

**Northern Wisconsin Center Closure Lawsuit Update
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Background

In February of 2003 Governor Doyle announced that the Northern Wisconsin Center for the Developmentally Disabled (NWC) in Chippewa Falls would be significantly downsized. At that time the plan was to eliminate long term care services at NWC by June of 2004 and increase the size of the short term care unit (the "Excel" unit) from 20 beds to 30 beds. In order to accommodate people in the community the CIP-1A daily rate (the amount paid to counties to fund community services for people leaving a state center) would be increased from \$225 to \$325. Throughout the budget deliberations that basic plan remained intact. The significant changes to it included extending the date for closure of the long term care unit through December of 2004 and budgeting for the possibility that as many as 20 long term care beds would remain available for temporary use through June of 2005. The idea behind these beds was to accommodate those few residents for whom the relocation process was not quite complete at the end of 2004.

The Lawsuit

In May of 2003 five guardians of NWC residents sued the Governor, DHFS Secretary Helene Nelson and the DHFS. They requested that the court prevent the state from relocating any NWC residents or making any effort to downsize the NWC. They also requested that all layoff notices be rescinded and that any employee that had left the NWC be permitted to return. They asserted a number of legal theories based on statutory and constitutional provisions. They also sought to have the case certified as a class action. Finally, the plaintiffs requested that the court issue a temporary injunction preventing the downsizing of the NWC while the lawsuit was pending.

The case was filed in Chippewa County, but venue was changed to Dane County. Dane County Circuit Court Judge Mary Ann Sumi was assigned to the case. The Madison law firm of Lawton & Cates represents the plaintiffs. The Wisconsin Department of Justice represents the defendants. In July the Wisconsin Coalition for Advocacy intervened in the lawsuit on behalf of the state.

A hearing on the temporary injunction and the request for class certification occurred over the course of 4 days in August and September. The plaintiffs presented testimony from two of the guardians named as plaintiffs, one attorney who is guardian ad litem for 72 current NWC residents, one employee of NWC and one expert witness. The state presented testimony from various state officials involved in the decision to downsize the

NWC, county employees involved in the relocation planning process, two guardians for people who have already left NWC, the interim director of NWC, and one expert witness.

In a brief filed during the hearing the plaintiffs significantly changed the result they were seeking from the temporary injunction. They explicitly abandoned their attempt to keep the NWC long term care unit open. As they stated:

“It should be stressed that Plaintiffs do not seek to force Defendants to continue to provide long term care services at NWC. This case is about the ICF/MR level of care, not the location where that care is provided.” *

What The Court Has Ordered

After hearing all the testimony and arguments and reading all the briefs, the court issued two orders. First, Judge Sumi certified a class consisting of all the residents of the long term care unit on September 12, 2003. She also ordered that any potential class member be given the choice of opting out of the class—meaning that those who have no interest in the lawsuit do not have to participate in it.

Second, she ordered that the state not move any resident from the long term care unit at NWC to the community without the consent of the ward’s guardian, unless ordered to by the court that ordered the resident protectively placed.[†] In making this ruling the court was directing all the parties to abide by state and federal laws. The state had to respect the guardians’ right to refuse a community placement (a federal right) and the guardians must abide by decisions by courts that override a guardian’s decision (a right reserved to courts under state law).

She specifically stated that her ruling had no effect on the relocation planning process currently underway. Nor did she enjoin the downsizing of the NWC. What she did was to assure that all residents’ rights under Medicaid law and all wards’ rights to be in the least restrictive environment would be respected by all parties.

In arriving at her decision she found that most of the claims the plaintiffs had advanced were unlikely to prevail. Her concerns involved the possibility under state law that residents might be moved without prior guardian consent or court order and therefore be deprived of their right under Medicaid law to choose between an ICF-MR placement and a community placement. It should be noted that the court came up with this potential conflict on its own. This was not an argument advanced by the plaintiffs.

* Thus, to the extent this lawsuit was originally designed to preserve jobs at NWC, it no longer seeks that result.

[†] It should be noted that the court’s order does not apply to relocations to other ICF-MRs.

The Bottom Line

What are the ultimate results of these rulings? **First and foremost is that the process of relocating residents and closing the long term care unit at NWC will continue.** The judge did nothing to slow or stop this process. Indeed, the plaintiffs are no longer asking that the closure of the long term care unit be stopped.

Second, a guardian's right to choose between a community placement supported by CIP-1A funding and another ICF-MR (other than NWC) will be respected. However, the court made it clear that the guardian's right does not trump the constitutional right the ward has to receive services in the least restrictive environment.

In practice, the ruling means that if a guardian refuses to consider community placement and it appears that it may be possible for the ward to be served in the community then some interested party (the county, the GAL, or NWC itself-as the current placement facility) should request a review of the protective placement to have the court determine if an ICF-MR is the least restrictive environment in which the ward can be served

If a guardian refuses to participate in the relocation planning process altogether, by say, withdrawing consent to have their ward assessed by all outside providers (including an ICF-MR), that matter needs to be brought to the attention of the court that protectively placed the individual. Failure to participate in relocating a ward when the facility is scheduled to close is not in the best interest of the ward. The court should be asked to order the guardian to participate in the process and sign all necessary consent forms to advance the process.

If a court determines that the least restrictive environment is the community or orders a guardian to participate in the process, but the guardian continues to refuse, then the court should be asked to appoint a successor guardian who will be able to faithfully exercise the guardian's responsibilities. Obviously, this would be a last resort and any guardian—particularly a family member—should be given every opportunity to fulfill his or her duties before being replaced.

Summary

The court has affirmed the state's decision to downsize the NWC by closing the long term care unit there. It has also confirmed that guardians will play a crucial part in decisions affecting their wards' relocation from NWC and that they will be given the choice of either a community placement supported by CIP-1A funding or another ICF-MR somewhere in the state. Northern Center, however, will no longer be an option for any long term care resident. Finally, it has also confirmed the authority of the court that protectively placed the ward to overrule a guardian decision that does not result in the ward being placed in the least restrictive environment.