



Legal Issues Surrounding Placement of an Adolescent in a Residential Program

A discussion of civil litigation on behalf of adolescents and their families

By Philip Elberg, Attorney at Law

Introduction

This is to set forth my understanding of the legal issues that arise when adolescents are sent off for residential treatment by someone other than a judge. This discussion is not intended to be exhaustive and it is important to note that laws vary significantly from state to state with regard to protecting children; the age at which a child becomes an adult; the regulation of residential facilities; the statutory and constitutional requirements concerning compulsory education; the commitment and treatment of those found to be mentally incompetent; and the licensing of schools, so what applies in one state may be significantly different in another.

The questions attorneys are most often asked in these matters arise in two circumstances. The first begins with someone wanting to get an adolescent out of what he or she believes is an inappropriate program. The second begins with a parent or a former patient wanting to pursue a civil law suit to compensate for harm, for the return of money paid, or to punish those that they believe harmed them. I discuss them in reverse order.

There are obstacles to damage suits arising from residential placements.

The unfortunate reality is that with the exception of the successful suits in New Jersey and the suits filed on behalf of parents whose children died while in a

program, there have been few lawsuits filed and even fewer successful lawsuits in this area. There are a variety of reasons for this and I will simply list some of them.

- 1) The adolescents we are talking about often have troublesome pre-placement histories resulting in a jury's belief that the child and/or their parents got what they asked for or needed.
- 3) Most of the injuries to adolescents are psychological injuries including post traumatic stress disorder (PTSD) claims, and they are a tough sell to a jury, particularly where there is no physical injury to go with it.
- 4) Statutes of limitations often expire before the victims a) understand what happened to them, b) are ready to talk about it, or c) feel powerful enough to take action by even looking for a lawyer. (Statutes of limitations vary significantly from state to state, particularly with respect to assessing claims by minors, and as a result, this is an area where the state-to-state variations are often critically significant.)
- 5) There may or may not be approval for the litigation from parents of the victim who are often slow to admit that they were duped, resulting in harm to a child they were trying to help.
- 6) Confidentiality agreements resulting from lawsuits often keep whatever settlements there have been secret, so lawyers considering these cases on a contingent fee basis do not know whether they are economically viable.
- 7) Many of these facilities either have big money behind them or cult-like aspects. In either case, a lawyer thinking of filing a complaint quickly learns that unless there is a death, or facts which if known could lead to the facility's reputation being seriously damaged and its marketing hurt, the other side is not likely to be interested in an early and financially significant settlement. The defendant often just has too much at stake.

Malpractice or consumer fraud lawsuits offer possibility of success

It is my view that successful litigation in this area is likely to proceed on one of two theories: consumer fraud claims or malpractice actions.

The first area where I believe that litigation has potential for success is the area of **consumer fraud**. Most states have consumer fraud statutes. They are all different but many include provisions for punitive damages of some kind, and reimbursement of attorneys' fees for successful litigants. The cases I envision would be filed by parents who were duped by dishonest marketing into sending their child away. The potential for a recovery beyond compensatory damages may make such suits economically viable where they would not otherwise be.

The second area is **malpractice actions** against the facility and the professionals involved in the placements. This may be a viable strategy because it places the focus on the initial diagnosis and focuses the litigation on whether the treatment was consistent with the standard of care for the diagnosis. A substantial portion of the more than \$16,000,000 in recoveries in the "Kids" cases that I litigated in New Jersey between 1998 and 2005 came from malpractice insurance carriers for the psychiatrists who lent their names to the diagnosis and treatment of the adolescents.

Please note that individuals wanting to file malpractice claims often have to deal with separate statutes of limitations, and obtain pre-litigation "affidavits of merit" from professionals.

Malpractice and the misuse of therapeutic and educational language

The teen help industry long ago adopted the language of mental health professionals and educators in its sales, marketing and advertising. These facilities commonly refer to "treatment" for mental health conditions such as bipolar disorder or depression, and to "help" for educational deficits such as ADHD. Yet unlike the regulated settings of mental health hospitals or public schools, the residential program may not, and may not be required to, provide a written mental health diagnosis and treatment plan, or a written educational plan.

It is my view that by stealing the therapeutic and educational language of mental health and educational professionals, and using the stolen words without defining them or taking responsibility for them, this industry was created and has grown. I have been amazed at the ability of these facilities to have it both ways by marketing on the Internet, and through “educational consultants,” with references to treatment or help for bipolar disorder, behavior disorders, eating disorders, ADHD, depression, and other conditions, and then presenting contracts to parents or caregivers that make no mention of, or even specifically deny, that they treat the conditions they advertise.

A legal requirement that written diagnoses and treatment plans be provided would both make it harder for these facilities to commit consumer fraud, and easier to pursue successful malpractice and consumer fraud actions against them.

It is important to press regulators and lawmakers to require that for every adolescent admitted to a residential facility with a mental health and educational component (or one that has marketed itself as providing treatment of medical conditions found in the Diagnostic and Statistical Manual of Mental Disorders—the “DSM IV”) there be a written diagnosis for the adolescent, and a written treatment plan that the facility and its licensed professionals represent as appropriate for that child’s diagnosis.

With respect to the educational component, there ought be a written report such as those prepared by child study teams in the public schools, and an educational program that is specifically related to the conclusions set forth in the report about the problems responsible for the educational deficits the adolescent is experiencing.

These steps would reduce consumer fraud and improve accountability.

Parents who are in agreement have legal authority to place the child

When the child is sent away by both of her/his parents who agree about the placement, no court is likely to intervene. If there are suspicions or proofs that the parents have physically abused the child, then the child welfare agency in each state is the appropriate institution to contact, but it takes dramatic and

verifiable proofs before any action by any such agency is appropriate or likely. There is simply no mechanism in our judicial system for courts to get involved with decisions involving child-raising over the objection of parents, and I think we would agree that involving the courts in such judgments that parents make every day would open up the proverbial “Pandora’s box.”

In practical terms, the legal concept of “standing” precludes anyone from pursuing a suit who does not have a stake in the outcome, and when it comes to the rights of children, no one outside of the child’s immediate family or legal guardian other than a school or a child welfare agency has the legal status that would permit them to institute an action claiming that they speak for the child’s “best interest.”

More options exist for children of divorced parents

Adolescents whose parents are divorced are in a different position because the courts routinely get involved in making decisions for such parents who disagree about how their children ought to be raised. The custody arrangement the parents have may impact on the result of any such decision, but you have to be careful about the meanings of legal terms like “joint custody,” “residential custody,” and “exclusive custody” because the words have different meanings in different places and are often redefined by a written separation agreement between the parents.

I have often heard from a non-custodial parent upset because his or her former spouse has sent their child away. Single parents are prime targets for the “tough love” marketers. And the marketing often convinces such parents that they need to act quickly in their child’s best interest to prevent the child from becoming “just like the good-for-nothing” who is finally gone.

For example, I have seen several overreactions to teenage drinking by single moms who believe that aggressive action is necessary to prevent their children from becoming alcoholics like their former spouses. (One of the subcategories of people who often send their kids away are parents who were or are active Alcoholics Anonymous participants themselves.)

If I could commission a study it would be one that measures the percentage of children placed in residential programs who were adopted, are living in a single parent home or have warring divorced parents—a percentage my experience suggests is high. The research might not yield a politically correct result but I believe the findings would be dramatic and perhaps shocking.

Find the right lawyer and know which court to approach

Family court judges clearly have the authority to overrule a divorced parent's decision to send a child to a treatment facility. The law they apply is governed in most or all states by a determination by the court of what is in "the best interests of the child."

The appropriate lawyer for the upset parent is a lawyer who has experience in the location where the parents were divorced, on issues of child custody, visitation, etc. The right judge is in the state where the child lived before being sent away, not a judge in the state where the facility is located.

The goal of the lawyer ought to be to get the child evaluated by a mental health professional who will see beyond the parents' fight and focus on the needs of the child. Once the dispute gets into that posture we can be helpful by focusing the lawyer and perhaps the clinician on the appropriate literature, studies and experts who understand what this industry is about. In practical terms, we can also focus the lawyer on the facility's visitation rules and explain how the visitation rules are often intended to break the bond with the non-custodial parent.

I want to emphasize that the right lawyer is a good local lawyer who knows his/her way around the family court and has an open mind with respect to our concerns about psychological abuse with long-term consequences and physical harm in residential programs for teens. Being comfortable or sympathetic to these issues is helpful but is not as important as having someone first-rate who is comfortable with local procedures, local judges and the realities of everyday practice in the family courts.

A grandparent whose child is divorced and whose grandchild has been sent away may be able to pursue visitation rights

I have received several phone calls from grandparents who are distraught about a placement. They are in a middle ground. Here the law varies from state to state with respect to visitation rights. In legal terms, the issue in grandparents getting involved in a lawsuit is one of “standing,” and the correct answer for them is to contact a local family /divorce lawyer and find out if they have standing to bring an action which may be couched in terms of the placement interfering with their visitation rights.

Few remedies under the law for other family or friends

The law provides no remedy for aunts, uncles, family friends, or parents of friends of the adolescent who has been sent away. I sympathize with the difficulty of their situations. For all of those folks the only realistic plan is to do everything they can to stay in touch with the child, to get information to the parents about the true nature of the facility, and to explain to the parents that the positive reports they hear from their children and the staff of the facility are often the product of pressure and monitored calls—and later, perhaps evidence of Stockholm syndrome. (Stockholm syndrome is a psychological condition of developing sympathy for, or loyalty to, one’s captors.)

These family members and friends should also be encouraged to make a contribution to an advocacy organization such as CAFETY (the Community Alliance for the Ethical Treatment of Youth, www.cafety.org).

The increase in the number of residential treatment programs for adolescents who are deemed by parents or guardians to be “troubled,” but who have not been charged with criminal activity, presents unique legal challenges for lawyers and courts. At their worst, these facilities can become private jails that operate outside of our system of judicial oversight, or become treatment centers that subject youth to “treatments” that have no basis in what is now known about mental health or adolescent development. Because they are operated primarily by for-profit operators who have an incentive to keep their costs down and their

income up, the potential for abuse is always present. And because they operate as “therapeutic communities,” the potential for the community to become corrupted by leaders with their own agendas is there, too.

I have tried in this memo to briefly survey the legal issues that arise most often in this emerging and troublesome area, understanding that unless these facilities are required to conform to the requirements of our nation’s educational and mental health systems, the potential for harm will be great and the need for creative legal work to prevent harm to adolescents and families is likely to increase.

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