

News Update: Ball v. Kasich

Guardians file new claims against State of Ohio, county boards, and DRO

Summary: On September 14, 2018, the Guardian Intervenors (“Guardians”) in the Ball v. Kasich lawsuit filed 85 pages of claims against the Governor, DODD, ODM, OACB (Defendants in Ball) and DRO (lead Plaintiff counsel in Ball). The Guardians claim that the State Defendants, along with OACB, have “acted in concert” with DRO to reduce or eliminate Intermediate Care Facilities (ICFs) as service options for individuals and have failed to provide adequate information to families and guardians about the ICF option. In addition, Guardians have claimed:

- ICFs are mandatory and should be presented to all persons seeking services in the DD system as the primary choice. Waivers are an alternative; Guardians claim that the State Defendants, OACB and DRO (collectively referred to as “Defendants”) have failed to provide sufficient information and support for ICFs.
- Guardians assert that before 1981 when waivers were first created, “100% of Medicaid DD recipients were in ICFs or non-Medicaid certified institutional care.” Today the number has gone down to less than 15% in ICFs.
- Guardians cite the history of DODD white papers, the “grand bargain” and legislation which seek to reduce reliance on ICFs and funding for ICFs. Guardians cite threats of litigation by DRO as major incentives for this trend and allege that the changes were supported by OACB, among others.
- Guardians describe individuals receiving services from large ICFs in a uniformly positive manner, and argue that these ICFs are less restrictive than community options and provide a greater range of services.

What are the claims made against the State of Ohio?

Guardians assert that the State Defendants are engaging in a systematic effort to downsize, if not eliminate, ICFs. Guardians cite public statements of John Martin, the recent changes in legislation, downsizing DCs, elimination of funding for ICFs over 8 beds, decrease in rates, the practice of DODD’s purchasing ICF beds and DODD’s interference in the sale and transfer of ICF beds as proof. Guardians further claim the reduction in general use and size of ICFs have forced many ICF providers out of business and the policies of State Defendants are likely to further inhibit the ability of ICFs to provide essential care. In addition, Guardians claim that the State Defendants fail to give adequate publicity and explanation of the ICF option in public presentations and on their websites.

What are the claims made against county boards of DD?

Guardians allege that DD Boards rarely provide families/guardians with adequate information about the ICF option and that, at times, have actively discouraged families from pursuing the option. OACB is criticized as supporting efforts of the State Defendants to reduce use of ICFs.

Guardians acknowledge that, under the new waiting list rule that there is a requirement to disclose the ICF option to people with immediate need, but assert that these people “are often not even advised of their ability to receive immediate ICF care.” They further acknowledge that discussion of the ICF option was required under the old waiting list rule, but DD Boards “rarely did so.”

The “freedom of choice” form is characterized as a mere “formality.” Guardians cite an anonymous former employee of “a large DD Board” who witnessed an SSA dismissing the ICF option. They claim the ICF option is “rarely” explained with any detail.

What are the claims made against Disability Rights Ohio (DRO)?

Guardians allege that DRO has failed in its statutory duty to provide advocacy to all eligible individuals and to have a board of directors which includes a representative of people in ICFs.

Guardians note that OOD, a defendant in the Ball case, is a member of the Ohio Olmstead Task Force which issued a statement supporting DRO in bringing the Ball litigation. Guardians further state that Michael Kirkman, executive director of Disability Rights Ohio, was appointed to the Defendant OOD's Council.

What are the next steps for county boards?

The claims raised by Guardians will significantly complicate this already complex case. OACB will file an answer to these claims in the coming weeks that will focus primarily on the claims specific to county boards (as many of the claims made against the State Defendants and OACB apply equally to both parties and are likely to be sufficiently answered by attorneys representing the State of Ohio).

OACB legal counsel will be in direct communication with counties serving the individuals referenced in the cross claims to prepare a response. County boards with questions about this development should feel free to contact OACB legal counsel directly at (216) 861-0360 or via email at fhickman@hickman-lowder.com.

Please note: Written communications about this case (including e-mails) that are not addressed to OACB legal counsel are not protected by attorney-client privilege and therefore may be discoverable (and used as evidence) by other parties in *Ball v. Kasich*. For this reason, we urge discretion when communicating on this topic via email or other written modes of communication unless this communication is sent directly to legal counsel.