MEMORANDUM

FROM: Kayla A. Bower, JD
Oklahoma Disability Law Center, Inc.

DATE: April 15, 2012

RE: Children with mental illness in therapeutic foster care

I. DESCRIPTION OF THE PROBLEM

The Oklahoma Legislature passed a statute which often excludes children with mental illness in therapeutic[1] foster care from enrolling and receiving benefits of the public educational system which encompasses the home in which they may be placed in the community. The statute as enforced by the school districts causes Department of Human Services (DHS) to delay assignment of deprived and abused children in its custody to a community-based therapeutic foster care home until a school district can be located with less than two percent (2%) of its enrollment also receiving therapeutic[2] foster care. As a result, deprived and abused children in state custody are at risk of remaining institutionalized (in hospitals, emergency shelters, etc.) or moved around the state many miles from their home to avoid the impact of the two percent (2%) rule.

DHS is now faced with implementing the Pinnacle Plan to reform its foster care system to protect our State's most vulnerable children – new families to care for children and shelters must be eliminated, all of which will be hampered by imposition of the existing state statute's quota of two percent (2%) on children with mental illness. The revised Pinnacle Plan is located on DHS's website, http://www.okdhs.org/programsandservices/foster/cwp/default.htm.

The statute with the "2% Rule" is found in Title 70, Section 1-113 of the Oklahoma Statutes:

> C. For the purpose of ensuring that a child placed in a therapeutic foster care home, as defined in Section 1-1-105 of Title 10A of the Oklahoma Statutes, receives an appropriate education, no receiving school district shall be required to enroll such a child if the enrollment would cause the proportion of students in therapeutic

[1]The child lives in a family home which provides specific supportive services designed to remedy social and behavioral problems. These children have a variety of DSM-IV mental health diagnoses.

[2]Oklahoma's large number of school districts (around 521) in a state with relatively small population makes the rule particularly burdensome because many districts (most of which are rural) are so small that the mere addition of one or two children with mental illness in therapeutic foster care would place them over the two percent (2%) limit.

> foster care homes as compared to the average daily membership of the receiving district for the preceding school year to exceed two percent (2%). Children served by Head Start may not be counted for the purpose of this paragraph unless the child is on an individualized education program provided by the school district. Any school district may enroll such students who are outside the student's resident district in therapeutic foster care home placements which exceed this limit if the school determines it possesses the ability to provide such child an appropriate education.

II. WHAT SHOULD BE DONE

Because of the requirement to provide children with an education, personnel making child placement decisions are reluctant to place a child in a community when the school district is refusing to enroll the child, so they continue their search for another school district, with all the complications and negative impact caused by the delay. It is our recommendation that a child with mental illness who is being placed in therapeutic foster care to remedy social and behavioral problems be placed in a community first based on the existence of a family home which can meet the child's needs. This will enable the child to be placed in a home in the community as quickly as possible, a result contemplated by the federal and state requirements for care of abused and deprived children. Upon placement in the community, a plan of action can be implemented to achieve enrollment of the child in the school district. Where appropriate, our office[3] is willing to provide legal and advocacy services, including technical assistance, designed to enroll a child in school.

A. Administratively

Our office has administratively challenged the failure of school districts to enroll children living in a therapeutic foster home because of the two percent (2%) rule and prevailed for the individual student by agreement of the parties, which does not yield a printed opinion of precedential value for other students. This can be repeated for individual children as each case arises. Because the issue involved is provision of an education for children with disabilities, exhaustion of administrative remedies may be required before seeking judicial relief for an individual. *Cudjoe v. Edmond Public Schools*, 297 F.3d 1058 (10th Cir. 2002).

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[3]Our office is the federally funded protection and advocacy system for people with disabilities in Oklahoma. The priorities and objectives established by our Board of Directors are committed to providing an appropriate public education for children with mental illness in the least restrict environment in the community where they can receive appropriate mental health services and supports. Any representative of a child eligible for services may contact our office directly to determine if the child's situation meets program and office standards for acceptance.

B. Judicially

This statute should be challenged in Court because it is unlawful and unwarranted discrimination based solely on disability (mental illness). The Tenth Circuit has concluded that " . . .[A] state law at odds with a valid Act of Congress, is no law at all. . . . officials who rely on their compliance with discriminatory state laws as evidence of their reasonableness will normally find themselves proving their own liability, not shielding themselves from it." *Barber v. Colorado, Dept of Revenue*, 562 F.3d 1222 (10th Cir. 2009) The Tenth Circuit quoted with approval the same conclusion reached by the Seventh Circuit, "A discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law." *Quinones v. City of Evanston, Ill,* 58 F.3d 275 (7th Cir. 1995) In *Quinones*, the Court inquired at oral argument why *Brown v. Board of Education* was not captioned Brown v. State of Kansas because state law required segregation of the races. In other words, the board of education did not make the discriminatory statute, they were only following the state law as it existed – a defense which was not approved by the U. S. Supreme Court in *Brown*, nor by the Tenth Circuit subsequently.

C. Legislatively

The statute should be rewritten to eliminate this limitation.

III. BASIS FOR CHALLENGE

Federal statutes support the conclusion that Oklahoma's statute with its two percent (2%) limitation should not be interpreted to confine children with mental illness in restricted settings (hospitals, emergency shelters, etc.) nor to prevent them from moving to available community homes with appropriate therapeutic supports and services.

Americans with Disabilities Act of 1990[4] (ADA)

Title II of the ADA, 42 U.S.C. §§ 12131-34, prohibits discrimination by state and local government agencies. Title II covers all public agencies, whether or not they receive federal financial assistance. Title II employs broad language in outlawing discrimination, stating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by any such entity." The Supreme Court has confirmed, in *PA Dept. of Corrections v Yeskey*, 524 U.S. 206 (1998), that this language covers all public entities "without any exception." A more detailed interpretation of this prohibition is included in Title II's

[4]See also the similar Rehabilitation Act of 1973, which applies to entities receiving federal financial assistance

implementing regulations (28 CFR 35), issued by the United States Department of Justice in its capacity as the agency charged with interpreting Title II.

Title II was intended as a vehicle to end the unnecessary institutionalization and segregation of individuals with disabilities. ADA regulations specifically direct public entities to "administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." On June 22, 1999, the United States Supreme Court issued its first decision on this rule in *Olmstead v. L.C.*, 527 US 581 (1999). In its analysis of this regulation, the Justice Department states: "[T]hese provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears and stereotypes of individuals with disabilities .... Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates people with disabilities to secondclass status."

In *Olmstead*, a 6-3 opinion authored by Justice Ruth Bader Ginsburg, the Supreme Court affirmed the ruling by the United States Court of Appeals for the Eleventh Circuit that unjustified isolation of individuals with disabilities is properly regarded as discrimination based on disability. The Court held that unjustified segregation in institutions is discrimination not only because it perpetuates unwarranted assumptions that people with disabilities are incapable or unworthy of participating in community life, but also because confinement in an institution severely curtails everyday life activities, such as family relations, social contacts, work, educational advancement and cultural enrichment.

Individuals with Disabilities Education Improvement Act of 2004 (IDEA)

A. IDEA's Access to Education

The IDEA requires that school district provide a free appropriate public education to all children with disabilities. 20 U.S.C. § 1400 et seq. There is not a single word in IDEA that suggests that there is a basis upon which to refuse to enroll a student with a disability who resides in the school district. IDEA is a statute about access. Once the student with a disability resides in the school district, the school district must assure access to an education to the child with a disability. IDEA contains a variety of requirements which enable a student with mental illness to obtain an education in an integrated manner in a public school – for example, research-based methodology[5], related services[6], positive behavioral interventions and supports (see below), etc.

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[5]The research based methodology requirements found initially in the No Child Left Behind Act, 20 U.S.C. 6361, were incorporated into IDEA 2004, 20 U.S.C. § 1411(e)(2)(C)(xi) and 34 C.F.R. § 300.35.

[6]*Cedar Rapids v. Garret F.*, 526 U.S. 66 (19 99)

B. IDEA and Medicaid

The children in state custody are eligible for Medicaid and receive all medically necessary services (including behavioral health services) through the State's Medicaid program. The Bazelon Center published a book entitled, "Teaming Up: Using the IDEA and Medicaid to Secure Comprehensive Mental Health Services for Children and Youth." This publication is designed to inform practitioners—IDEA attorneys and advocates who are not familiar with Medicaid, and Medicaid attorneys and advocates who do not know the IDEA or who have little experience in using Medicaid—how they may obtain the services and supports needed by children with emotional and behavioral disorders. Collaborative service delivery among major agencies statewide is provided for by a cooperative interagency agreement.

C. IDEA and PBIS

Positive Behavior Interventions and Supports (PBIS) and mental health collaboration has produced excellent results and won widespread support among stakeholders—school and mental health professionals, parents and youth, support staff and community members. It is affordable, cost-efficient and effective in creating school environments that are safer, more respectful and better suited to learning.

The U. S. Department of Education offers free technical assistance through one of its federally funded centers. Their website is http://www.pbis.org.

Dr. Laura Riffel has a website loaded with PBIS materials, all of which are free to download. Her website is http://www.behaviordoctor.org.

CONCLUSION

The ADA (as well as Section 504 of the Rehabilitation Act) prohibits discrimination based on disability and contains an integration mandate that prevents the unjustified isolation of people with disabilities. The IDEA requires enrollment of the students where they live in a home and does not give the school the power to force the students to move from their home in the school district. The IDEA requires that each student with a disability be provided a free appropriate public education. Interagency collaboration (including Medicaid, positive behavioral intervention, etc.) supports a student living in the community in a home – not an institution, facility or emergency shelter. Floating children with mental illness around the state because a school district invokes the "2% Rule" to exclude the child is unjustified and harmful to the children. This state law is not recognized by the Courts as a defense to failing to integrate these children solely based on their mental illness and only creates liability for the public entities which follow it..

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