions to dismiss, the state defendants were asking the court to dismiss the lawsuit in its entirety. Each defendant's motions contained different reasons for why the court should dismiss the case. The court ruled against nearly all of the state's motions, with one exception – that Governor John Kasich should be dismissed from the lawsuit related to alleged violations of the Americans with Disabilities Act and Social Security Act.

#### ***Why did the court dismiss some of the claims against Gov. Kasich?***

The court dismissed the governor from these claims because it agreed with defendants' arguments that he is immune under the Eleventh Amendment to the U.S. Constitution. In addition, the court ruled that claims made against Gov. Kasich in these areas could be defended by the other state departments named in the suit, which are, according to the court's ruling, "capable of providing the relief sought" by plaintiffs. Gov. Kasich remains a part of the lawsuit, however, because the court did not dismiss claims made against him with regard to the federal Rehabilitation Act.

#### ***Why did the court allow all of the remaining claims against the state to proceed?***

The state defendants had offered several reasons that the case should not be allowed to move forward in its motions to dismiss. The court ruled against the state's motions in the following areas:

##### **Issue #1: Martin Settlement**

In their motions to dismiss, the defendants argued that the Martin consent decree (settlement) and the legal concept of "res judicata" (which means that a person cannot file additional lawsuits about an issue the court has already addressed) prevent the court from hearing *Ball v. Kasich*. The court disagreed – in its ruling denying this aspect of the state defendants' arguments, the court said that the Martin consent decree expired in 2009, and for that reason, the court was allowed to consider lawsuits like *Ball v. Kasich* so long as the subject matter of the lawsuit occurred after the settlement had expired.

In addition, the court noted that there have been changes to the law since the Martin settlement expired, which could possibly give plaintiffs more rights. Lastly, the court said that the Martin lawsuit did not address employment and day services, so these aspects of *Ball v. Kasich* are not addressed by the previous case.



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### **Issue #2: Plaintiffs' Claims Were Not "Ripe"**

In their motions to dismiss, the state defendants argued that at least one plaintiff's claims were not "ripe." In legal terms, "ripe" means a plaintiff can make a claim because he or she is experiencing some harm or injury in the present or in the reasonably foreseeable future. Generally, federal courts cannot hear claims made by plaintiffs if they are based on the potential for future harm. In this specific instance, the defendants argued the plaintiff's claim was not ready to be heard by the court because he was not currently living in an intermediate care facility (ICF).

In its ruling denying the state defendants' motion, the court referenced several recent decisions which found that Olmstead claims may be pursued for people "who are at risk of institutionalization." The court also looked to recent U.S. Department of Justice determinations that Olmstead rights apply to such individuals. The court said that the question to be decided was whether the state defendants, "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." With this in mind, the court found that the particular plaintiff who lived at home with his aging caregiver and who was now receiving a Level 1 Waiver could claim a sufficient harm to have his case heard.

### **Issue #3: The Ability Center**

In their motions to dismiss, the state defendants argued that the Ability Center did not have "standing" to act as a plaintiff in the case. In this instance, "standing" means that a person or organization must have a strong enough connection to the claims being made in order to be allowed as a party to a case. The court decided that Ability Center's connection was sufficient to act as a representative of the people with disabilities they serve.

### **Issue #4: Free Choice Provisions**

In the Medicaid program, "Free Choice" means that people must have the ability to choose among providers who are willing and authorized to provide Medicaid services. In their motions to dismiss, the state defendants argued that the "Free Choice" provisions of the Social Security Act – which govern how Medicaid waivers are issued – do not give plaintiffs the right to ask a court to enforce them. To be enforceable, the language of the law must very clearly give that right to a person before they can make a claim in court.

While the Free Choice provision had been found to be enforceable by the U.S. Sixth Circuit Court of appeals in 1994, there was a later U.S. Supreme Court decision that called this into question. Since that time, however, the court found that most (but not all courts) have found the provision to be enforceable.

For this reason, the court ruled that plaintiffs could argue that they were not meaningfully informed of alternatives to ICF placement (including waiver services) under the Free Choice provision, and thus unable to exercise free choice. Therefore, the state defendants' motion was denied.

### ***What impact does this decision have on County Boards at this time?***

There is no immediate effect on county boards. OACB has filed a motion to intervene as a defendant in the lawsuit. The court has not yet ruled upon that motion but is expected to do so in the next few months.



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### ***What are the next steps in this process?***

The lawsuit will now move forward to the class certification phase, which means whether or not the court will allow the case to become a “class action” lawsuit. Class action lawsuits are cases in which a small number of plaintiffs are permitted to represent hundreds (if not thousands) of other people who would have claims very similar to those who filed the lawsuit.

In *Ball v. Kasich*, plaintiffs have sought class certification asking to represent others who they argue are also not being provided with appropriate community based services or who are at risk of being institutionalized. The discovery process, which is a period in which both sides of a lawsuit exchange information to help make their arguments, is happening now for issues related to class certification.

OACB is participating in the discovery process by providing information to all parties as it is requested (in conjunction with and on behalf of the affected county boards) and will continue to communicate with members as this process moves forward.

### ***For More Information***

For more information about this recent development, or any other questions regarding *Ball v. Kasich*, members should contact OACB legal counsel via email at [drolegal@oacbdds.org](mailto:drolegal@oacbdds.org). This email address is protected under attorney-client privilege and is not subject to disclosure or public records requests.