# DOCKET OF CASES RELATED TO ENFORCEMENT OF THE ADA TITLE II "INTEGRATION REGULATION"

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This docket summarizes federal court cases seeking enforcement of the ADA integration regulation.1

Changes since April 2015 are highlighted in yellow for easy reference.

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# I. Organization of Cases in This Docket

Cases in this docket are listed alphabetically by state and are divided under two topic headings: 1) cases on behalf of individuals residing in institutions and seeking movement into appropriate integrated home and community based settings; and 2) cases on behalf of individuals living in the community but at risk of institutionalization because their home and community based services are being terminated or reduced, or because they are on waiting lists for the Medicaid community based services they need. In addition, cases in which the U.S. Department of Justice has been involved in any capacity are indicated with this symbol Ĵ next to the case name.

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# II. Executive Summary

Title II of the Americans with Disabilities Act (ADA) makes it illegal for public entities—essentially state and local governments—to deny qualified individuals with disabilities the benefits of their programs, services or activities, or to otherwise discriminate against them.[2] This Docket lists cases raising the claim that a state is violating a Department of Justice (DOJ) regulation implementing Title II, which mandates that state governments must administer services "in the most integrated settings appropriate to the needs of qualified individuals with disabilities."[3] This regulation is commonly referred to as the "integration mandate" and is often referred to as an "Olmstead" claim. This refers to *Olmstead v. L.C* (Olmstead), a U.S. Supreme Court decision holding that unjustified institutionalization of individuals with disabilities constitutes illegal discrimination on the basis of disability.[4]

To understand the Olmstead decision and most of the cases in this docket, it is important to know that the right to receive services in the most integrated setting possible is not unqualified. Although the ADA requires states to make "reasonable accommodations" to comply with the statute, states are not required to make accommodations that would be a "fundamental alteration of its system for providing care for individuals with disabilities." To assert a "fundamental alteration" defense to an integration mandate claim, a state must demonstrate that, "in the allocation of available resources, immediate relief for the Plaintiffs would be inequitable, given the responsibility the state has undertaken for the care and treatment of a large and

2. ADA § 202, 104 Stat. at 337 codified at 42 U.S.C. §§ 12131-34)

3. (28 C.F.R. § 35.130(d) (2010).

4. 527 U.S. 581, 597 (1999).

diverse population of persons with mental disabilities."[5] Just what constitutes the most integrated setting appropriate and what would be a "reasonable accommodation" as opposed to a "fundamental alteration" have been the subjects of much litigation.

DOJ has authority to enforce the ADA Title II integration mandate. In 2009, the President announced the Year of Community Living and, in response the DOJ, has greatly increased its Olmstead enforcement efforts. However, the majority of litigation to enforce Olmstead has been brought by legal aid agencies, public interest law firms, and the nationwide network of Protection and Advocacy Systems (P&As). Although DOJ has filed its own litigation to enforce Olmstead, DOJ enforcement often involves intervening in or filing "Statements of Interest" or amicus briefs in support of Plaintiffs in cases brought by others.

There are many litigation questions that arise over and over in cases throughout this docket. Below is a summary of these frequent litigation questions and the current state of the law on the issue. To the extent that they are helpful, excerpts from a recent *Olmstead Technical Assistance Guide* published by the DOJ in July 2011 are also included. The *Guide* catalogs and explains the positions the DOJ has taken on many of the questions frequently raised in Olmstead litigation.[6]

### *1. What is the most integrated setting?*

The ADA regulations define most integrated setting as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible."[7] This does not always reflect the settings that states consider "community services." A federal court in New York addressed this issue directly in *Disability Advocates, Inc. v. Paterson*,[7] involving whether "adult care homes for individuals with mental illness" could legitimately be considered part of the state's community services system. The Judge ruled that Olmstead requires placement in the most integrated setting appropriate to the needs of the individual; thus, an unlocked but highly regimented congregate setting constitutes unnecessary segregation when individuals could be served in their own apartments by supported housing.

*The Disability Advocates, Inc.* case was appealed to the Second Circuit and ultimately vacated on procedural grounds, however, the Circuit Court majority did not question the findings that adult homes are institutions and that New York State is violating the Americans with Disabilities Act.[7] Indeed, in July 2013, New York settled with Disability Advocates Inc., and the U.S. DOJ, with New York agreeing to provide community supportive housing and services to residents of adult care homes (of at least 100 beds in size, and with at least 25% or 25 residents diagnosed with significant mental illness). The North Carolina U.S. District Court also addressed this question in *Marlo M v.*

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5. 527 U.S. at 604

6. The full Technical Guide can be downloaded at http://www.ada.gov/olmstead/q&a_olmstead.htm.

*Cansler.*[7] Plaintiffs were two individuals with mental illness currently living in their own apartments in the community with supports. They sought to prevent threatened state Medicaid cuts which would force them out of their own apartments and into group homes in the community. The state argued this does not violate Olmstead because the Plaintiffs will still be living in the community. The Judge entered a Preliminary Injunction to stop the cuts, holding that Olmstead requires not just integration but the *most* integrated setting appropriate. The Judge was also influenced by the fact that past attempts at living in group homes had been difficult for the Plaintiffs because of the nature of their mental illness.

On January 16, 2014, the Centers for Medicare and Medicaid Services (CMS) published a final rule governing home and community based settings (HCBS) for 1915(c) waivers and 1915(i) and 1915(k) state plan options. These rules set forth standards for determining whether a setting is actually home and community based and therefore a permissible site at which Medicaid HCBS may be provided. In defining HCBS settings, CMS focuses on the nature and quality of participants' experiences rather than the setting's location, geography, or physical characteristics. CMS comments in the preamble to the rule state that a goal of the new rule is to "ensure that Medicaid is supporting needed strategies for states in their efforts to meet their obligations under the ADA and the Supreme Court decision in Olmstead v. L.C." It is important to note, however, that settings that meet these new standards may NOT necessarily meet the ADA requirement of most integrated setting appropriate to an individual's needs.

### *2. Does Olmstead apply to private facilities?*

Very often, the entities serving individuals with mental illness are private for-profit or not-for-profit agencies, such as nursing facilities, "board and care homes," and psychiatric residential treatment centers. States have argued that they cannot be held accountable for the failure of these non-governmental entities to ensure services in the most integrated settings appropriate. Whether the states' arguments are correct will likely depend on the private facilities' relationships with the state. For example, some states contract with private psychiatric hospitals to treat individual state clients on a one-at-a-time basis; in other cases, states have ongoing contractual relationships with private facilities to set aside entire wards, units, or facilities for state clients. In these situations, the DOJ regulations are clear that when the individual is a client of the state mental health system and is unnecessarily institutionalized in a private psychiatric facility, that person can bring an Olmstead claim against the state. The Title II regulations state that "[a] public entity may not, directly *or through contractual or other arrangements*, utilize criteria or methods of administration...that have the purpose or

7. 679 F.Supp.2d 635 (2010)

effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to persons with disabilities."[8]

This regulation was tested *Disability Advocates Inc. v. Patterson* and survived judicial scrutiny. As noted above, the Plaintiffs were individuals with mental illness living in an adult "board and care" home instead of more appropriate community settings. The state argued that it could not be held responsible for segregation of private for-profit adult homes. In rejecting this argument the Judge noted that New York, through its various agencies, was involved in licensing and inspecting the adult homes, as well as that, when the state chose to allocate some of its mental health dollars to support adult homes, it was "administering services" in a manner that violates the ADA as interpreted in Olmstead.[9]

DOJ again asserted its interpretation of the regulation when it filed a complaint in *U.S. v. North Carolina*,[10] arguing that "[a]s a result of [North Carolina's] planning, structuring, administration, and funding of its system of care, people with mental illness receive services unnecessarily in adult care homes or are at risk of unnecessary institutionalization" in violation of the integration regulation. On August 23, 2012, DOJ and North Carolina settled the case, agreeing that North Carolina will provide community-based supported housing to 3,000 individuals who currently reside in, or are at risk of entry into, adult care homes.[11]

Whether Olmstead applies to individuals in private psychiatric hospitals with little or no relationship with the state's mental health agency but receive payments from state Medicaid programs for treatment of children and adolescents, older patients, or, pursuant to Medicaid waivers has yet to be tested.

### *3. When does a state's failure to provide discharge planning or proper assessments of community services needs violate Olmstead?*

A good example of how failure to provide discharge planning can violate Olmstead is *Connecticut Office of Protection & Advocacy for People with Disabilities v. Connecticut.* The case asserts that the state's failure to adequately assess the long-term care needs of nursing facility residents with mental illness to determine whether their needs could be more appropriately met in community settings violates Olmstead. The case settled before the Court could issue a decision on the issue. However, the Court did grant a Motion for Class Certification indicating that the claim was feasible.[12] Furthermore, the

8. 28 C.F.R. 35.130(b)(3)(ii)(emphasis added).

9. Id. At 6.

10. No. 5:12-cv-557 (E.D.N.C. 2012)

11. Id.

12. 706 F.Supp.2d 266 (2010)

Judge approved the settlement requiring that all 441 residents receive an evaluation for community readiness and appropriate discharge planning.

In an interesting twist on this question, some operators of institutions in Illinois sought to halt implementation of a consent decree in *Williams v Quinn*. The *Williams* consent decree requires Illinois to provide community services for residents in these institutions. The institution operators argued that residents were not receiving appropriate discharge planning and this was leading to higher "critical incident reports" for individuals who had moved out of the institutions than for those who remained in the facilities; thus, implementation of the consent decree should stop until assessments and other issues with transition were fixed. The Judge reviewed the data, found that transitions were proceeding safely, and denied the motion to halt implementation of the Decree.

Disability Rights Iowa (DRI) is also making the argument that a state's failure to provide proper assessment to facility residents could lead to an Olmstead violation. In September 2014, DRI filed a complaint with the Centers for Medicare and Medicaid Services (CMS) asserting that the state's failure to provide appropriate Preadmission Screening and Resident Review (PASRR) reviews of nursing facility residents with mental illness or intellectual disabilities, as required by the Nursing Home Reform Act, violates Olmstead. The premise is that Iowa has not created an effective oversight system to ensure that nursing facility residents with mental illness or intellectual disabilities are receiving the PASRR Specialized Services they need to improve and maintain their functioning, reduce their dependence on anti-psychotic medications and transition into more integrated, community settings, where appropriate. On October 31, 2014 CMS sent a letter to Disability Rights Iowa stating that CMS has opened an investigation, initiated discussions with state officials, and is collecting data.

### *4. When does Olmstead apply to individuals "at risk" of institutionalization?*

The vast majority of Courts that have considered the issue have ruled that Olmstead applies to individuals at risk of institutionalization as a result of cuts to state programs, failure to move waiting lists at a reasonable pace, or policies that favor institutionalization over the community. One often cited example is *Fisher v. Okla. Health Care Authority*. In Fisher, the Plaintiffs challenged Oklahoma's decision to stop providing unlimited prescription drug coverage in a community-based Medicaid waiver program, while continuing to provide unlimited prescription coverage to nursing facility residents. The Tenth Circuit agreed that this policy violated Olmstead by putting waiver recipients who needed more than three prescription drugs each month "at risk" of placement in a nursing facility.[13]

13. 335 F.3d 1175 (2003)

There are a few exceptions however, including, *Arc of Virginia v. Kaine.* This case was brought by individuals living in the community on a waiting list for community services. Plaintiffs argued that Virginia's plans to build a new intermediate care facility for individuals with mental retardation (ICF/MR), instead of using the money on community services placed them at risk of placement in the new facility. The Virginia U.S. District Court Judge held that the case was not ripe for litigation until one of the Plaintiffs was actually placed into the new ICF instead of a more appropriate community setting.[14]

The other exception is a July 2013, decision of the 7th Circuit in *Admunson v Wisconsin.* In this case, plaintiffs were living in group homes and sought to stop cuts in the Medicaid program that supported their group home placement. Plaintiffs claimed that the cuts placed them at risk of institutionalization in violation of the integration mandate. The 7th Circuit ruled that plaintiffs claim was not yet "ripe" because so far, no one subject to the Medicaid cuts has been forced to move to an institution to receive necessary services, instead, they've found placements in other, less expensive, group homes. Justice Easterbrook writing for the 7th Circuit held that: *Plaintiffs fear the worst, but their fears may be unwarranted."*

The issue of when do budget cuts create a risk of institutionalization that violates "Olmstead" almost went to the U.S. Supreme Court in the case of *MR v. Dreyfus (now Quigley)*,[15] Plaintiffs in the case sought a preliminary injunction to stop Washington State from making cross-the-board cuts to its Medicaid personal assistance services, arguing that it placed Children with mental illness at serious risk of unnecessary institutionalization. The Lower Court refused to grant the preliminary injunction holding that plaintiffs must actually be institutionalized, as a result of the cuts, in order to bring the ADA claim. Fortunately, on appeal, the 9th Circuit issued the preliminary injunction and ruled that the Medicaid cuts might place Plaintiffs at serious risk of institutionalization, and this risk was enough to allow them to bring an ADA integration mandate claim. The State of Washington considered appealing the "level of risk of institutionalization" ruling to the Supreme Court but decided not to. On August 29, 2013, the Parties signed a proposed settlement in which Washington State agreed to provide Medicaid funding for intensive community based mental health services and supports, so Children are not forced into institutions to receive them.

A somewhat related decision was decided on June 5, 2015, by the U.S. Court of Appeals for the Ninth Circuit ruled in *K.W. v. Armstrong. K.W.* does not actually include ADA Integration Mandate. However, it does involve individuals with disabilities who receive Medicaid HCBS, who are facing loss of these services, and risk of

14 . U.S. District Court, E.D. Virginia, Richmond Division .December 17, 2009, Not Reported in F.Supp.2d 2009 WL 4884533 CIV 3:09 CV 686

15. 2011 WL 6288173 (9th Cir. 2012).

institutionalization, because of Medicaid budget cuts. The case centers around whether the Federal District Court in Idaho had the right to issue a court order (preliminary injunction) to temporarily stop the state from cutting Medicaid services for individuals on the Medicaid developmental disabilities waiver. The Idaho Federal District Court had ordered the halt in Medicaid cuts on the grounds that the Idaho Department of Health and Welfare Services had changed the way it calculated individual service needs, and then sent waiver enrollees notice that their services were going to be cut, but the notices violated Medicaid law because the state failed to explain why the services were being cut.

Idaho appealed to the Ninth Circuit Court, in part, arguing that only individuals who lose services are entitled to Medicaid notice, and these waiver recipients had not actually lost waiver services. The state asserted that these waiver recipients had no basis for expecting that their budgets will continue beyond the current year because Idaho's regulations require that a participant's individual budget be reevaluated each year. And further, the state had merely notified waiver recipients of a budget calculation, since this budget can still be appealed by the waiver recipient, the had not yet been denied a Medicaid service. The 9th circuit rejected these arguments, holding that Medicaid notice rights attach because "calculating lower budgets had the "practical effect" of reducing the Plaintiffs' waiver services, regardless of whether the waiver recipient could appeal the budget determination at a later date.

### *5. Does Olmstead apply to the provision of employment or education related services?*

Until very recently, all Olmstead claims in federal courts have concerned discrimination in the provision of residential services. The case of *Lane v. Kitzhaber*, filed in Oregon Federal District in January 2012, marks the first time a court has examined whether the ADA Integration Mandate could apply to a state's provision of employment-related services. *Lane* was filed on behalf of individuals with intellectual or developmental disabilities (IDD) who, with the support of the State of Oregon, are employed, or have been referred for employment, in segregated settings called sheltered workshops. They claim that the State of Oregon is violating the ADA integration mandate by over-relying on sheltered workshops and failing to provide, fund, or make available integrated supported employment services to all persons with disabilities who want and can benefit from such services. Two important litigation developments have occurred in the case to date. First, the Judge certified a "Class" of individuals who were segregated in sheltered workshops, were denied contact with non-disabled peers, were qualified for

supported employment, and wanted to work in integrated settings.[16] Second, the Judge granted DOJ's Motion for Intervention, in which the Agency claimed Oregon is over-relying on segregated employment settings. The Motion asserts that:

- 61% of people receiving employment services are in sheltered workshops; and only 16% are in individually. supported employment;
- People with intellectual disabilities remain in sheltered workshops an average of 11-12 years; and
- The lack of supported employment options creates a virtual pipeline from school to segregated employment

The DOJ is a strong proponent of applying the ADA integration mandate to employment-related settings. In addition to seeking the Motion to Intervene in *Lane,* DOJ investigations in other states have resulted in "findings letters" informing the relevant Governor that their over-reliance of state support for sheltered workshops violates the ADA Integration mandate.

In June 2014, DOJ signed an interim enforceable agreement with Rhode Island and the City of Providence. The agreement seeks to fix the DOJ "finding" last March (see Section III(b) above) that the State and City are violating the ADA integration mandate by unnecessarily segregating individuals with intellectual and developmental disabilities (I/DD) in sheltered workshops and segregated day activities, and placing public school age children with I/DD at risk of the same segregation. Pursuant to the Interim Settlement Agreement, the State and City will give individuals in these segregated settings, and students at risk of such placement, the opportunity to receive integrated supported employment and integrated daytime services that will enable them to interact with the broader community to the fullest extent possible.

In 2015, *SS. V. Springfield, Massachusetts Public School District,* became the first ADA integration mandate case filed in Federal District Court on behalf of students with disabilities in segregated schools. Plaintiffs' argue that the school district is failing to provide reasonable accommodations for students with mental health needs and is unnecessarily placing these students in a segregated, inferior public day school. Traditionally, students and parents have used the Individuals with Disabilities Education Act (IDEA) to argue for the services and supports they need to be receive a free appropriate education in the least restrictive environment. Having an ADA Title II claim, in addition to an IDEA claim, is important because the ADA's non-discrimination mandates require school districts to provide different and additional measures to avoid discrimination against children with disabilities than they are required to under the

16. 841 F. Supp. 2d 1199 (D. Or. 2012),

IDEA. No decision has been reached yet, but the DOJ has filed a Statement of Interest in support of plaintiffs' ADA claim.

1. *What constitutes a "fundamental alteration" defense to an Olmstead suit?*

This is by far the most litigated Olmstead issue and can be broken down into a variety of separate questions, discussed below in some detail.

### 6. What budget is appropriate for determining whether the requested accommodation would be a fundamental alteration?

In *Frederick L v. Pennsylvania Department of Public Welfare*, a class of 300 residents of Norristown State Hospital urged the state to provide appropriate assessments of home- and community-based services (HCBS) needs and appropriate discharge planning to comply with Olmstead. The state raised a fundamental alteration defense. The case eventually went to the Third Circuit to determine whether, in deciding whether the requested relief constitutes a "fundamental alteration," a court should consider only the immediate extra costs to the state and not any later cost savings as a result of community integration; and whether the Court may consider only the available funding for the particular group to receive the services or the funding available in the entire disability services budget. The Circuit Court held that the budget can be broader than just the particular narrow budget item; it could include the entire agency budget as long as there is a nexus between the agency responsibilities and the provision of community services to people with disabilities. Thus, Plaintiffs could argue that agency or state resources allocated for housing, general health services, and meal programs may all have a nexus to the provision of community-based services for individuals with disabilities.

The DOJ *Olmstead Technical Assistance Guide* explains the agency position on this question, stating:

> *The relevant resources for purposes of evaluating a fundamental alteration defense consist of all money the public entity allots, spends, receives, or could receive if it applied for available federal funding to provide services to persons with disabilities. Similarly, all relevant costs, not simply those funded by the single agency that operates or funds the segregated or integrated setting, must be considered in a fundamental alteration analysis.*

### 7. Must the state expand "optional" Medicaid services in order to prevent unnecessary institutionalization?

To understand this "defense" it is important to know that the Medicaid Act makes coverage of most HCBS, including HCBS waivers, optional. States that choose to provide "optional" services are given the flexibility to cap optional services and to stop

providing them altogether. However, the actions the state takes to eliminate or reduce services must be legal and comply with certain protections under the Medicaid Act, as well as the ADA. Thus, it may not be legal to cut optional services if the cut will result in unnecessary institutionalization.

The DOJ recently affirmed this fact in a December 22, 2014 letter they sent to state officials, jointly with HHS, concerning state Olmstead obligations and a new Department of Labor regulation affecting Medicaid home health workers. The new rule, effective January 1, 2015, requires that Medicaid home health providers who provide "live-in" or "companionship services" must, for the first time, be paid minimum wage and overtime. The DOJ Letter reminds states that, if they choose to reduce Medicaid home health services, to adjust for the fact that these services may cost more, they should ensure the cuts don't lead to unnecessary institutionalization.

Concern over how the new FLSA home care regulation is implemented is temporarily halted, however, because the federal District Court for the District of Columbia issued two rulings which effectively invalidate the regulation. The Department of Labor has appealed the District Court decisions and a hearing is expected in August 2015. If DOL wins the appeal, states are still not endanger of suit until 2016 since DOL has said they will exercise "prosecutorial discretion" until December 31, 2015.

It is not uncommon however, for states, when confronted with an Olmstead lawsuit demanding more HCBS services, to argue that requiring a state to expand an "optional" Medicaid service constitutes a fundamental alteration. On this issue the DOJ *Olmstead Technical Assistance Guide* states:

> *A state's obligations under the ADA are independent from the requirements of the Medicaid program. Providing services beyond what a state currently provides under Medicaid may not cause a fundamental alteration, and the ADA may require states to provide those services, under certain circumstances.*

Federal Court rulings on this issue have varied depending on a host of factors. *Radaszewski v. Maram*[17] is emblematic of one line of cases that have held that states must "alter" their optional services to comply with Olmstead. Eric Radaszewski was receiving 16 hours of private-duty nursing daily through a Medicaid waiver for medically fragile children younger than 21. When Eric turned 21, the state Medicaid agency reduced his coverage to only five hours of private-duty nursing each day. Eric could not remain safely at home with the reduced coverage; yet, he would be at great risk for infections and other life-threatening problems in an institutional setting. The Seventh Circuit Court of Appeals ruled that because no institution would be equipped to handle Eric's care needs without extra staff, it is actually less expensive to provide the requested home-based care. Thus, it is a reasonable accommodation to waive the

17. 383 F.3d 599 (7th Cir. 2004)

"cap" on service hours.[18] Key to the Judge's ruling was that not very many individuals are as medically fragile as Eric; thus, even if a handful of individuals with the same high level of care asked to waive the "cap" it would not likely cause a fundamental alteration of the state's program.[19]

Another example is the Tennessee U.S. District Court case *Crabtree v. Goetz*, in which individual Plaintiffs were able to obtain a preliminary injunction barring cutbacks of their Medicaid home health services.[20] The Judge found that Plaintiffs would be forced into a nursing facility if the hours were reduced, and stated that the state should have individually assessed the potential impact of the service reductions before ordering the service reductions.

However, cases seeking to increase the number of slots a state offers in its Medicaid HCBS waiver as a reasonable accommodation under Olmstead have been less successful. In *ARC of Wash. State v. Braddock*,[21] the Ninth Circuit refused to require Washington State to add additional HCBS waiver slots, stating that ADA requirements are not boundless and finding that the waiver was already substantial in size and slots were filled. In *Sanchez v. Johnson,*[22] the Ninth Circuit refused to order an increase in funding for community-based services for people with developmental disabilities (DD), finding the state was working "with an even hand" to provide HCBS because evidence showed waiver size and expenditures had increased over time and institutionalization had decreased. However, these cases often also include claims that budget cuts violate Medicaid law. Accordingly, the case may continue even when the ADA claim is denied.

### *8. What types of remedies have Courts ordered to resolve Olmstead claims affecting individuals with mental illness?*

The DOJ stated in its July 2012 Olmstead guidance that:

> *A wide range of remedies may be appropriate to address violations of the ADA and Olmstead, depending on the nature of the violations. Olmstead remedies should include, depending on the population at issue: supported housing, HCBS waivers,*

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18. Id. At 613-14

19. (See also: *Wilborn ex rel. Wilborn v. Martin*, (M.D. Tenn. 2013); Grooms v. Maram (N.D. Ill. 2008); Sidell v. Maram (D. Ill. May 14, 2007); and Knowles v. Traylor (N.D. Tex 2008; 5th Cir. 2010)).

20. No. 3:08-0939, 2008 WL 5330506. (M.D. Tenn. Dec. 19, 2008)

21. 403 F.3d 641, 644 (9th Cir. 2005)

22. 416 F. 3d 1051 (9th. Cir. 2005).

*crisis services, Assertive Community Treatment [ACT] teams, case management, respite, personal care services, peer support services, and supported employment.*

In T.R. et al v Quigley, the settlement agreement included a remedy that Washington State improves its compliance with the Individuals with Disabilities Act (IDEA). On the premise that better compliance with this Act may help children receive the services they need to avoid unnecessary institutionalization. The ongoing U.S. v Florida case also asserts that the Florida's failure to provide appropriate IDEA services to children could contribute to their risk of institutionalization.

### *9. What is the role of parents and guardians who may object to community placements?*

It is not unusual for some parents and guardians of facility residents to object to the residents' discharges from a facility to community programs. Individuals or groups occasionally file objections to settlements and sometimes seek formal intervention. When this happens, there is likely to be a protracted debate to the Court about the benefits of community living and the meaning of the Olmstead opinion.

Most courts have at least allowed the objecting families to be heard; some have allowed formal intervention, and a few have granted relief. For example, in *Brown v. Bush*, the Court denied intervention but allowed the objectors to participate at a fairness hearing to consider whether the Court should approve a settlement that included closing two facilities. The Eleventh Circuit affirmed.[23] In *U.S. v. Virginia*,[24] the District Court granted intervention and allowed the objectors to fully participate at the fairness hearing on approval of the proposed consent decree. In *Ricci v. Patrick*, several of the original associational Plaintiffs (parents' groups) in a case settled years earlier objected to the state's plan to close a facility. Another original Plaintiff, the state Arc, and an intervener supported the closure. The trial Court reopened the case and, in essence, ordered the facility to remain open. The First Circuit reversed, holding that the state had the authority to close the facility under the terms of the consent decree.[25]

This question was revisited on April, 1 2013, in *M.D. v. Dept. of Developmental Services* DDS. The case is only at the intermediate state level appeals court, but it is still worthy of note because the decision is consistent with the decision by the 5th Circuit on the issue. The State Appellate Court Judge ruled that the Magistrate (who oversaw decisions on Fernald transfers) was not required to consider an ADA integration

23. 194 Fed. Appx. 879 (11th Cir. 2006).

24. 2012 WL 1739165 (E.D. Va. 2012)

25. 544 F.3d 8, 21 (1st Cir. 2008)

mandate claim when deciding whether to transfer one of the last remaining residents of the Fernald Developmental Center to another state developmental center.

In this case, M.D.'s guardians (the plaintiffs) wanted M.D. to remain at Fernald and argued that Olmstead required them to keep Fernald open since it was the "most appropriate integrated setting" for M.D. The Judge rejected this, stating that, nothing in the *Ricci v. Patrick consent decree* guarantees "any Ricci class member [Fernald Resident] a particular residential placement or that [Fernald] must be maintained by DDS as long as any particular resident preferred to remain there." Second, that Judge upheld the Magistrate finding that, "A point-by-point comparison of the two facilities may reveal some features favoring one facility, while the remaining features favor the other facility. But the statute does not require that every feature of a proposed facility be superior in order to approve a transfer. Rather, by focusing on the best interest of the ward, it commands that the whole picture be examined."

The question of whether the ADA gives individuals a right to remain in a particular institution if they oppose transfer also arises in *Sciarrillo v. Christie*, before the Federal District Court in New Jersey. The U.S Department of Justice submitted an amicus brief (statement of interest) in *Sciarrillo* arguing that states do not have a right to bring this claim under the ADA.

The examples above concern parent or guardian opposition to residents' discharge as a result of a court settlement or consent decree. In the case of *Illinois League of Advocates for Developmentally Disabled (ILADD) v Quinn,* parents and Guardians of residents at the Murray and Jacksonville Developmental Centers filed in Federal District Court seeking an injunction to stop the closure of the Murray Center. This case is different from the others in that the closure of the Murray and Jacksonville Center was not prompted by litigation, rather it was a pro-active policy decision by the Governor as part of a state initiative to "re-balance" Medicaid spending so more is spent on community-based long term supports.

**A**nother difference in the ILADD case is that the parents/guardians don't argue that the Olmstead decision gives them a right to remain in the Murray Center. Instead, they claim that Illinois uses a service needs assessment process that violates the ADA because the process presumes, but fails to demonstrate, that community-based settings would be appropriate for class members. They further claim the state is violating residents 14th Amendment rights by targeting developmental disability services for more cuts than services used by individuals with other disabilities. On July 21, 2014, the Illinois Federal District Court ruled in the case that the assessment process does not violate the ADA, stating: "Defendants predisposition in favor of the integration of the developmentally disabled population cannot alone constitute unlawful discrimination" and finding it sufficient that the assessment process does not preclude an individual from transferring to a different ICF if they desire. The Court also dismisses plaintiffs 14th Amendment Equal Protection claim, holding that there is no evidence that Illinois expressly tried to deprive Murray Development Center residents of either

placement choice or necessary services. The Murray parents filed a notice of appeal, so the case will now go to the 7th Circuit.

Equip for Equality drafted an *amicus* brief in support of the state that was joined by Access Living, the Americans Civil Liberties Union of Illinois, the Arc of Illinois, the Illinois Council on Developmental Disabilities, Illinois Network of Centers for Independent Living, the Statewide Independent Living Council, and United Cerebral Palsy of Illinois. The brief offer the perspective of many people with intellectual and developmental disabilities who have long awaited and still await full integration into the community. It highlights research showing the ability of people significant disabilities to succeed in the community. Finally, the brief explains that the Murray Center has experienced failures that have threatened the lives and safety of the individuals residing there.

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# III. Cases on Behalf of Individuals Residing in Facilities Seeking Community Placement

### *1. (AL) Boyd v. Mullins (M.D. Ala. 2010) Ĵ*

Action brought by the Alabama P&A alleging violation of the integration mandate and Section 504 for failure to provide community-based services to a young graduate student with quadriplegia currently living in a nursing home. The Plaintiff sought a Preliminary Injunction and DOJ filed a brief in support of Boyd's motion for a preliminary injunction. After the complaint was filed, the state Medicaid agency uncovered new information that led to an administrative denial of Boyd's eligibility for benefits. Boyd ultimately dismissed his federal court case without prejudice, and appealed the state agency's claim that he is not eligible for benefits. The appeal is pending**.**

### *2. (AL) Susan J v. Riley (M.D. Ala. 2000)*

Plaintiffs sought declaratory and injunctive relief, alleging that Defendants failed to ensure:

1) the development of appropriate residential placement services, day habilitation services, and/or other services;

2) that Plaintiffs could apply for and receive these services with reasonable promptness;

3) that these services were made available to the Plaintiffs in the same manner that the services were provided to other similarly situated Medicaid assistance recipients in Alabama; and

4) that Plaintiffs received these services.

The Plaintiffs filed the lawsuit on behalf of persons with DD who applied for services under Alabama's HCBS waiver programs and

1) were found eligible for such services but either did not receive them with reasonable promptness or received services that were inadequate or inappropriate;

2) were deemed ineligible and not given notice or an opportunity for hearing; or

3) did not receive a claims determination with reasonable promptness.

On October 24, 2008, the Court denied the Plaintiffs' motion for class certification as to the first subclass but granted it as to the second and third subclasses. The parties reached a settlement agreement in which the Department of Mental Health and Mental Retardation agreed "to provide additional notices and procedures on a system-wide basis." As part of the settlement agreement, the parties filed a joint motion to decertify the two subclasses, which the Court granted on July 29, 2009. As the Court explains,

> *The combination of system-wide relief and decertification would have the effect of allowing the benefits of the settlement to reach all class members (and other persons who are not class members) without the otherwise attendant burdens of issue and claim preclusion.*

Subsequent to the Settlement Agreement, the parties filed a Joint Stipulation of Dismissal With prejudice, and on August 10, 2009, the Court dismissed the case.

3. **Alabama Disabilities Advocacy Program v. SafetyNet Youthcare, (S.D.** Ala. 2013) Ĵ

The Alabama Disabilities Law Program ("ADAP") made repeated attempts to monitor SafetyNet Academy, a facility which provides care and treatment to young persons with disabilities both as a Psychiatric Residential Treatment Facility for Children under age 21 ("PRTF"), and also under a so called "Moderate Program" for children who do not require PRTF services. Though SafetyNet admits the P&A has the authority to monitor the PRTF program, it refuses to provide ADAP access to monitor or speak with residents in the Moderate Program.

ADAP filed for declarative and injunctive relief against SafetyNet in federal district court to gain access to the entire facility. While still refusing to allow access, SafetyNet brought a third party complaint against the Alabama Department of Human Resources, the licensing agency in the state, asserting that the Department informed SafetyNet that ADAP did not have the authority to monitor the Moderate Program. While the

Department admits its legal position, it denies there is any relief available against the State. A motion for summary judgment by ADAP in pending.

In October 2014, the U.S. Department of Justice filed a Statement of Interest in support of ADAP arguing that P&A access is needed in order to fulfill their Congressionally intended role. The DOJ specifically mentions the P&As important role as monitor of Olmstead compliance.

### 4. *(AK)) Lampman v. Alaska Dept. of Health and Social Services et al. (August 2010)—3AN-10-9567 CI*

Plaintiff has dementia and, as a result of symptoms, was unsuccessful in several assisted living homes and ultimately ended up in a state psychiatric facility. Plaintiff's discharge plan from the state facility was to return to an assisted living home with a 1:1 staff ratio. She applied for the Older Alaskans Medicaid waiver to secure the funding for the services in her discharge plan. She was denied on the grounds that her physical needs did not meet the required level of care requirements. The P&A filed this class action alleging that the Consumer Assessment Tool (CAT) that is used to determine level of care for the waiver is discriminatory against individuals with cognitive disabilities who have no attendant physical needs, in violation of the ADA integration mandate, Medicaid, and Section 504.

The case settled in summer 2012. Unfortunately, Ms. Lampman's physical health deteriorated to a point where she was admitted to a nursing home and her guardian chose institutional care over community-based care options because the change in her physical health resulted in her finally becoming eligible for the waiver. As part of settlement, the state admitted that it does not have a written Olmstead plan.

### 5. *(AK) Spear et. al v. State of Alaska Dept. of Health and Social Services (January 2009)—3AN-09-4343 CI*

Plaintiffs are individuals with mental illness. Both are older than 65 and thus otherwise eligible to reside at the state-run assisted living facilities known as the Pioneers' Homes. However, both have been denied because the Pioneers' Homes do not accept individuals with chronic mental illness. The Pioneers' Homes say they cannot accept these individuals because they are not licensed to care for them. However, there is nothing in the statute or the regulations regarding the Pioneers' Homes that require this restriction. The P&A challenges these denials on ADA integration mandate and 504 grounds, as well as state law, since these policies cause Plaintiff to remain at the state psychiatric facility well past the time she was ready for discharge.

The Parties settled. Pioneer Homes has agreed not to categorically exclude individuals with mental illness. The Homes have instituted a clear notice and appeal process individuals with mental illness can use if they are denied residence.

### *6. U.S. v. Arkansas—10-CV-327 (E.D. AR 2010) Ĵ*

The United States filed suit against the State of Arkansas and Arkansas officials on May 6, 2010, alleging that the Defendants were violating the ADA by failing to provide services to individuals with developmental disabilities in the most integrated setting appropriate to their needs and by failing to provide community service options for the 1400 people on waiting lists at risk of institutionalization. On January 24, 2011, the U.S. District Court for the Eastern District of Arkansas dismissed the complaint without prejudice on procedural grounds relating to pre-litigation notice to the state.

### *1(b). U.S. v. Arkansas—4:09-CV-00033 (E.D. AR 2009)*

The United States filed a complaint on January 16, 2009, against the State of Arkansas and Arkansas officials alleging violations of the ADA, the U.S. Constitution, and the Individuals with Disabilities Education Act at the state's Conway Human Development Center for failing to provide services to facility residents in the most integrated setting appropriate to their needs; subjecting them to unconstitutional conditions; and depriving them of a free appropriate public education in the least restrictive environment. On June 8, 2011, the U.S. District Court for the Eastern District of Arkansas dismissed the action with prejudice.

### *7. (CA) Capital People First v. Department of Developmental Services (State superior court 2002)*

Class action brought by the California P&A on behalf of individuals living in one of several ICFs arguably because of lack of Medicaid community services and in violation of the ADA integration mandate. In 2005, the Superior Court denied class certification. Specifically, the Court found that common legal and factual issues do not predominate, stating that, "[t]here is no way for the trier of fact to find that Defendants have failed to meet their statutory obligations without examining how individuals have been affected," and that it would be necessary to establish that each individual had a legal right to a certain type of community service, which would mandate an individualized inquiry. The P&A appealed and, in September 2007, the state Court of Appeals overturned the Superior Court and granted class certification.

On April 24, 2009, the California Superior Court approved the final settlement. In the settlement, the state agreed to expand community integration options for people with ID, consistent with a California community integration statute (the Lanterman Act). The settlement will benefit all people with ID in California who reside in, or are at risk of placement in, institutions—defined in the lawsuit as public or privately-run facilities for 16 or more individuals. The settlement provides for additional funds for case management to assist class members in state-run institutions called developmental centers; improved information to class members and training for developmental center staff about community living options; increased state-level coordination of services for people diagnosed with DD and mental illness; and continued funding and program efforts to provide community living alternatives for class members.

### *8. DOJ Finding Letter to California (2008) Ĵ*

In mid-June 2008, the Division executed a comprehensive Settlement Agreement with the City of San Francisco to address outstanding deficiencies at the LHH nursing home. LHH is owned and operated by the City through the San Francisco Department of Public Health, and is licensed as both a skilled nursing facility and an acute care hospital. At the time of our settlement, LHH was the largest publicly-operated, single-site nursing home in the United States with a capacity of over 1,200 skilled nursing beds. The Division issued CRIPA/ADA findings letters on May 6, 1998, April 1, 2003, and August 3, 2004, which collectively concluded, in part, that the City engages in a pattern or practice of unlawful conduct with respect to placement of qualified LHH residents in the most integrated setting pursuant to the ADA. The Settlement Agreement required the City to address our findings, in part, by developing and implementing appropriate services and supports for residents in integrated community settings. Because of our settlement, the City has reduced the census capacity of LHH by more than one-third and developed a rich network of community homes and programs that now serve hundreds of former LHH residents as well as an unquantifiable number of persons who likely would have been admitted to an institutional setting like LHH but for the newly-established community network. Community residences include scattered-site apartments and other integrated homes throughout the San Francisco metropolitan area that are supported by an effective community system of case management and other clinical professionals.

### *9. (CA) Chambers et. al. v. City and County of San Francisco (N.D. Cal. 2006)*

On October 11, 2006, six residents of Laguna Honda Hospital, joined by the Independent Living Resource Center (ILRCSF) in San Francisco, filed a lawsuit to challenge San Francisco's discriminatory actions resulting in their unnecessary institutionalization at Laguna Honda, a more than 1,000-bed nursing facility owned and operated by the City. These residents prefer and have been determined to be capable of living in their own homes and in the community. San Francisco's actions violate the ADA, which requires that individuals with disabilities be provided with services in the "most integrated setting appropriate" to their needs. This lawsuit seeks relief from San Francisco that will enable Plaintiffs and the class of current and potential residents they represent to leave Laguna Honda, or avoid placement there, with affordable, accessible housing and services that will support full, independent, and productive lives.

On July 2, 2007, the Judge granted Plaintiffs' uncontested motion for class certification, which defines the class as all adult Medicaid beneficiaries who are:

5) residents of Laguna Honda Hospital and Rehabilitation Center; or

6) on waiting lists for Laguna Honda Hospital and Rehabilitation Center; or

7) within two years post-discharge from Laguna Honda Hospital and Rehabilitation Center; or

8) patients at San Francisco General Hospital or other hospitals owned or controlled by the City and County of San Francisco, who are eligible for discharge to Laguna Honda Hospital and Rehabilitation Center.

In June 2008, the Parties agreed to settle; a fairness hearing was held on September 18, 2008. The Settlement provides for access to**:**

1) Medicaid waiver services;

2) development of a diversion and community integration program, which will conduct assessments and prepare a Community Living Plan for each class member referred for admission to and/or recommended for discharge from Laguna Honda;

3) case management and wraparound services and enhancement of mental health/substance abuse services; and

4) affordable, accessible community housing, including a rental subsidy program, through which the City will subsidize scattered-site, accessible, independent housing for approximately 500 class members.

Additionally, upon completion of the current rebuild project, the total bed capacity of the rebuilt Laguna Honda facility will not exceed 780 skilled nursing beds. The mission of the rebuilt facility shall include as a goal that the facility is for short-term, rehabilitative treatment. The complete agreement is available at www.drc.org.

### *10. (CA) Katie A v. Bonta (D. Ca. 2002)*

Class action filed by the P&A and others challenging California's failure to provide community-based mental health services to children in the foster care system or at risk of removal from their families. Of special concern is California's practice of confining children with mental health needs in hospitals and large group homes instead of providing services that would enable them to stay in their own homes and communities.

By November 2006, Los Angeles County had settled its portion of the lawsuit, agreeing to comply with an implementation plan to provide community-based mental health services in the county. However, the suit against the state continued. First the District Court ordered the state to provide family-based "wraparound" and therapeutic foster care, but in March 2007, the Ninth Circuit reversed the District Court decision and remanded it to address three concerns related to the provision of therapeutic foster care. In January 2008, the Plaintiffs filed a renewed motion for preliminary injunction, asking the District Court to order to address the issues raised in the Ninth Circuit's decision. The Court did so in April 2008, and ultimately granted a preliminary injunction directing Defendants to make wraparound services and therapeutic foster care

available to all class members on a consistent statewide basis through its Medicaid program or other means.

A special master was appointed in 2009 to serve for one year. During the first five months he was to determine whether the parties can reach agreement on a range of issues, then take four months to produce a final written agreement or make recommendations to the Court. Key issues that remained to be resolved include timing, service expansion, funding, the roles and responsibilities of health care providers and administrative agencies, and oversight and quality assurance. The hope was that, by agreeing, the parties could ensure that all of California's at-risk youth were provided the intensive mental health services they need to remain safely at home.

In September 2011, after two years of negotiations, the parties reached a settlement requiring the state to make two types of mental health services available under Medicaid: "intensive home-based services" and "intensive care coordination." the state will also determine what parts of "therapeutic foster care" services are covered under Medicaid and provide that service to certain class members. The settlement was expected to be approved in December 2011. It also required California to take a number of steps to ensure that children who need the covered services will receive them. For example, under the proposed settlement the state will:

9) instruct providers on delivering therapeutic foster care as a Medicaid service;

10) convene an interagency task force to advance the goal keeping children with mental health issues with their families; and

11) create a system to identify children in need of the covered mental health services and to link them with those services.

### *11. (CT) Connecticut Office of Protection and Advocacy v. Connecticut, (D. Conn. 2006)*

Action on behalf of Connecticut residents with mental illness forced to reside in nursing facilities as a result of the way the state provides mental health services under Medicaid. The case, originally filed in 2006, alleges that the Connecticut Departments of Mental Health and Addiction Services, Social Services, and Health, violate the ADA and the Rehabilitation Act. The DOJ filed a Statement of Interest in support of the Plaintiffs and opposing the state's Motion to Dismiss. The Court agreed, and denied the Defendants' Motion to Dismiss and granted, in part, Plaintiffs' motion for class certification.

On November 19, 2010, the U.S. District Court of Connecticut approved a settlement between the Connecticut Department of Developmental Services and the Arc. It provides that each of the 441 residents will receive an evaluation for community readiness and they and their guardians will be given detailed information and recommendations about the best community setting for the individual. The settlement

does not specifically close the school or require residents to move. However, the school has not accepted new residents since 1986 and the census has already reduced 50 percent since that time. A remedial expert is in charge of ensuring implementation.

On July 2, 2014, The U.S. District Court for Connecticut approved a final settlement between the State and the Connecticut Office for Protection and Advocacy. The 4 year settlement requires: 1) residents to receive education about available community supports and services, including an opportunity to visit available community residences; 2) residents, who make an informed choice to do so, to transition to the community within 18 months using a person centered planning process; 3) residents, or their conservators, who make an informed choice not to transfer will not be forced to move but will remain in the class, and their desires regularly re-assessed; 4) the P&A to be notified of residents whose conservators refuse to authorize a community eligibility assessment or to approve an appropriate community transfer; and 5) individuals admitted to the nursing facilities during the term of the agreement to be evaluated for transition to the community within one year of admission. To support these transitions Connecticut will provide, among other services, case management, mobile crisis services, Assertive Community Treatment, employment assistance, and peer support. Kevin Martone, former deputy commissioner of the New Jersey Department of Human Services will serve as remedial expert.

### *12. (DE) U.S. v. Delaware—11-CV-591 Ĵ*

On July 6, 2011, the Division filed in District Court a Complaint and a simultaneous Settlement Agreement resolving its investigation into whether persons with mental illness residing in the Delaware Psychiatric Center are being provided appropriate services while at the Center and whether residents could be served in more integrated settings appropriate to their needs as required by the ADA.

The fundamental goals of the Agreement are to ensure that:

- people who are unnecessarily institutionalized, at the Delaware Psychiatric Center or other inpatient psychiatric facilities, can receive the treatment they need in the community;
- when individuals go into mental health crisis, sufficient resources are available in the community so that they do go unnecessarily to psychiatric hospitals or jails; and
- people with mental illness who are living in the community are not forced to enter institutions because of the lack of stable housing and intensive treatment options in the community.

Pursuant to the Agreement, Delaware will create a comprehensive community crisis system to serve as the front door to the state's mental health system including a crisis hotline, mobile crisis teams able to reach someone anywhere in the state within one

hour, two walk-in crisis centers, and short-term crisis stabilization units. The agreement also commits the state to providing intensive community-based treatment through 11 ACT teams, four intensive case management teams, and 25 targeted case managers. The state will offer at least 650 housing vouchers or subsidies to allow people to obtain stable, integrated housing. Finally, the state will develop evidence-based supported employment services for 1,100 people, rehabilitation services including substance abuse and educational services to 1,100 people, and family and peer support services to 1,000 people. The Agreement requires Delaware to establish a statewide quality management system reflecting qualitative and quantitative measures and provides for an independent monitor with capacity to hire staff to assist in the implementation and to conduct compliance reviews.

### *13. U.S. v. Delaware—11-CV-591 Ĵ*

On July 6, 2011, the Division filed in District Court a Complaint and a simultaneous Settlement Agreement resolving its ADA Olmstead investigation into whether persons with mental illness in Delaware are being served in the most integrated settings appropriate to their needs and its CRIPA investigation into conditions of confinement at Delaware Psychiatric Center.

The fundamental goals of the Agreement are: to ensure that people who are unnecessarily institutionalized, at the Delaware Psychiatric Center or other inpatient psychiatric facilities, can receive the treatment they need in the community; to ensure that when individuals go into mental health crisis, sufficient resources are available in the community so that they do not need to go unnecessarily to psychiatric hospitals or jails; and to ensure that people with mental illness who are living in the community are not forced to enter institutions because of the lack of stable housing and intensive treatment options in the community.

Pursuant to the Agreement, Delaware will create a comprehensive community crisis system to serve as the front door to the state's mental health system including a crisis hotline, mobile crisis teams able to reach someone anywhere in the state within one hour, 2 walk-in crisis centers, and short term crisis stabilization units. The agreement also commits the state to providing intensive community-based treatment through 11 Assertive Community Treatment (ACT) teams, 4 intensive case management teams, and 25 targeted case managers. The state will offer at least 650 housing vouchers or subsidies to allow people to obtain stable, integrated housing. Finally, the state will develop evidence-based supported employment services for 1100 people, rehabilitation services including substance abuse and educational services to 1100 people, and family and peer support services to 1000 people. The Agreement requires Delaware to establish a statewide quality management system reflecting qualitative and quantitative measures and provides for an independent monitor with capacity to hire staff to assist in the implementation and to conduct compliance reviews.

### *14. (DC) Thorpe (formerly Day) v. District of Columbia (D.DC 2010) 1:10-cv-02250 J*

Class action on behalf of people with physical and/or mental illness in nursing facilities who want to return to the community with the services and supports they need. Plaintiffs claim that the District's long-term care program is financed and administered in such a way as to favor placement in a nursing facility. They seek injunctive relief. Plaintiffs are represented by University Legal Services (the D.C. P&A), AARP, and Arent Fox LLP. In response the District filed a Motion to Dismiss claiming, among other things, that it has a fundamental alteration defense to an Olmstead claim. At this point, the DOJ stepped in to support the Plaintiffs, filing a Statement of Interest urging the Court to deny the District's Motion to Dismiss. The DOJ makes several important assertions, including:

> *[A] determination by the public entity's treatment professionals regarding the appropriateness of community placement is one method of establishing this element of an Olmstead claim, but is not the only way to do so; [and] in order to prevail on a fundamental alteration defense, a public entity must demonstrate that it has a comprehensive, effectively working plan for placing qualified persons with disabilities in integrated community settings and that the relief requested would fundamentally alter that plan or the entity's programs.*

The Court denied the City's Motion on to Dismiss on February 14, 2012, holding that governing legal standards and undisputed facts undermine the District's claims that it complies with the ADA & Supreme Court's Olmstead decision. The District has no Olmstead Integration Plan or measurable commitment to deinstitutionalization of people with disabilities from nursing facilities.

The latest litigation battle in Thorpe is whether a Class could be certified - The rules for Certifying a class require that the members of the class suffer a common harm for the same reason, and that this harm can be fixed through a common remedy. In March, the District Court certified a class of "All persons with physical disabilities who, now or during the pendency of this lawsuit: 1) receive DC Medicaid-funded long-term care services in a nursing facility for 90 or more consecutive days; (2) are eligible for Medicaid-covered home and community-based long-term care services that would enable them to live in the community; and (3) would prefer to live in the community instead of a nursing facility but need the District of Columbia to provide transition assistance to facilitate their access to long-term care services in the community." The Judge concluded that this class shared the "common harm" of unnecessary segregation in nursing facilities, for the shared reason that D.C. has failed to implement an effective system of transition assistance.

In February 2015 the plaintiffs won an appeal of class certification by the D.C. government. The Judge rejected DC's argument that since each resident's transition plan is different – there is no common harm or remedy necessary to qualify for class certification.

### *15. (FL) Long v. Arnold(11th Circuit 2010)*

Plaintiff is partially paralyzed and lives in a nursing facility. He sought a motion for preliminary injunction to require Florida to provide him with Medicaid community-based services as required under the ADA and Section 504. The District Court granted the preliminary injunction and the state appealed the case to the Eleventh Circuit, arguing that the integration regulation was not enforceable under by individuals. The DOJ filed an amicus brief in support of Plaintiff, arguing that the requirements of the ADA integration regulation reasonably interpret the Act, and may therefore be enforced by individuals through the private right of action to enforce the statute.

The state also argued in the case that the ADA Title II personal services regulation (28 C.F.R. 35.135), which states that public entities are not required to provide personal services, means that the state can never be required under Title II to provide such services in a community setting. A Statement of Interest filed by the DOJ clarifies that the personal services regulation applies to situations in which the provision of personal services is not part of the Medicaid program a state operates. But where a state operates a Medicaid program that includes the provision of personal services, it must do so in compliance with Title II's integration regulation. The Eleventh Circuit affirmed the District Court's grant of Plaintiff's request for preliminary injunctive relief.

### *16. DOJ Findings Letter to Florida (2012) Ĵ*

The United States issued a Findings Letter on September 5, 2012, concluding that Florida is violating the ADA's integration mandate in its provision of services and supports to children with medically complex and medically fragile conditions. After a comprehensive investigation, the Department found that the State of Florida plans, structures, and administers a system of care that has led to the unnecessary institutionalization of children in nursing facilities and places children currently residing in the community at risk of unnecessary institutionalization.

In July 2013, the DOJ filed Suit against Florida for unnecessarily institutionalizing children with disabilities in nursing facilities. See Section III(c) below.

### *17. (FL) Haddad v. Arnold (M.D. FL 2010)*

Michelle Haddad successfully sought a preliminary injunction preventing the State of Florida from denying her HCBS available under its TBI/SCI Medicaid waiver. The DOJ filed a Statement of Interest in Support of Haddad's Motion for Preliminary Injunctive Relief. On April 19, 2011, the Court granted the parties' joint Motion to Dismiss with prejudice. Michelle Haddad continues to receive HCBS under the waiver.

### *18. (FL) T.H. et al. v. Dudek et al. (D. Fla. 2013) J*

In April 2013, DOJ filed a Statement of Interest opposing Florida's Motion to Dismiss, and supporting plaintiffs' Motion for Class Certification on behalf of medically fragile children in, or at risk of placement in, nursing facilities due to the state's failure to provide appropriate community based services and supports in violation of the ADA, Section 504 and the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) and Pre Admission Screening and Resident Review (PASRR) provisions of the Medicaid Act.

The state's motion to dismiss alleges the case is moot since recent court decisions already require them to improve HCBS for children. DOJ's brief counters that Florida's recent policy revisions do not make the case moot because they have barely begun, and even if fully implemented are not adequate to remedy existing ADA, 504 and Medicaid violations. DOJ further argues that the policies "appear to have been proposed simply as parts of a strategy to deprive this Court of jurisdiction in support of Class Certification."

Defendant's admit up front that they are vulnerable to plaintiff's challenge that the policy changes appear to violate the doctrine of "voluntary cessation," which states that: "a federal defendant cannot manufacture a mootness defense simply by voluntarily ceasing its objectionable conduct once litigation has begun, unless it is "absolutely clear that the conduct in question cannot reasonably be expected to recur". Nevertheless, Defendants argue that they should not be accused of "voluntary secession" since Eleventh Circuit precedent establishes that "government actors may be subject to a rebuttable presumption that they will not resume objectionable behavior that they have ceased voluntarily."

The DOJ brief thoroughly differentiates Florida's actions from those of government actors for whom the Eleventh Circuit has granted the rebuttable presumption; and goes on to argue that even if the presumption of mootness is granted, Florida's recent policy changes would not be sufficient to moot all the class claims.

The remainder of DOJ's brief explains why class member claims satisfy the "commonality" requirement for certification; and provides a lengthy list of Olmstead and Medicaid class actions to support the Department's assertion that class actions are an "effective, efficient means of resolving….ADA and Medicaid violations. he DOJ statement of interest in *T.H. et. al. v. Dudak* is available at: http://www.ada.gov/olmstead/documents/th-dudek_soi(2).pdf

In December of last year, the District Court consolidated T.H. v Dudek with a similar suit before it, called A.R. v. Dudek. The A.R. case also alleges that Florida's policies and practices have caused children with disabilities to be unnecessarily placed in nursing facilities, or at risk of placement in nursing facilities. Florida filed a motion to dismiss A.R. v Dudek, and on March 31, 2014, the DOJ filed a statement of Interest to the Florida District Court explaining why A.R. v Dudek should not be dismissed.

### *19. U.S. v. State of Florida Ĵ*

On July 22, 2013, the United States filed a lawsuit against the State of Florida in federal district court to remedy ADA violations involving the State's failure to provide services and supports to children with disabilities in the most integrated setting appropriate to their needs. The lawsuit alleges that, as a result of the manner in which Florida administers its service system for children with significant medical needs, children with disabilities are unnecessarily segregated in nursing facilities when they could be served in their family homes or other community-based settings. The lawsuit further alleges that the State's policies and practices place other children with significant medical needs in the community at serious risk of institutionalization in nursing facilities.

In September 2013, Disability Rights Florida filed a motion to intervene in this suit seeking to represent the 200 children with medically complex needs, who reside in nursing facilities throughout the state, are illegally segregated in institutional settings in violation of the ADA integration mandate.

Previously, in June 2012 and April 2013, the Department filed two Statements of Interest in private litigation that is related to the United States' lawsuit – *T.H. v. Dudek*, (S.D. Fla. 2012)) (See: Section III( A) above; and also Section III (B) above "U.S. v Florida".

### *20. U.S. v. Georgia (N.D. GA 2010) Ĵ*

On October 19, 2010, the DOJ entered into a comprehensive Settlement Agreement with the State of Georgia and Georgia officials, resolving the United States' complaint alleging that individuals with mental illness and developmental disabilities confined in state hospitals were unnecessarily institutionalized and subjected to unconstitutional harm to their lives, health, and safety in violation of the ADA and the U.S. Constitution.

The agreement requires Georgia to expand community services so that individuals with mental illness and developmental disabilities can receive supports in the most integrated setting appropriate to their needs. Specifically, for individuals with developmental disabilities, the agreement provides that Georgia will cease all admissions to the state-operated institutions; transition all individuals to the most integrated setting appropriate to their needs by July 1, 2015; create more than 1100 home and community-based waivers to serve individuals in the community; serve those receiving waivers in their own home or their family's home consistent with the individual's informed choice; and provide family supports, mobile crisis teams, and crisis respite homes.

For individuals with mental illness, the agreement provides that Georgia will serve in the community 9,000 individuals with serious and persistent mental illness who are

currently served in state hospitals; frequently readmitted to state hospitals; frequently seen in emergency rooms; chronically homeless and/or being released from jails or prisons. Services will be provided through a combination of 22 Assertive Community Treatment teams, 8 Community Support teams, 14 Intensive Case Management teams, 45 Case Management service providers, 6 Crisis Services Centers, 3 additional Crisis Stabilization Programs, community-based psychiatric beds, mobile crisis teams, crisis apartments, a crisis hotline, supported housing, supported employment, and peer support services. The agreement also provides for a statewide quality management system for community services and names Elizabeth Jones as the Independent Reviewer to assess the state's compliance with the agreement.

### *21. (IL) Williams v. Quinn (Blagojevich) (D. Ill. 2006)*

Class action brought by Equip for Equality (the P&A) on behalf of individuals with mental illness unnecessarily placed in privately owned institutions for individuals with mental illness (IMDs). These facilities, often large with 100 residents, receive state funds and funds from individual residents. Plaintiffs did not receive appropriate mental health supports, and claim the state is violating the ADA integration mandate and 504 for failing to serve individuals in the most integrated settings.

On May 24, 2010, the DOJ filed comments in *Williams v. Quinn*, supporting a Settlement Agreement that would provide hundreds of individuals with mental illness the opportunity to move from institutions to community-based settings. Parties negotiated a settlement in September 2011. Before the fairness hearing, individuals with a financial stake in the growth and success of the facility spread misleading information about the proposed settlement, designed to scare residents from seeking to transfer to a community setting. The P&A obtained a court order stopping the inappropriate communication. A fairness hearing was held in September 2012, and the Judge approved the settlement requiring the state to develop a specific plan to transition those persons with mental illness currently housed in IMDs to community-based settings; and hire trained professionals to evaluate eligible members of the class who reside in IMDs to determine:

a) whether they are able to transition to permanent supportive housing and other community-based settings; and

b) what additional services will be necessary for each individual as part of the transition process.

On January 10th, the U.S. District Court for Illinois denied a motion by the IMD operators to suspend and modify the consent decree. The IMD operators argued that suspension was necessary because data showed a higher rate of critical incidents among class members now living in the community. The Judge disagreed with the operators' interpretation of the critical incident reports and found that transitions thus far have been successful. The Judge further stated…. "The fact that not all transitions have been or will be successful and that some class members have experienced

serious difficulties does not support a conclusion that the Decree must be fundamentally revised. When it is considered that the member class has a history of mental illness, the statistics do not support that the effect of the program has been or is alarming either from an individual or community point of review."

### *22. (IL) Illinois League of Advocates for the Developmentally Disabled v. Quinn, (E.D. IL 2013) Ĵ*

In April 2013, the DOJ filed a Statement of Interest opposing a Motion for Preliminary Injunction to prevent the scheduled closure of the Murray Development Center . The Plaintiffs, guardians of individuals residing in Murray, and other ICF's, argue that the needs assessment tool that Illinois is using to determine community readiness violates the ADA because it presumes that residents are appropriate for the community, given the right supports, but fails to actually determine that community placement is appropriate. They also argue that the Governor's decision to close 2 of its 7 ICF's in order to re-balance Medicaid funding, violates residents 14th Amendment rights because it targets developmental disability services for cuts more so than services needed by individuals with other disabilities. On July 21, 2014, the Illinois Federal District Court ruled in the case that the assessment process does not violate the ADA, stating: "Defendants predisposition in favor of the integration of the developmentally disabled population cannot alone constitute unlawful discrimination" and it sufficient that the assessment process does not preclude an resident from transferring to a different ICF if they desire. The Court also dismisses plaintiffs 14th Amendment Equal Protection claim, holding that there is no evidence that Illinois expressly tried to deprive Murray Development Center residents of either placement choice or necessary services. The Murray parents filed a notice of appeal, so the case will now go to the 7th Circuit.

### *23. (IL) Ligas v. Homos (formerly Maram) (D. Ill 2006) Ĵ*

Class action brought by the Equip for Equality (the Illinois P&A) on behalf DD facility residents claiming that numerous state human service agencies are violating the ADA integration mandate, Section 504, and the Medicaid Act for failing to properly assess individuals' community service needs, and failing to provide appropriate community supports.

A group of residents or their families sought to intervene in the case to protect residents, arguing that the Plaintiffs were seeking such community placements for all who were eligible for such without giving facility residents the option to choose to remain in institutional settings as required by Olmstead. The lower court found that the applicants' interest in remaining in the institution would not be impeded by the resolution of the case, since the Plaintiffs did not seek "mandatory" community integration. The Seventh Circuit affirmed, holding that appellants:

> *make much ado about the distinction between those who would "desire" and those would "not oppose." This is a distinction without a difference… the [do not oppose] language comes directly from the Olmstead decision.*

In November 2008, the parties reached a proposed consent decree that all individuals with DD living in private institutions would receive independent evaluations to determine the supports and services they need to live in a community setting, and after the evaluation, those who chose or did not oppose community placement would receive an individualized service plan and move into the community over a six-year period. Additionally, people with DD living in the family home at risk of institutionalization would have expanded options under the agreement.

Unfortunately, pending the fairness hearing, more that 2,500 written objections to the proposed Consent Decree were submitted and 240 people attended the fairness hearing. At the fairness hearing the Judge decertified the class on the grounds that the class lacked commonality and typicality, stating:

> *the class definition fails to restrict the class to developmentally disabled individuals that are eligible for, and desire, community placement...[a]nd based on the objections raised at the fairness hearing, it appears that sufficient commonality does not exist among the highly specialized needs and desires of the class members and their legal guardians. Similarly, because the named Plaintiffs meet the conditions set forth in Olmstead insofar as they have been adjudged eligible for, and desirous of, community placement, the named Plaintiffs claims are not typical of class members who may or may not satisfy the Olmstead criteria. Therefore commonality and typicality among class members are lacking.*

The Court further found that the settlement negotiated by the parties was "considerably broader than was necessary to address the needs of the class contemplated by the Plaintiffs' lawsuit."

The parties continued in new settlement negotiations. In January 2010, the DOJ filed a Statement of Interest urging the Court to grant preliminary approval of the Plaintiffs' and Defendants' jointly submitted Consent Decree and participated in settlement discussions. A decree was eventually signed requiring the state, over a six-year period, to provide transition and supports to enable any of the approximately 6,000 residents of the ICF, who provide a written declaration of a desire to do so, to move to the most integrated community-based setting appropriate. Additionally, during the same six-year period, 3,000 people with DD currently living at home without services would be given community services to prevent unnecessary institutionalization.

One of the modifications agreed to is that all ICF residents who are happy with their current placement will not be part of the proposed class and will not be required to move. However, residents are able to join the class at any time over the six-year period. Also new is an assurance in the consent decree that resources will be provided to enable individuals to remain in ICFs if they choose to. Importantly, however, the

state does not assure that an individual with DD will receive ICF services in a specific ICF. Other highlights of the proposed decree include individualized evaluations of community support needs, transition services, deadlines for implementation throughout the six-year period, and appointment of an independent monitor to oversee compliance.

### *24. (IL) Colbert v. Quinn (D.Ill. 2007)*

Class action filed by five people with disabilities who reside in nursing facilities and who could live in the community if provided with appropriate services. Plaintiffs claim that the state is violating their rights, and those of other nursing facilities residents in Cook County, under the ADA integration mandate and the Freedom of Choice and Reasonable Promptness provisions of the Medicaid Act. Plaintiffs seek to require the state to inform Plaintiffs and class members that they may be eligible for community services and that they have the choice of such services; to provide comprehensive assessments, evaluations and screenings to determine Plaintiffs' and class members' eligibility for community services, both before and after admission to nursing facilities; and to provide, as appropriate, Plaintiffs and class members with long-term care services in the community.

In December 2011, the parties reached a Consent decree requiring the state to provide housing and related assistance, including personal assistants, to at least 1,100 Cook County nursing home residents with disabilities during the first two and a half year–period of the agreement—the first phase After the first phase, the state will continue to provide housing and related assistance to other Cook County nursing home residents with disabilities so they can move into the community. During the second phase, the state will implement a comprehensive plan to move Medicaid recipients living in nursing homes who desire to move into the community in accordance with a plan based on data collected during the first phase. The state will spend no more, in the aggregate, than what it is now paying to serve people with disabilities living in nursing homes.

### 25. *(KY) Kentucky Protection and Advocacy (P&A) v Kentucky Cabinet for Health and Family Services (2014)*

The parties signed a settlement agreement on behalf of individuals with mental illness living in "personal care homes" (PCH) who do not oppose community placement and those at risk of placement. These individuals all receive "state supplementation" through a program known as "KRS". The state agrees to begin the process to provide these individuals services in the most integrated setting appropriate consistent with the decision in Olmstead. The state signed this agreement once they became aware that the P&A was prepared to file a federal lawsuit on behalf of a class of over 2,000 individuals claiming violation of the ADA, and the Rehab Act. Specifically, Kentucky agrees to provide access to community based housing assistance for 600 individuals currently living in PCH, or at risk, with supports for a 3 year period; and assurances that such supports will be expanded to include other individuals in a subsequent agreement. Kentucky also agrees to adjust the state supplementation program so that

community based housing options receive equal funds with PCH. Kentucky pledges to provide 7 million dollars in 2014, and 6 million per year in 2015, and 2016 to support this agreement.

### *26. (LA) Pitts v. Greenstein (M.D. LA 2010)*

Brought by the Louisiana P&A on behalf of four individuals with disabilities who receive and depend on Medicaid Personal Care Services (PCS) in order to remain in the community and to prevent hospitalization and institutionalization. Plaintiffs filed suit to prevent Louisiana from reducing the maximum number of PCS hours available each week. The DOJ filed a Statement of Interest supporting the Plaintiffs' argument that the cuts would place individuals with disabilities at risk of institutionalization and urging the Court to deny the state's Motion for Summary Judgment. In May 2011, the District Court denied the state's Motion for Summary Judgment. In June 2011, the Court granted the Plaintiffs' Motion to Certify a Statewide Class of Individuals affected by the reduction in PCS services.

In February 2012, the parties reached a Settlement Agreement requiring that slots on the Community Choice Waiver program will be set aside for people who were approved for more than 32 hours of long-term personal assistance services before the 32-hour cap took effect. The Community Choice Waiver program, which has a four-year waiting list for most people who are not currently in nursing facilities, provides personal care services as well as a variety of other services that enable people to remain in their homes and communities. Additionally, the state will offer waiver slots on an expedited basis to class members who apply if they can show that without the additional services, they will not be able to maintain their health and are at serious risk of nursing facility placement.

Additionally, the settlement requires the Louisiana Department of Health to ask the federal government for approval for an additional 200 Community Choice Waiver slots to meet the needs of class members. If any of these slots are not needed for class members, they will be added to the pool of slots that are available to meet the needs of others who are waiting for the services. Further, the state must "use its best efforts" to have an additional 500 Community Choice Waiver slots included in the governor's executive budget. The 500 slots were requested in the 2012-2013 executive budget, and are currently before the legislature for funding.

### *27. (ME) Van Meter v. Mayhew (D. Me. 2009)*

Class action filed by the P&A on behalf of individuals diagnosed with cerebral palsy, epilepsy, and other related conditions who have been unnecessarily institutionalized in nursing facilities. The case brings claims under ADA and Section 504 for the state's failure to provide appropriate community services for these individuals, as well as claims under the Nursing Home Reform Act (PASRR) for the state's failure to provide necessary "specialized services" to these individuals while they are isolated in nursing facilities. The case was initially brought, in December 2009, on behalf of three young

men with cerebral palsy who have been forced to live in nursing facilities for years because of the lack of community services.

**Update:** On May 2, 2012, the U.S. District Court in Maine approved a final settlement. Subject to Court approval, the state is obligated to:

- assess all nursing facility residents who have DD (class members) to determine eligibility for community services;
- ensure that class members who desire them receive appropriate community services with reasonable promptness;
- assign a case manager to each class member to assist with transition; and
- provide "specialized services," not yet available in the community, to those residents with DD who require these services to be ready for discharge to the community.

To facilitate transition to the community Maine has instituted a new HCBS waiver for class members that will offer home and community supports; employment services; home adaptations; transportation; assistive technology; counseling and crisis services; occupational, physical and speech therapy; case management; and specialized medical equipment. The waiver will support at least 15 people in the first year and up to 75 class members within three years. A copy of the settlement is available at http://www.drcme.org/uploads/Van_Meter_Settlement.pdf

### *28. (MA) Ricci v. Patrick (D. Mass 2006)*

This case reopens a decades-old settlement that provided for community placements from five DD/ID facilities. When Massachusetts announced plans to close the Fernald Developmental Center, some of the original Plaintiffs objected and sought an order to keep the facility open. A Court appointed monitor studied the patients and conditions at the institution and recommended that the facility continue to operate. On August 11, 2006, the District Court held that simplicity, continuity, and consistency in the surroundings, activities, and caretakers help residents live each day and, therefore, that Fernald must be maintained as a placement option for residents during the Department of Mental Retardation individual service planning process because, as the Judge stated, "for some, many or most, any other place would not meet an 'equal or better' service outcome." The Final Order returned to the Department of Mental Retardation the authority to manage and oversee the Fernald and the Court reserved the right to intervene if the state fails to offer Fernald as a placement option for residents.

The state Defendants, the Plaintiff, Arc of Massachusetts, and the intervener P&A all appealed to the First Circuit. On October 1, 2008, the First Circuit reversed the District Court order. The Circuit Court held that based on the facts of the case and the

provisions of the disengagement order, the District Court lacked jurisdiction to re-open the case. The Supreme Court denied the state's request for Cert. Institutional supporters next tried a policy strategy to keep the facility open. However, as of September 2012 all but a small number of residents have moved out of Fernald, including all residents who requested community-based services with supports. [But see below: *M.D. v. Dept. of Developmental Services* DDS, No. 12-P-241, 83 Mass. App. Ct. 463, 985 N.E.2d 863 (Mass. 2013).

### *29. (MD) M.D. v. Dept. of Developmental Services (Mass. App. Ct. 2013).*

On April 1, 2013, on a motion for judgment on pleadings, the Massachusetts Court of Appeals ruled that the Magistrate was not required to consider an ADA integration mandate claim in its ruling on whether to transfer one of the last remaining residents of the Fernald Developmental Center to another state developmental center. While only a decision of an intermediate level state appellate court, the decision is of interest nationally for its ruling on whether *Olmstead* requires the state to maintain a particular residential placement if it is the stated preference of a resident to remain in that setting and not be moved.

In May 2010, the Massachusetts Department of Developmental Services (DDS) gave notice to the guardians of M.D., a resident of the Fernald Developmental Center, that M.D. was being moved to a different state Intermediate Care Facility (ICF). The move came about as part of a disengagement order in *Ricci v. Okin,* 823 F.Supp. 984 (D.Mass.1993) (*Ricci III*). [See above].

The plaintiff's guardians timely objected to the transfer and their appeal was denied all the way through to this Court. Among several procedural claims, plaintiffs argued that the administrative magistrate erred by refusing to consider whether DDS violated the integration mandate of the ADA in making its decision to transfer plaintiff.

There are two parts to this argument. First, that DDS is violating the ADA by denying M.D. the opportunity to live in an "appropriate" home, which they identified as Fernald. Rejecting this, the Magistrate cited state precedent for the principle that, "If the Legislature had intended for appeals court's to consider Federal law claims in the context of [the] transfer proceeding, it would have included appropriate language to this effect in the statute." The Court also pointed to a First Circuit ruling in *Ricci v. Patrick,* in which the Circuit Judge made clear that the Fernald disengagement order does not guarantee "to any Ricci class member [Fernald Resident] a particular residential placement or that [Fernald] must be maintained by DDS as long as any particular resident preferred to remain there."

Second, that the Magistrate decision was not supported by substantial evidence of why the new ICF will be as appropriate a placement as Fernald. To this claim, the Appeals Court upheld the magistrate's finding that, "A point-by-point comparison of the two facilities may reveal some features favoring one facility, while the remaining features

favor the other facility. But the statute does not require that every feature of a proposed facility be superior in order to approve a transfer. Rather, by focusing on the best interest of the ward, it commands that the whole picture be examined."

### *30. (MA) Rosie D v. Romney (D.Mass. 2001).*

Class action alleging that the state has violated the Medicaid EPSDT, reasonable promptness, method of administration and managed care provisions by failing to ensure that class members received necessary, intensive home based services and mental health assessments, resulting in a waiting list for case management services. The class includes children with mental illness who have been hospitalized or are at risk of hospitalization because of lack of home-based mental health services. The main issue in the case was not whether the state had an obligation to provide behavioral supports under Medicaid, but rather, whether the state is adequately delivering these services. This class action did not include an ADA claim.

On January 27, 2006, the District Court in Massachusetts granted all the injunctive relief Plaintiffs sought and required the state to improve its system for assessing and providing adequate in home-behavioral supports to children with severe emotional disturbances under EPSDT. The Court found that the state had violated reasonable promptness and EPSDT provisions, but not equal access requirements. The Judge approved a remedial plan in February 2007 that seeks to restructure the children's mental health system by incorporating intensive home-based services, including behavioral health screenings, assessments, case management, crisis intervention and in-home therapeutic supports. The plan, which has strict timelines, must be fully implemented by June 2009. A Court Monitor oversees the implementation, mediates disputes between the parties and ultimately will determine compliance.

On January 14, 2009, the federal District Court in Massachusetts issued a decision granting nearly in full Plaintiff's request for attorneys' fees and costs. District Judge Ponsor prefaced his decision by stating:

> *First, in more than 25 years trying cases as a Magistrate Judge and District Judge, this is one of the two or three most legally and factually complicated and vigorously litigated, lawsuits I have ever presided over. Second, the level of professionalism exhibited by Plaintiffs' counsel at every stage has been unsurpassed by any the Court has seen. Third, as noted, the result achieved by Plaintiffs' counsel has been profound and, for their clients, one hopes, transformative.*

Factors that the Judge weighed heavily included:

- Plaintiffs' requests were reasonable, if not low, and showed "restraint";
- Plaintiffs' attorneys "seemed dedicated to children with disabilities, fought vigorously, and achieved much for this needy population";

- The litigation was extremely complex and relied on numerous experts at every stage Plaintiffs complied with the requirement to provide detailed, computerized time records that were searchable; and
- "Counsel showed rare courage in offering a huge commitment of hours and expenses (many of which, even now, will not be reimbursed), with no certainty of success."

## *31. (MA) Rolland v. Patrick (D. Mass. 1999).*

Class action filed by the P&A alleging violations of the ADA integration mandate, and the PASRR, provisions of the Medicaid Act by failing to provide "specialized services" and also community service options to individuals with DD residing in a private nursing facility. State Defendants asked the Court to dismiss the ADA claim on the grounds that Plaintiffs are residing in a privately run nursing home and, therefore, the state is not administering services and has no obligation to administer them in compliance with the ADA. The District Court denied the Motion to Dismiss and ruled it immaterial that Plaintiffs are residing in a private rather than public facility. On October 20, 1999, the parties settled with the state, agreeing to provide specialized services and community residential supports.

The case was reopened in December 2000 when Plaintiffs asked the Court to find the state in violation of the settlement agreement because class members were not receiving the specialized services identified as needed in the PASRR review. On March 27, 2001, the Court agreed with Plaintiffs and ordered the state to provide specialized services for persons with DD residing in nursing facilities at a level similar to the active treatment standard that applies to individuals receiving services in ICF/MRs

In response the state appealed, claiming Eleventh Amendment immunity from suit. The state lost at the District Court level and appealed to the First Circuit. The Circuit Court upheld the lower court and affirmed a right of individuals with DD to specialized services, as required under PASRR.

On April 10, 2007, the Massachusetts District Court granted a Motion for Noncompliance, finding that Massachusetts was failing to comply with prior court orders mandating provision of active treatment. The District Court stated that the state must employ the Centers for Medicare & Medicaid Services (CMS) standards and interpretive guidelines as the criteria for complying with their active treatment obligations. The Court ordered parties to appoint a court monitor to ensure compliance with earlier orders. A new active treatment protocol was developed.

In June 2008, the parties filed a Joint Motion to Approve Settlement on Active Treatment. After a fairness hearing, a family member of a nursing facility resident challenged the settlement on the grounds that it did not give residents a right to refuse community placement. The Court dismissed this challenge, reminding the family member that the ADA does not give a person with a disability a right to reside in a

particular facility. The Court approved the proposed agreement as an order of the Court.

### 32. SS. V. Springfield, Massachusetts (D. Mass. 2015)

Plaintiffs in this action are students with mental health disabilities in the Springfield public schools, and a parent advocacy group for these students, who allege that the Springfield Public Schools are violating various provisions of the ADA Title II, including the integration mandate by placing hundreds of children with mental health disabilities in a separate and inferior public day school. Among other things, Plaintiffs allege that the separate school is comprised of physically segregated buildings where children with mental health disabilities are denied access to nearly all extracurricular activities that are available in neighborhood schools, including (but not limited to) afterschool sports, clubs, and activities; are subjected to harmful forced isolation and dangerous physical restraints that risk serious injury or death; and are regularly subjected to unduly punitive responses to even minor infractions of school rules and routine disciplinary matters, including arrest by armed, uniformed Springfield police officers.

The state have moved to dismiss the complaint, arguing, that Plaintiffs are required to bring a claim under the Individuals with Disabilities Education Act (IDEA) in lieu of or alongside their ADA claim, and that the students don't have the independent right to enforce the ADA Title II. There is no ruling right, but the DOJ has filed a statement of interest in support of the plaintiffs.

This is one of the first cases to bring an ADA claim to prevent unnecessary segregation of students. The use of the ADA is important because the ADA's non-discrimination mandates require school districts to provide different and additional measures to avoid discrimination against children with disabilities than they are required to under the IDEA.

### *33.(MN) Jensen v Minnesota (D. Minn. 2011)*

On December 5, 2011 the Minnesota federal district court approved a final settlement agreement requiring the state of Minnesota to, in part, utilize an Olmstead committee process to develop an Olmsted compliance plan to move people with developmental and behavioral disabilities in institutions, and those at risk, into appropriate integrated settings. The first version of this plan was submitted in 2013. This year, plaintiffs asked the District Court to find the state out of compliance with the settlement.

On May 6, 2015, the judge overseeing implementation of the settlement ruled that Minnesota's proposed "Olmstead Plan" was too vague and lacks "concrete, reliable and realistic commitments" on firm timelines and deadlines for implementation. Judge Frank ordered the state to develop a revised Olmstead plan by July 10, 2015.

### *34. (MS) DOJ Findings Letter to Mississippi (2011) Ĵ*

On December 22, 2011, the United States DOJ send a letter to Mississippi's Governor finding the states developmental disabilities and mental health systems out of compliance with the ADA integration mandate, IDEA's Child Find program and Medicaid's EPSDT provisions. It calls Mississippi a "broken system" whose reliance on institutional care "harms residents" and "incurs unnecessary expense" for the state. The letter offers extensive statistics and examples that undermine any fundamental alteration argument the state might try to assert. The DOJ instructs the Governor to implement certain remedial measures or face litigation, among them:

- Make every effort to divert new admissions from state facilities by offering comprehensive supports in the community;
- Expand waiver slots and ensure that IDD waiver services are sufficient to support individuals with complex needs, in integrated community settings;
- Offer intensive community services across the state, including ACT, crisis services, case management, peer support, supportive housing, supported employment, and transportation services to enable individuals with serious mental illness to remain successfully in the community;
- Provide adequate medically necessary treatment services to children under EPSDT and ensure that all children with disabilities are identified for special education services under the IDEA; and
- Institute a quality assurance system to ensure the safety of those individuals who are in the community, or return to the community with supports. Professionals should regularly review and assess the safety, treatment, and services provided by the state and by community providers. After each review, the state should require that providers implement plans for correcting any deficiencies identified by the process.

The full letter can be downloaded at http://www.justice.gov/crt/about/spl/documents/miss_findletter_12-22-11.pdf

### *35. (MO) U.S v. Marion County Nursing Home District - (E.D. Mo. 2013) Ĵ*

On March 14, 2013, the DOJ filed a Settlement Agreement with Marion County, Missouri requiring them to serve residents of the Maple Lawn nursing facility in the most integrated setting appropriate to their needs, as required by the ADA Integration Mandate. The Agreement addresses basic elements of residents' care and treatment and requires Maple Lawn to develop numerous improvement measures. An independent monitor has been selected to monitor the Settlement Agreement.

### *36. (NE) DOJ Findings Letter to Nebraska (2008) Ĵ*

On March 7, 2008, the Division issued a CRIPA/ADA Findings Letter to the State of Nebraska that detailed systemic conditions that violated the constitutional and statutory rights of the residents of the Beatrice State Developmental Center ("BSDC"), the state's largest facility for persons with developmental disabilities. At the time, BSDC housed close to 350 residents. The parties then swiftly concluded negotiations on a judicially enforceable remedial agreement. On July 2, 2008, the Hon. Richard G. Kopf, U.S. District Court Judge for the District of Nebraska (Lincoln), signed the parties' proposed consent decree as an order of the Court. The agreement provides for oversight by a court monitor. Our decree has a strong ADA/Olmstead focus that has prompted the state to greatly expand community resources and to place dozens of BSDC residents into more integrated community settings. The state has funded the creation of new community programs, including specialty residential and day programs to meet the needs of persons with difficult health care and/or behavioral concerns. The census at BSDC has been cut about in half so far, and there are tangible plans to place several dozen more individuals in the community in the near future. The Division has accompanied the Independent Expert on just about all team monitoring visits since the decree took effect.

### *37. DOJ Findings Letter to New Hampshire (2011) Ĵ*

Finding that the State of New Hampshire fails to provide services to individuals with mental illness in the most integrated setting appropriate to their needs in violation of the ADA, which has led to the needless and prolonged institutionalization of individuals with disabilities and has placed individuals with disabilities at risk of unnecessary institutionalization. The letter finds that community capacity in New Hampshire has declined in recent years and that this has led to unnecessary institutionalization, prolonged institutionalization. There is also a greater likelihood that some people will end up in even less desirable settings not designed to provide mental health care such as the state corrections system and the county jails. The letter finds that acute/crisis alternatives to institutional care have diminished dramatically in recent years, and that there is a lack of safe, affordable, and stable community housing for persons with mental illness which can lead to greater levels of impairment, more difficulty in accessing needed services and supports, a loss of stability, and a greater risk of hospitalization and/or institutionalization. The letter highlighted that community alternatives cost significantly less than institutional services. The Court recently granted the DOJ's request to intervene in *Amanda D., et al. v. Wood Hasan, et al,* a Federal District Court case raising ADA claims on behalf of individuals with mental illness at risk of unnecessary institutionalization.

### *38. (NH) Bryson v. Stephen (D. NH 1999)*

Action filed by the P&A alleging that the state is violating the Medicaid Act, the Rehabilitation Act, and the ADA by wait listing individuals with TBI on the TBI waiver

waiting list. Plaintiffs claim that the state can easily provide community-based services to individuals on the list without suffering a significant fiscal or administrative impact by enlarging the TBI waiver with federal subsidies or by using available state resources. In 2001, the case went to the First Circuit, which overturned the lower court's ruling that the state was required to provide Medicaid waiver services for up to 200 individuals under a model waiver. The First Circuit instead found that the state simply had to fill those slots available under the state's cap (a considerably smaller number of slots). The matter was then sent back to the District Court, at which time the state filed a Motion to Dismiss the ADA integration mandate claim on the grounds that it would be a fundamental alteration for the state to expand its waiver slots.

In March 2004, the District Court ruled that states should not be able to claim a fundamental alteration defense to an integration mandate claim on behalf of individuals on waiver waiting lists (in this case for TBI waiver slots) simply by asserting that it has filled all its existing waiver slots. The Court said that this approach views the fundamental alteration defense too "simply." Citing Bruggeman v. Blagojevich and Martin v. Taft, the Court provided a long list of complex legal questions that must be answered to prove this defense, including:

> *…Does it make a difference that the state directly limits the number of slots available in the program by applying for only that number it chooses to fund, notwithstanding the apparent availability of additional slots from the federal government simply for the asking?*
>
> *…If the state chooses not to take advantage of federal funding participation available through the waiver program, must it nevertheless provide a reasonable accommodation under the ADA at its own expense?*
>
> *…If some [individuals] move off the list into the community quickly but others never move off the list, does the list "move" at a reasonable pace? . . . . What budget should the Court look to when making that determination?*

The case went back to Federal District Court and the parties had a second opportunity to file summary judgment motions. Summary judgment was denied for both sides. The case went to trial in October 2005 and the issue discussed was whether the state could claim a fundamental alteration and not be found in violation of the ADA integration mandate. In late 2006, the Court ruled that it would be a fundamental alteration to force the state to expand its waiver slots and that the state was making reasonable progress eliminating the waiting list. The Court dismissed the ADA and Section 504 claims. At the same time, the Court approved an August 2005 settlement agreement between the parties under which the state committed to make procedural changes in how requests for waiver enrollment are handled.

### *39. (NH) Amanda D v Hassan and prior to that Lynn E. v. Lynch (D. N.H. 2012) Ĵ*

Plaintiffs allege that the state of New Hampshire fails to provide mental health services to people with disabilities in community settings in violation of ADA, Section 504 and the Pre-Admission Screening and Resident Review (PASRR) provisions of the Medicaid Act . The suit alleges that as a result of the state's failures, people with mental illness who need state mental health services are forced to go to segregated institutions such as the New Hampshire Hospital and the Glencliff Home. Plaintiffs seek injunctive relief requiring the State to develop Assertive Community Treatment ("ACT"), supported housing, and supported employment. Plaintiffs do not seek individually-tailored injunctions regarding appropriate treatment for each class member.

Plaintiffs were represented by the Disabilities Rights Center (the NH P&A), Devine Millimet, the Center for Public Representation, and the Bazelon Center for Mental Health Law. After an investigation, the DOJ intervened in the lawsuit in support of the Plaintiffs. (See Section III B) The Class was certified for the ADA and 504 claims but not PASRR.

On December 19, 2013 Disabilities Rights Center, the DOJ, and the New Hampshire Attorney General's office announced a proposed settlement that will enhance and expand community-based mental health services for thousands of people with mental illness living in state hospitals and nursing facilities. Under the proposed settlement the state agrees to: expand its supported housing to include a minimum of 450 scattered-site supported housing units; add Assertive Community Treatment (ACT) to serve 1500 people; expand supported employment programs; and provide new mobile crisis services. For individuals with serious mental illness and complex medical needs residing at the state-run nursing facility, New Hampshire will work to develop community settings that are able to address their unique needs. The proposed 16 community residence beds may include enhanced family care, supportive roommate, or other non-congregate settings to help achieve integration back to the community for those who cannot cost-effectively be served in supported housing. The Court approved the settlement after a fairness hearing on February 12, 2014.

### *40. (NJ) Disability Rights New Jersey, Inc. v. Velez (D. NJ 2005)*

The New Jersey P&A brought this case on behalf of hundreds of persons with DD residing in several large state-owned and -operated institutions in New Jersey. The P&A alleges that the state fails to provide individuals with services and supports in the most integrated setting appropriate to their needs. In May 2010, the parties filed cross-motions for Summary Judgment. The DOJ filed a Statement of Interest supporting the Plaintiffs and arguing that unnecessary segregation of individuals with disabilities in institutions is a form of discrimination prohibited by the ADA. The DOJ also asserted that New Jersey is failing to serve individuals with disabilities in the most integrated

setting appropriate to their needs and that continued unjustified institutionalization violates their rights. On September 24, 2010, the Court denied both parties' Summary Judgment motions and set the proceeding for trial. (2010 WL 3862536).

On March 4, 2013, the district court approved a settlement providing that all individuals determined to be community placement-eligible, currently about 600 people, will be discharged to the community by the end of June 2017, and new admissions will have to be determined as necessary for the individual's health, safety, and welfare, after all reasonable and appropriate alternatives have been attempted and exhausted prior to admission. In addition New Jersey will fund a consultant to be involved in assisting the Division to identify and implement best practices and to identify barriers to the successful completion of the settlement agreement. Lastly, the NJ P&A will monitor the implementation of the agreement and to provide representation to individuals seeking discharge from or to prevent admission to a developmental center.

### *41. (NJ) Sciarrillo et al. v. Christie, (D. NJ 2013)*

In this case before a Federal District Court in NJ, private plaintiffs who are guardians of some residents of ICF's in NJ, Arc sued to stop the transfer of their family members into community settings. Plaintiffs argue that ADA as interpreted by the Supreme Court in the Olmstead decision creates a right for individuals to remain in a particular facility if they oppose transfer. The DOJ filed a statement of Interest opposing the plaintiffs complaint and expressing the United States' view that plaintiffs have failed to assert a legitimate claim under the Americans with Disabilities Act. On September 2013 the District Court dismissed plaintiffs complaint.

In March plaintiffs 2014 appealed the District Court's dismissal to the 3rd. Circuit, arguing that the State is discriminating against individuals with disabilities, in violation of the ADA, if it moves an individual to a community setting without first, obtaining an independent assessment by a state treating professional that the community is the most appropriate integrated setting, and provides the individual a chance to oppose the move. The Circuit Court has yet to rule.

### *42. (NJ) Disability Rights New Jersey v. Velez, 05-1784 (D. NJ 2005).*

At issue in this case is a state law permitting the state hospital to hold an individual who is otherwise appropriate for release until an appropriate community placement can be arranged. The P&A alleges that the state has used this special status to confine individuals for excessive periods of time and has failed to implement an effective plan for discharging these individuals into the community in violation of the ADA integration mandate, Section 504 and the Fourteenth amendment. In October 2005, the District Court denied states Motion to Dismiss asserting lack of standing and sovereign immunity.

On July 29, 2009, the NJ P&A and the New Jersey Department of Human Services signed a settlement, in which the state agreed to provide community-based services and supports for 300 individuals with mental illness who remain in state psychiatric facilities at least a year after their doctors found them appropriate for community placement. The state also agreed to develop 1,065 new supportive housing and other similar community settings between now and 2014 and to develop a plan for ending the illegal confinement of nearly 1,000 individuals, all of whom had been adjudicated ready for discharge from New Jersey's four state psychiatric hospitals.

### *43. (NY) Ross v. Shah et al. (USDC/NDNY 2012).*

Case brought by Disability Advocates (P&A) on behalf of a man with TBI and co-occurring psychiatric diagnoses who was on the TBI waiver in New York State and has been housed against his express wishes since September 2009 in a nursing home in Massachusetts. The Department of Health, originally responsible for placing him in the nursing home (promising that it would be for six months, to stabilize medications), has not held the facility to account for discharge planning. The Plaintiff is housed in a locked facility for no reason anyone has been able to provide. The P&A argues that this is not the least restrictive environment for this man, in violation of the ADA Integration mandate, Section 504, and Fourteenth Amendment due process. This action is filed on behalf of an individual, but there may be others in similar circumstances, in which case the P&A would seek class action certification.

### *44. (NY) Disability Advocates, Inc., & Joseph S v. Hogan (E.D. NY 2006).*

Action filed by the P&A against the state for unnecessary institutionalization of individuals with mental illness in nursing facilities in violation of the ADA integration mandate, Section 504 and PASRR provisions of the Medicaid Act. Plaintiffs, represented by New York Lawyers for the Public Interest and Disability Advocates, cite evidence from a yearlong study conducted finding that hundreds of young to middle-age adults with mental illness have been discharged from state hospitals and instead of placed in the community with supports, are unnecessarily placed in nursing facilities. The study documents that while in the nursing facilities, residents with mental illness, are not provided appropriate mental health services; and live in locked wards, despite the fact that no Judge has ruled incarceration is appropriate. Disability Advocates, Inc., is also a Plaintiff in the lawsuit on behalf of constituents with mental illness inappropriately placed in nursing homes and at risk of such placement.

On April 21, 2008, the U.S. District Court denied Defendants' Motion to Dismiss for lack of P&A standing and also rejected the states argument that the ADA integration mandate cannot be enforced against private nursing facilities. Unfortunately, the Court did hold that because of the statute of limitations, individuals who were discharged to nursing facilities more than three years before the filing of the lawsuit could not be Plaintiffs in the lawsuit. Finally, The Magistrate declined to rule on the fundamental alteration defense stating that "it would be inappropriate to dismiss Plaintiffs' ADA and

Section 504 claims at this stage of the litigation because Defendants bear the burden of establishing 'fundamental alteration' as a defense."

In fall 2011, the parties settled. The state agreed to improve the quality of PASRR evaluations, provide appropriate discharge planning, and ensure community-based services primarily in one's own home with supports.

### *45. (NY) A.M v Mattingly (E.D.NY 2010)*

Plaintiffs alleged that New York administers its child welfare system in such a manner that Children in foster care, who need mental health services, are routinely forced into state hospitals instead of more home like foster care settings, in violation of the ADA, Section 504, NY State Law and the 14th Amendment of the U.S. Constitution. New York quickly settled and in March 2011, state agreed to begin tracking, monitoring, and providing individuals planning to ensure kids in foster care received services in the most integrated settings.

### *46. (NY) City of New York v. Maul (S. Ct. of New York, 2008)*

Class action on behalf of individuals with DD who are, or have been, in the New York City foster care system. The suit, brought by the New York Lawyers for the Public Interest (P&A) alleges that the Agency for Children's Services (ACS) and the state Office of Mental Retardation and Developmental Disabilities (OMRDD) is violating state law and the integration mandates of ADA and Section 504 for:

1) failing to coordinate with each other to find appropriate, least restrictive placements for individuals with DD in the custody of ACS;

2) placing individuals with DD in inappropriate facilities, such as adult nursing homes;

3) failing to provide educational and other support services to individuals with DD; and

4) leaving eligible individuals on waiting lists for appropriate community placement, in some cases for years.

In April 2008, the Court rejected the Defendants' argument against class certification that determining whether an individual is in the least restrictive placement must be done on an individual basis and is not appropriate for class certification. The Court held that it "can certainly consider as a general matter whether placing children in an adult nursing facility or leaving children on a waiting list for months and even years for permanent placement, constitutes violations of state and/or federal law."

On February 10, 2009, the New York State Appellate Division affirmed the certification of a class of Plaintiffs. Both OMRDD and ACS agreed that there were currently at least 150 children in ACS custody who are waiting for residential placements with OMRD. The state appealed the certification and lost.

### *47. (NY) William G and Walter S. v. Patterson (formerly Pataki) (D. 2003)*

Class actions alleging that parole violators with mental illness are incarcerated longer than violators without mental illness. This is because individuals with mental illness are required to wait until a spot opens in one of very few programs for individuals with mental illness. Plaintiffs argued that this practice violates the integration mandate because incarceration can exacerbate mental illness, making recovery and a successful transition back to the community even more difficult for parolees with serious mental illness. Plaintiffs claim that that instead of funding the community placements that parole violators with mental illness need, New York pays to rent beds in jails, in violation of the integration mandate. The lawsuit seeks improved access to MICA (mentally ill, chemically addicted) services. Unlike residential treatment programs for parole detainees with only substance abuse problems, MICA programs are in very short supply. Parties settled in 2010.

### *48. Disability Advocates, Inc. (DAI) v. New York—03-CV-3209 (E.D. NY 2009) Ĵ*

On July 23, 2013 the state of New York signed an agreement with the Disability Rights New York (formerly known as Disability Advocates, Inc.) as well as, the U.S. Department of Justice, the Bazelon Center for Mental Health Law, and other attorneys for adult care home residents, to settle the litigation. The settlement ensures that residents of 23 adult homes have the opportunity in live in scattered site supported housing in the community. The settlement is limited to "adult homes" with 120 residents or more, of which 25% or 25 residents, whichever is fewer, have a diagnosis of serious mental illness.

Prior to the agreement, the parties litigated these issues in *Disability Advocates v. Paterson*, 2009 WL 414682 in the District Court and in the Court of Appeals for the Second Circuit. In that case, following a trial on the merits, the District Court for the Eastern District of New York ruled that New York State violated the integration regulation of the ADA and Rehabilitation Act by administering the State's mental health service system in a manner that segregated individuals with mental illness in institutional adult homes.

The DOJ intervened during the remedy phase of the case and participated in the appeal. On April 6, 2012, the Second Circuit vacated the remedial order and

judgment of the District Court and dismissed the action for lack of jurisdiction *DAI and DOJ v New York Coalition for Quality Assisted Living*, 2012 WL 1143588.

The Settlement requires that within 5 years all adult care home residents shall be assessed and transitioned if appropriate. Additionally, New York shall:

- provide scattered site supported housing and ensure that housing contractors provide in-reach to adult homes residents to facilitate informed choice and an opportunity to visit and visualize housing units [paraphrased];
- care coordination, psychiatric rehabilitation services; assistance with taking medication; home health care; personal assistance services; assertive community treatment; and crisis services.
- employment services
- person centered individual care plans
- use an assessment process that assumes supported housing is the most appropriate, unless the assessment finds the individual: has significant dementia; needs a level of nursing services care that that connect be provided in the community with appropriate supports; would be a danger to self or others even with appropriate supports; needs a type and frequency of service that will not be paid for by an available public or private program of which the individual is eligible; or the individual makes an informed decision that they do not desire supported housing. If the assessment finds any of these exceptions, the state must identify specific reasons why supported housing is not appropriate and offer the individual the most integrated setting appropriate to their needs. [paraphrased]

Clarence J. Sundram will serve as the independent monitor.

A fairness hearing was held and On March 17th, the U.S. District Court for the Eastern District of NY approved the settlement as *United States v. State of New York and O'Toole v. Cuomo.* (These are the successor cases *to Disability Advocates, Inc. v. Paterson*. The March 17th order approving the settlement also serves as a consent judgment. Copies of Court Orders and the Settlement are available at: http://www.bazelon.org/News-Publications/Press-Releases/7.22.2013Landmark-New-York-City-DAI-Settlement.aspx

### *49. U.S. v. North Carolina, No. 5:12-cv-557 (E.D.N.C. 2012)Ĵ*

On August 23, 2012, the United States entered a comprehensive, eight-year settlement agreement with the State of North Carolina resolving the Civil Rights Division's ADA Olmstead investigation of the state's mental health service system, which currently serves thousands of individuals with mental illness in large adult care homes. The Agreement will expand access to community-based supported housing—integrated housing that promotes inclusion and independence and enables individuals with mental illness to participate fully in community life.

Pursuant to the Agreement, the state will provide community-based supported housing to 3,000 individuals who currently reside in, or are at risk of entry into, adult care homes. A person-centered discharge planning process is designed to ensure individuals are able to transition successfully to community-based settings, while a pre-admission screening process will prevent more individuals from being unnecessarily institutionalized. The Agreement will also ensure that thousands of people with mental illness have access to critical community-based mental health services such as Assertive Community Treatment (ACT) teams, and will expand integrated employment opportunities for individuals with mental illness by providing supported employment services to 2,500 individuals. The Agreement also requires development of a crisis service system that offers timely and accessible services and supports in the least restrictive setting, including mobile crisis teams, walk-in crisis clinics, short-term community hospital beds, and 24/7 crisis hotlines.

### *50. (NC) Pashby v. Delia (formerly Cansler) (D. NC 2011)*

Class action filed by the P&A alleging that North Carolina Department of Health and Human Services' new rules restricting coverage of Medicaid-covered PCS for adults over age 20, and notices announcing this change to class members, violates: the ADA integration mandate; Section 504 of the Rehab Act; various provisions of Medicaid law and the Fourteenth Amendment. Under the Department's new rules, individuals residing in segregated assisted-living facilities known as adult care homes need to satisfy much less restrictive criteria to qualify for PCS than do those living in their own homes, thus favoring unnecessary institutionalization. In December 2011 the District Court certified the class and granted a preliminary injunction. The state appealed to the 4th Circuit.

In March 2013, the 4th Circuit upheld the preliminary injunction, ruling that the new rules placed adults living in the community and requiring personal assistance at a significant risk of institutionalization. In doing so the Circuit Court agreed with the DOJ that the adult care homes were institutions. Finally, the 4th Circuit "join[ed] the Third, Ninth, and Tenth Circuits in holding that, although budgetary concerns are relevant to the

fundamental alteration calculus, financial constraints alone cannot sustain a fundamental alteration defense." The Circuit Court, however, remanded the case back to the District Court, to meet a procedural requirement requiring "specificity" of the preliminary injunction.

The state again appealed to the 4th Circuit requesting a rehearing, which the 4th Circuit denied on April 2, 2013. The Fourth Circuit agreed with the District Court that:

> Since the eligibility requirements for receiving PCS in adult care homes (limits in one of seven activities of daily living) are less stringent than the requirements for obtaining in-home PCS (two of five activities of daily living) the new policy violates the comparability provisions of the Medicaid Act….[And] The proposed cuts would likely force individuals out of the community into adult care homes.
>
> For this finding the Circuit Court relied on the declarations of named class members that they could not live on their own without in-home PCS or that it would be unsafe for them to do so….[had] no friends or family members who could offer the same amount of care that their aides provided under the in-home PCS program.…and "may," "might," "probably" would, or were "likely" to enter an ACH facility due to the termination of their in-home PCS."

The case was remanded back to the District Court to put the preliminary injunction back in place, which had be "stayed" during the appeal to the 4th Circuit. The District Court ordered the state to comply with the preliminary injunction, and specifically, to re-instate in-home personal care services to class members, reassess their current need and eligibility for in-home personal care services, and ensure they are provided appeal rights. The case is on-going.

### *51. (PA) Benjamin v. Dept. of Public Welfare, 1:09-cv-01182-JEJ (unreported).*

Disability Rights Network of Pennsylvania, the Pennsylvania P&A, filed this class action on behalf of persons with intellectual disabilities (ID) who are unnecessarily institutionalized in any of the state's ICF/MR facilities. The DOJ filed a Statement of Interest in support of the Plaintiffs' motion for Summary Judgment, agreeing with Plaintiffs' assertion that the state failed to offer sufficient community-based services to individuals with DD—leaving individuals who could and desired to live in the community with no choice but institutional placement. The Court granted a preliminary injunction holding that the state is violating the ADA and Section 504 of the Rehabilitation Act by failing to provide community services to those state center residents who could reside in the community with appropriate supports and services and who do not oppose moving to the community.

Between 2004 and 2009, only 54 out of more than 1,000 residents, were discharged to community settings; and in the 2009-2010 fiscal year "the only census reduction is expected to be attributed almost exclusively to deaths." In rejecting the state's defense

claiming fundamental alteration, created by its recently and hastily created community integration plan, the Judge cited the Third Circuit decision in *Frederick L v. Dept. of Public Welfare (Frederick L II)*, 422 F.3d. 151 (2005), stating that "general assurances and good faith intentions do not meet federal law or patient expectations." The Judge was particularly troubled by the state's admission that "the money promised in the current plan may be directed to non-institutionalized persons." Thus, the state could spend the funds on people in the community at risk of institutionalization, leaving little money for people in ICFs to move out.

In May 2011, the Court preliminarily approved a Settlement Agreement between the Plaintiffs, the Plaintiff class, and the state. The agreement requires the state to create and maintain a list of individuals currently residing in state ICFs and who do not oppose discharge to community-based treatment, to develop and implement a program to educate all state ICF residents and their families and guardians about community-placement and available services, and to develop and implement a viable integration plan to provide community placements to 325 state ICF residents by 2015.

A group of family members and guardians of residents of ICF's in Pennsylvania who opposed community placement for their family members sought District Court permission to intervene in the case in order to challenge the settlement agreement and to decertify the class. The District Court denied the request, and the family members appealed to the Third Circuit. On December 12, 2012, the Third Circuit ruled that the district court abused its discretion in denying the intervention and held that the family members were allowed to challenge the settlement agreement and seek decertification of the class. However, the Circuit Court was careful to state that they were expressing "no opinion as to whether or not the Settlement Agreement (or any other settlement that may be reached in this proceeding) should ultimately be approved or disapproved—or whether or not the class should be decertified."

### 52. (PA) Frederick L. v. Department of Public Welfare (E.D. Pa. 2001); (3rd Cir. 2004).

Class action filed by the P&A on behalf of residents of a state hospital challenging the state failure to provide them with proper evaluation of their service needs, discharge planning, and community supports in violation of the ADA. In 2003, the District Court ruled that the state did not violate the integration mandate because to do so would require a fundamental alteration of how it runs its Medicaid mental health program. In April 2004, the Circuit Court agreed with the state's budget analysis in many ways and upheld many parts of the lower court ruling. Ultimately however, the Court vacated the judgment and remanded the case back to the District Court to require more information before it would grant a fundamental alteration ruling, including development of a comprehensive community integration plan, as required under Olmstead.

On remand, the District Court ruled that the state had an effective Olmstead plan. The Plaintiffs again appealed the District Court decision, in favor of the state, to the Third Circuit. For a second time the Third Circuit ruled in favor of the Plaintiffs and remanded

the case back to the District Court a second time. Specifically, the Third Circuit held that the state could not assert a fundamental alteration defense absent "an adequately specific comprehensive plan for placing eligible patients in community-based programs by a target date." The Court directed the state to develop "a viable integration plan" that, at minimum, specifies

> *the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.*

In April 2006, the Department of Public Welfare submitted an integration plan for Norristown State Hospital residents and the Plaintiffs agreed to accept it and to put further litigation on hold.

### *53. (PA) Jimmie v. Department of Public Welfare (M.D. Pa. 2010)*

Class action filed by Disability Rights Network of Pennsylvania (P&A) on behalf of more than 60 Pennsylvanians with ID who were being inappropriately housed in state psychiatric hospitals. The P&A alleged that the Department of Public Welfare violated the ADA and Section 504 by failing to offer community supports and services to those residents who are appropriate for discharge; and the Due Process Clause of the Fourteenth Amendment to the Constitution by failing to provide appropriate habilitation and adapted mental health services to state hospital residents with ID.

The parties agreed to a settlement, subject to the approval of the Court, providing the following:

- Defendants will request funding to provide community I/DD services to all class members over the next three years;
- Staff at the state psychiatric hospitals will receive comprehensive training in the appropriate treatment of individuals with dual diagnoses of mental illness and ID; and
- Staff at the state psychiatric hospitals will be required to adhere to a comprehensive protocol with respect to the treatment of individuals with dual diagnoses (from assessments to treatment plan development and evaluation, to behavioral approaches) and with respect to discharge planning.

### *54. (PR) DOJ Findings Letter to Puerto Rico (1997) Ĵ*

Several years ago, the Division issued two CRIPA/ADA Findings Letters concluding that the Commonwealth of Puerto Rico was violating the constitutional and legal rights of several hundred persons with developmental disabilities who had been living in one or more of the Commonwealth's six residential institutions. Shortly thereafter, the

Division reached agreement with the Commonwealth that Puerto Rico would develop and implement a series of measures to drastically transform the nature of its service-delivery system for persons with developmental disabilities. In recent years, the Division has been actively monitoring the Commonwealth's compliance with three CRIPA/ADA consent decrees, as well as several other court orders, all executed to protect the rights of persons with disabilities. The most recent of the consent decrees has a primary ADA/Olmstead focus and is called the "Community-Based Service Plan." It is a comprehensive community plan that has effectively changed the Commonwealth's service-delivery system from an institutional model to an entirely community-based system. Through our efforts, we have been successful in prompting the Commonwealth to close all six of its government-run residential institutions and, in their place, to create a vast network of small homes and other programs in integrated community settings all across the island. The Division has also prompted the Commonwealth to create competitive and supported employment and other meaningful opportunities for many of the former-residents in integrated community settings. We conduct regular onsite compliance visits of the community homes and programs in conjunction with a court monitor, and we participate in regular status hearings and conferences before the Hon. Gustavo A. Gelpi, U.S. District Court Judge for the District of Puerto Rico. In recent years, at our urging, the Court has issued several orders to prevent proposed massive cuts in personnel and to the budget of the Commonwealth's mental retardation program, thus ensuring continued services to the vulnerable participants. The Division is also currently monitoring the adequacy of the delivery of clinical and other professional services to the community participants.

### *55. (RI) U.S. v Rhode Island and City of Providence Ĵ*

On June 13, 2013, the United States entered a court-enforceable interim settlement agreement with the State of Rhode Island and the City of Providence which resolved the Civil Rights Division's findings, as part of an ADA Olmstead investigation, that the State and City have unnecessarily segregated individuals with intellectual and developmental disabilities (I/DD) in a sheltered workshop and segregated day activity service program, and have placed public school students with I/DD at risk of unnecessary segregation in that same program. The first-of-its-kind agreement will provide relief to approximately 200 Rhode Islanders with I/DD who have received services from the segregated sheltered workshop and day activity service provider Training Thru Placement, Inc. (TTP), and the Harold A. Birch Vocational Program (Birch), a special education program which has run a segregated sheltered workshop inside a Providence high school.

Pursuant to the Interim Settlement Agreement, the State and City will give TTP and Birch service recipients the opportunity to receive integrated supported employment and integrated daytime services that will enable them to interact with the broader community to the fullest extent possible. The State will no longer provide services or funding for new participants at TTP's sheltered workshop and segregated day

program, and the City will no longer provide services or funding to Birch's in-school sheltered workshop, which has served as a pipeline to TTP. Instead, over the next year, the State and City will provide adults at TTP and youth in transition from Birch with robust and person-centered career development planning, transitional services, supported employment placements, and integrated day services. The Interim Settlement Agreement calls for individuals to receive sufficient service to support a normative 40 hour work week, with the expectation that individuals will work, on average, in a supported employment job at competitive wages for at least 20 hours per week.

### *56. (TN) U.S. v Tennessee (M.D. Tenn. 2013)Ĵ*

On January 10, 2013, the U.S. Department of Justice (DOJ) signed a settlement with Tennessee whereby the state agreed that over the next year, it will expand home and community-based Medicaid waivers; seek new and cost-efficient models of care for class members with behavioral needs; and provide supported employment and competitive work opportunities for class members seeking work. This expansion will also improve community needs assessments and transition services for individuals with developmental disabilities in nursing facilities and ICF/DD's. If these criteria are met by December 31, 2013, the court will vacate all outstanding injunctive relief and dismiss the twenty year old U.S. v Tennessee class action.

The history leading to this Settlement began in 1991 when the DOJ issued a letter of findings detailing poor conditions of care at the Arlington Developmental Center (ADC) in violation of the Civil Rights for Institutionalized Persons Act (CRIPA). The following year the DOJ brought suit against the State and some of its officials pursuant to CRIPA alleging, among other things, that the State failed to ensure that ADC residents received adequate medical care, were free from neglect and abuse, and were not subject to undue bodily restraint in violation of the Fourteenth Amendment. In 1993, the court joined that suit with a separate suit, People First of Tenn. v. Arlington Developmental Ctr., concerning ADC and the rights of people at risk of institutionalization at ADC. Tennessee closed ADC in October 2010. This new agreement primarily involves identification of, and provision of services to, class members who were at risk of placement in ADC prior to its closure. People First of Tennessee remains active in the case and also is a party to the agreement.

### *57. (TN) Wilborn ex rel. Wilborn v. Martin, (M.D. Tenn. Aug. 15, 2013)*

Plaintiff seeks a preliminary injunction requiring Tennessee to provide Medicaid coverage for 24-hour home care despite a Medicaid waiver cost cap on services. Plaintiff had received 12 hours a day of private duty nursing care along with 12 daily hours of home health aide care when he was under 21 and was eligible for Early and

Periodic Screening, Diagnosis and Treatment (EPSDT). When plaintiff turned 21, he was moved into Tennessee's waiver program for adults with disabilities. The program offered 40 hours per week of home care, despite a physician's request for 24-hour-care due to plaintiffs inability to swallow. The state capped the services available at the amount it would cost the state to place plaintiff in a nursing facility.

Unfortunately, when plaintiff had previously sought treatment at a nursing home he was removed because the facility was unable to care for him. Plaintiff claimed that it was a reasonable accommodation, required under the ADA integration mandate and the Rehabilitation Act. To restore his previous levels of care pending trial so that he would not be moved to a nursing facility. He argued that lifting the cap would not be a fundamental alteration of the state's Medicaid program, because he is one of only a few Medicaid recipients whose needs are so great they cannot be met in a nursing facility.

The U.S. District Court granted the preliminary injunction, finding that there is a substantial likelihood that his claims will succeed. The court determined that the cost of plaintiffs care is actually lower than similarly situated patients and that the state's "prior approval of Plaintiff's home health care services and his treating physicians' assessment that Plaintiff continues to need such care are proof that institutionalization will cause injury to Plaintiff's mental and physical health demonstrating irreparable injury."

### *58. (TX) Steward v. Perry (CA 5:10-CV-1025-OG (W.D. TX 2011)) Ĵ*

Case brought by the P&A seeking certification of a class of more than 4,500 individuals with IDD confined to nursing facilities in Texas. Plaintiffs allege that the state unlawfully segregates individuals with DD in nursing facilities and fails to provide them with necessary treatment and services while they are there in violation of the ADA, Section 504 and the Nursing Home Reform Act. The state filed a Motion to Dismiss the ADA integration mandate claim, promoting the DOJ to file a Statement of Interest opposing the state's Motion to Dismiss. The DOJ also intervened as a party in the case in support of plaintiffs.

On August 19, 2013, The U.S. Department of Justice, along with Disability Rights Texas and the Center for Public Representation, signed an interim settlement agreement in the case. The two-year Interim Agreement, if approved by the Court, requires Texas to expand community-based services through Medicaid waivers and individualized supports for over 600 adults with developmental or intellectual disabilities who are unnecessarily living in nursing facilities or who are at risk of unnecessary institutionalization in nursing facilities. The parties also agree to pause their ongoing litigation and negotiate a comprehensive settlement of all remaining issues in the case. A copy of the interim agreement is available at: http://www.ada.gov/olmstead/olmstead_cases_list2.htm#steward

A few of the agreed upon remedies include:

360 Home and Community-based Services waivers to transition individuals residing in nursing facilities to the community over the next two years. 150 Home and Community-based Services waivers and 125 Texas Home Living Program waivers for individuals at-risk of admission to nursing facilities over the next two years.
Assessment of all Texas nursing facility residents by August 31, 2014, to ensure identification of I/DD.
Service Planning Teams and Service Coordinators for all residents with I/DD in the nursing facility or diverted from. Teams will develop person-centered individualized service and transition plans. Teams must also monitor implementation of supports both in the facility and after transition.
Access to an array of integrated day, employment, and recreational services.
Diversion Coordinators to identify and arrange community services for individuals at-risk of nursing facility placement; and
An Expert Reviewer to assist the Parties to negotiate a comprehensive settlement to be complete within 150 days, with possible extension.

Unfortunately, the settlement has still not been finalized. Parties are back at the negotiating table revisiting some of the terms with the new Governor.

### *59. (VA) ARC of Virginia v. Kaine (D.Va. 1999)*

Plaintiffs, the Arc of Virginia, represented by the Virginia P&A, seek an injunction to stop the state from violating the ADA integration mandate by building a new segregated institution to replace the old ICF that the governor had ordered closed. Specifically, 75 of the current ICF residents will be forced to live in the new institution, even though a state-sponsored study found that each one of them can be served in the community rather than in an institution. The DOJ filed a Statement of Interest supporting the Plaintiffs. Unfortunately, the District Court denied the injunction and granted Defendant's Motion to Dismiss on the grounds that the case was not ripe for adjudication. The Judge stated that because the state was creating new community placements as well as the segregated facility it is not for certain that the state will move ICF residents into the newly built segregated setting; until the state actually makes a determination to move a resident into the facility instead of the most integrated setting the case is not ripe. The case closed when the Plaintiff chose not to appeal.

### *60. (VA) DOJ Findings Letter to Virginia (2011)Ĵ*

Finding that Virginia is in violation of the ADA integration mandate in the operation of its developmental disabilities services. The letter concludes that Virginia violates the ADA by unnecessarily institutionalizing more than 1000 individuals with developmental disabilities in large institutions and by placing other individuals at risk of institutionalization, including over 3000 individuals on the "urgent waitlist" for

community services. The letter identifies a lack of sufficient community-based services, including waivers, crisis services, housing, and supported employment as a primary cause of the violations. It also cites a flawed and inadequate discharge planning process at the state's large institutions.

On August 23, 2012, Federal Judge John A. Gibney signed the *U.S. v. Virginia* Settlement, approving the agreement as an order of the Court. The order follows seven months of legal action to secure the Court's approval. The consent decree will transform Virginia's service system from one that is reliant on large, segregated institutions to one that is focused on safe, integrated community-based services. Virginia currently has over 2900 people on an 'urgent wait list' for Medicaid waivers. The Agreement includes the addition of thousands of Medicaid waiver slots, necessary to enable people with disabilities to transition from training centers and for those already in the community to receive the services they need; mandates the creation of crisis response services; enhances case management services for all individuals covered by the agreement; and requires integrated housing. Although the agreement does not require the state to close any facilities, it is anticipated that four of the state's five training centers will be closed by 2020. An independent reviewer has been appointed to evaluate the state's compliance with the terms of the agreement.

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# IV. Cases Seeking Community Supports for Individuals Living in the Community at Risk of Unnecessary Institutionalization (other than those with DOJ involvement)

### *1. (AK) Myers v. Sebelius and Hogan, 3:09-cv-175 TMB, Federal District Court (August 2009)*

The state Medicaid agency had built up backlog of waiver-program assessments and reassessments, and was otherwise mismanaging HCBS waiver programs. The federal government imposed various corrections on the state, which included a June 2009 moratorium on new assessments and new admissions into the HCBS waiver programs. The P&A sought a temporary restraining order on behalf of a class of applicants whose applications were not being processed as a result of the moratorium, alleging:

(1) the moratorium is ultra vires because it forces the state to violate Medicaid Act "reasonable promptness" provisions without prior notice and the opportunity to be heard; and

(2) the moratorium forces people to remain in institutions, or go into institutions, in violation of the integration mandates in Title II of the ADA and Section 504.

The day before the scheduled temporary restraining order hearing, the federal government lifted the moratorium.

### *2. (AZ) Ball v. Betlack (formerly Rogers) (D.Ariz. 2000; 9th Cir. 2007).*

Class action filed by the P&A and AARP on behalf of individuals eligible for community-based Medicaid services who are not receiving the personal assistance services that doctors have determined are medically necessary, in violation of Medicaid law, the ADA integration mandate, and state law. Plaintiffs also claimed that the state was violating Medicaid by failing to provide written denial notices when services are not provided.

In August 2004, the District Court ruled that "Plaintiffs have a property right in the health care benefits for which they qualify" and that the state violated federal Medicaid law by failing to provide enough attendant care workers to meet the need. The Judge did not mention the ADA claim, basing his decision solely on violations of federal Medicaid law. The Court ordered the state to:

1) develop adequate or alternative contingency plans when a service is unavailable;

2) provide a rate of pay to health care workers so as to deliver adequate services to qualified individuals; and so as "to attract enough health care workers to deliver all the services for which an individual qualifies";

3) monitor the program so that gaps in services are detected "in enough time to implement the alternative or contingency plan and eliminate the gap in service in less than four (4) hours"; and

4) implement a grievance process allowing an individual to call and speak to a live person to report a gap in service, and arrange for an alternative.

The state appealed to the Ninth Circuit arguing that individuals could not use Section 1983 to enforce the Freedom of Choice or Equal Access provisions. In July 2007, the Ninth Circuit Court disagreed, holding that both provisions are enforceable. The Court remanded the case to the District Court for further consideration of whether Arizona:

1) waived its privilege and thus must comply with the Medicaid Freedom of Choice provisions; and

2) violated the ADA and Section 504 in the administration of its Medicaid waiver program.

On April 24, 2009, in an unreported decision, the District Court, on remand, ruled that Arizona violated Medicaid Act's Freedom of Choice provisions by failing to provide prescribed home care services and to remedy gaps in services. In so doing the Court rejected Arizona's argument that the free choice provisions required it only to approve home care services, but not to ensure that the Arizona Medicaid health plans actually delivered the services to beneficiaries. The Court also held that,

> *[Arizona's:] failure to prevent unnecessary gaps in service and properly monitor the Home and Community-Based Services program improperly discriminated against persons with disabilities by limiting their ability to maintain their social and economic independence and depriving them of a real choice between home and institutional care. [the state's] failure to provide adequate services to avoid unnecessary gaps in service and institutionalization was discriminatory,... .by reason of the Plaintiffs' disabilities…*

…in violation of the ADA and Section 504 integration mandates

In March 2010, the District Court issued another decision, holding that Arizona's Medicaid program failed to follow the Court's prior orders by not implementing a statewide hotline for beneficiaries to report gaps in critical home care services and by failing to require its program contractors to have back-up workers on-call to substitute for times when a gap in critical services occurs.

### *3. (AZ) Newton-Nations v. Betlach & Sebelius (formerly Rogers) 660 F.3d 370 (9th Cir. 2011)*

A state Medicaid regulation has imposed copayments that exceed the "nominal" levels authorized by federal Medicaid laws, and clients cannot afford to pay them. A preliminary injunction was obtained in 2004 and is still in place. In late March 2010 the Court ruled in favor of the state and dissolved the injunction. Plaintiffs appealed to the Ninth Circuit Court of Appeals. The Judge denied a request for stay and oral argument was held in May 2011.

The Ninth Circuit concluded that the Secretary was statutorily entitled under copayment provisions to permit Arizona to impose higher cost-sharing amounts on "expansion populations" under a demonstration project, but reversed, vacated, and remanded the Secretary's approval of Arizona's waiver proposal for further consideration because "there was little, if any, evidence that Secretary considered the factors" required under Section 1115 before granting Arizona's waiver. "Merely saving money" was held not tantamount to showing that the new cost-shifting measure had an approvable "research or demonstration value." The Court remanded the case for CMS to further consider and articulate its reasoning under the statutory criteria.

In 2011, the 1115 waiver with the higher cost sharing, at issue in the case, expired. The state applied for a new 1115 waiver program that would last until 2016. CMS approved this waiver request, which had similar co-payment requirements. Since it was a new 1115 waiver program, and because Arizona had improved its notices, to comply with due process, the District Court found this litigation to be moot. Since this time, CMS has approved a handful of other states to use 1115 waivers that impose higher than "nominal" co-payments on the new Medicaid expansion populations.

### *4. (AZ) Alvarez v. Betlach—4:09-cv-00558-AWT (D. Ariz. May 21, 2012)*

On May 21, 2012, the U.S. District Court for Arizona granted declaratory and permanent injunctive relief ordering the Arizona Medicaid agency to cover adult incontinence briefs when medically necessary to prevent or treat skin breakdown. The Judge relied on *S.D. v. Hood*, 391 F. 3d 581, 584 (5th Cir. 2004) in finding that adult incontinence briefs are "medical supplies" covered as a Medicaid home health service, when a physician determines them medically necessary. the Court also declared Arizona's policy of covering physician-prescribed adult diapers only to "treat" not to "prevent" skin breakdown and infection a violation of the Medicaid reasonable standards, 1396a(a)(17), requirement. Plaintiffs are represented by the Arizona Center for Disability Law (P&A). An ADA integration mandate and Section 504 claim were dismissed in an earlier stage of litigation, but the P&A presented evidence that adult incontinence briefs can cost between $300 and $500 a month, and failure to prevent skin infection can lead to isolation from community activities.

The state appealed the decision to the Ninth Circuit Court of Appeals. On May 13, 2014, the Ninth Circuit issued a largely successful decision and agreeing with the District Court and overturning the state regulation and policy that barred coverage of incontinence briefs to prevent skin breakdown and infection for adults age twenty-one and over.

### *5. (CA) V.L. v. Wagner (N.D. Cal. 2009)*

Plaintiffs are disabled and elderly Californians who receive Medicaid in-home assistance with activities of daily living to remain safely at home without risk of serious injury or harm. Plaintiffs seek to prevent the state from applying a change in eligibility criteria for the program which would reduce or terminate these services to more than 130,000 people who receive them. Plaintiffs argue that the loss of services would result in their unnecessary institutionalization in violation of the Medicaid Act and the ADA integration mandate. The Court issued a preliminary injunction finding that the functional indexing and scoring system to determine individuals' needs for these personal care services was not likely to measure need accurately, and individuals with ID were particularly likely to be disadvantaged in violation of Medicaid Act and the integration mandate. The state appealed to the Ninth Circuit. The case was consolidated with *Oster v Lightbourne*, described in Section III (A) above. In March 2013 a settlement was reached in *Oster* in which California agrees not to implement the functional indexing and scoring system.

### *6. (CA) Darling v. Douglas (formerly Cota v. Maxwell-Jolly), 2009 WL 2941519 (N.D.Cal.)(2009).*

Class action seeking an injunction halting the reduction in a state Medicaid adult day health care (ADHC) program. ADHC provides medical, physical, and mental health services to approximately 8,000 at-risk Medicaid beneficiaries. As part of the 2009 Budget Act, the state legislature proposed capping ADHC to no more than three days a week until the implementation of more restrictive eligibility criteria. Without ADHC services, many elderly and disabled Californians could be subject to inappropriate institutionalization or hospitalization in violation of the ADA integration mandate and Section 504. The District Court agreed and issued a preliminary injunction stopping the state from "reducing, terminating or modifying" ADHC benefits, "unless and until appropriate alternative Medi-Cal services are provided to prevent inappropriate institutionalization in violation of their rights." The state appealed to the Ninth Circuit, at which time the DOJ filed a Statement of Interest in support of the Plaintiffs.

On January 24, 2012, the U.S. District Court for the Northern District of California granted final approval of a Settlement Agreement requires the state to transition the ADHC program from an optional Medicaid benefit into a new community-based adult services managed care waiver program. There will be no enrollment cap on the number of individuals who can be served under the program and services will be provided at no cost to recipients. In counties where managed care is not available, and for people who are not eligible for managed care, the program will remain a fee-for-service Medicaid benefit.

### *7. (CA) Oster, et al. v. Lightbourne (formerly Wagner—09-CV-17581 and 09-CV-4668 ( 9th Cir. in March 2010 and in the 9th Cir. in January 2012). Ĵ*

The United States filed a Statement of Interest on January 9, 2012, regarding Plaintiffs' challenge to a 20 percent reduction in personal care services provided through the State of California's In-Home Support Services (IHSS) program. IHSS is designed to enable elderly individuals and individuals with disabilities to avoid hospitalization and institutionalization. On January 19, 2012, the U.S. District Court for the Northern District of California granted Plaintiffs' motion for preliminary injunction.

Previously, the Court preliminarily enjoined the state's planned implementation of more restrictive eligibility criteria for the IHSS program that would reduce or terminate IHSS services. The state has appealed the preliminary injunction, and the United States filed an amicus brief in the Ninth Circuit Court of Appeals supporting Plaintiffs-Appellees on March 2, 2010. The District Court granted a Preliminary Injunction and Class Certification, finding that the likelihood of harm to the many recipients of IHSS by a 20 percent cut in their hours was demonstrated. This likelihood of harm to health and safety, could result in institutionalization, violating ADA. The Judge also found that the notice being sent by the state about the cuts was deficient in important ways: Through

omission and misleading language, it failed to inform recipients of the reason their hours were being reduced or how to rebut it effectively.

On March 20, 2013, California reached a settlement agreeing to repeal and eliminate two major cuts to IHSS: (1) the 20% across-the-board reduction in IHSS hours from 2011, and (2) the termination or reduction in IHSS for many recipients based on their functional index score from 2009. Instead, the settlement:

a. Replaces the permanent 20% cut in IHSS hours with a temporary 8% cut in July 2013. (This is an additional 4.4% on top of the 3.6% current cut.)
b. Reduces the cut to 7% (3.4% on top of the 3.6% current cut) in July 2014.
c. Restores the hours lost from the 7% cut as early as the spring of 2015 if the State obtains federal approval of a provider fee which could bring significant new federal revenue to California.
d. Commits any savings from retroactive federal approval of the new provider fee to fund a program to benefit IHSS recipients, such as the SSI Special Circumstances program, which was used to pay for refrigerators and stoves, rent to avoid eviction and other emergency needs but has not been funded in the budget for many years.

### *8. (CA) Napper v. County of Sacramento, et al.*

On November 15, 2010, the District Court for the Eastern District of California approved an interim agreement under which Sacramento County will hire an expert to evaluate its adult outpatient mental health services and make recommendations for a more "recovery"-oriented model. Disability Rights California (the California P&A) the Western Center on Law and Poverty and Cooley LLP jointly filed the class action in May 2010 alleging that the county's plan to close outpatient mental health clients that served upwards of 5,000 clients violated the ADA integration mandate and state law because it placed thousands of people with mental health needs at risk of unnecessary institutionalization. DOJ filed a Statement of Interest in support of Plaintiffs' Motion for Preliminary Injunction, requesting that the Court stop the county from moving forward with its plans to drastically change the mental health service system.

In July 2010, the Judge issued a preliminary injunction preventing the county from ending contracts with existing non-profit mental health providers and instead opening its own clinics using county staff. On November 15, 2010, the District Court for the Eastern District of California approved an interim agreement under which Sacramento County hired an expert to evaluate its adult outpatient mental health services and make recommendations for a more "recovery"-oriented model.

A Consent Decree was signed on January 24, 2012, dismissing the claims with prejudice and requiring the county to develop a plan for providing a continuum of care through the county-operated and -funded adult outpatient mental health system and to consolidate the two county outpatient clinics.

### *9. (CA) Carranza v Douglas (E.D. Cal. 2012)*

The Plaintiff is a 21-year-old with muscular dystrophy. He qualifies for care in a Subacute Medical Facility but is able to remain in the community so long as he receives extensive nursing care in his home. When the Plaintiff turned 21 in September 2012, the state reduced his nursing care by 200 hours per month due to his new categorization as an adult. The state provides fewer nursing hours to adults than to children. Despite this change, he alleges that his condition remains the same, and without adequate nursing care in his home, he would need to be institutionalized in violation of the ADA and Section 504. . The case is still pending

### *10. The Arc of California v Douglas (Ca. D.Ct. 2011)*

The Arc of California initiated this lawsuit in late September 2011, alleging that California's statutes reducing the state's compensation of HCBS for persons with I/DD living in the community violates the Medicaid Act, state law, and the Integration Mandate of the ADA and Rehab. Acts. The statutes at issue included a "percentage payment reduction," a "uniform holiday schedule," and a "half-day billing rule." Plaintiffs sought a preliminary injunction. The California District Court ordered proceedings on the case to be put on hold until the U.S. Supreme Court issued a decision in *Douglas v. Independent Living Center of Southern California*, a case which raised similar questions about whether provider rate cuts violate Medicaid Law and the ADA (see a summary of Douglas v ILC in this docket).

In the Summer of 2012, after the Supreme Court issued its decision in *Douglas v. ILC*, litigation in *Arc v Douglas* resumed. On July 1, 2013, the district court issued two orders, one denying Arc's motion for a preliminary injunction, the other dismissing Arc's Medicaid Act claims but allowing the remaining ADA, Rehab. Act, and state law claims to move forward. The Arc appealed the denial of the Medicaid Claims to the 9th Circuit.

On June 22, 2014, the 9th Circuit ruled that while the Arc has a substantial likelihood of success on the merits of its Medicaid Act, the Court is not granting the preliminary injunction. The 9th Circuit found that "The current record is insufficient to permit our independent evaluation of the harms threatening Arc's members [as a result of the state statutes at issue]". The Court remanded the case back down to the California Federal District Court to develop a new record that better documents the possible harms to plaintiffs caused by the statutes.

Upon remand, in February 2015, the District Court granted summary judgement on plaintiffs Medicaid claims. Specifically, the Court ordered the state not to implement the so-called "uniform holiday schedule" or make any changes to provider payments without first obtaining approval from CMS. Unfortunately, a month later, the U.S. Supreme Court decided a case called *Armstrong v Exceptional Child Center,* and determined that provider agencies, like The Arc, do not have a right to independently enforce this provision of the Medicaid Act. In April 2025, California received approval by the California federal District Court to overturn the February 2015 order and

reinstate the Medicaid claims. It is also important to note that since neither the District Court nor the 9th Circuit ever dismissed the ADA integration mandate claim, this claim is also live and waiting a District Court ruling.

### *11. (CO) Rossert v. Developmental Pathways (D.Co. 2007). Case No.: 06CV4479*

Action alleging that the state Medicaid contractors failed to provide state-level hearings to a class of all people with DD whose eligibility for Medicaid DD waiver services were denied or terminated. The class was represented by both the Colorado P&A and the private attorneys of Fox and Robertson. When these services were denied to class members, Colorado afforded only the right to appeal through a local-level hearing. The Court determined that the state agencies' failure to afford Plaintiffs with state-level hearings violated the Medicaid Act and the Due Process Clause.

### *12. (DE) DOJ Findings Letter to Delaware (2010)Ĵ*

The United States issued a Findings Letter in November 2010 stating that Delaware is violating the ADA integration mandate in its provision of mental health services. The Letter finds that the state's system results in prolonged institutionalization of people who could be served in the community and leads to unnecessary hospitalization and risk of institutionalization of those currently in the community. DOJ concludes that the remedy for the identified violations is the development of community services for all those who are unnecessarily institutionalized or are at risk of institutionalization. DOJ finds that an expansion of community-based services for people with mental illness would not constitute a fundamental alteration of Delaware's system and recommends improvements to the crisis system, assertive community treatment and case management programs, supported housing, supported employment, and family and peer support services.

DOJ signed an agreement with Delaware, in which the state agrees to: provide relief for more than 3,000 individuals unnecessarily institutionalized in Delaware's State-operated psychiatric hospital or in state-funded private psychiatric facilities or at risk of placement because of a lack of community supports. Provide a full range of crisis services including: Crisis walk-in centers; Mobile crisis teams (with the capacity to respond to any crisis within 1 hour; Crisis stabilization services (14 day limit); Peer run crisis apartments and a Statewide crisis hotline. Provide intensive Case Supports, including ACT and targeted case management. Provide integrated supported housing with no more than 20% of individuals per building have a mental health diagnosis. Provide supported employment, peer supports and rehabilitation services for at least 1,100 individuals.

### *13. (FL) Moreland v. Agency for Persons with Disabilities, 2009 WL 2602298 (Fla. App 1 Dist 2009)*

Plaintiffs/Appellants are the P&A representing individuals with ID receiving Medicaid waiver services. In 2007, the state legislature passed legislation requiring the state to dissolve its existing waivers and replace them with a four-tiered system for assessing level of services. The legislation specified that "Tiers 2, 3, and 4 would each have a different annual monetary cap; thus, the level of services available for each individual is contingent upon the tier into which the individual is placed." Also, the state must have a valid assessment tool for placing individuals in different tiers and Tier 3 "shall include clients who require residential placement, clients in individual or supported living situations, and clients who reside in their family home, regardless of age."

In response, the state Medicaid Agency proposed rules which the P&A challenged at hearing on a number of grounds, including that the rules were an invalid delegation of legislative authority pursuant to a state statute providing that "an administrative rule is an invalid delegation of legislative authority" if it "enlarges, modifies, or contravenes the specific provisions of the law implemented." Fla. Stat. 120.52(8)(c).

The administrative law Judge determined the rules were valid and the P&A filed this direct appeal. Overturning the Administrative Order, the Florida Court of Appeals held, among other things, that the tiered system is invalid because it "places an age limit on eligibility for Tier 3 in contravention of the statute it implements," which does not allow an age limitation. The Circuit Judge held that: "pursuant to section 120.52(8), a rule is invalid if it contravenes the statute which it implements, regardless of whether the Agency was justified in contravening the statute."

### *14. (FL) Cruz v. Dudek—1:10-CV-23048 (S.D. FL 2010)*

Luis Cruz and Nigel de la Torre successfully sought a preliminary injunction enjoining the State of Florida from denying them the HCBS available under its traumatic brain injury (TBI)/spinal cord injury (SCI) Medicaid waiver. The DOJ filed a Statement of Interest in support of Cruz and de la Torre's motion for preliminary injunctive relief. On April 19, 2011, the Court granted the parties' joint Motion to Dismiss with prejudice. Luis Cruz and Nigel de la Torre continue to receive HCBS under the waiver.

### *15. (FL) Lee or Dykes et. al v. Dudek (D.Fla. 2011)*

Class action seeking declaratory and injunctive relief on behalf of more than 19,000 individuals with DD in Florida who are on Medicaid waiver waiting lists in violation of the ADA integration mandate, Section 504, and Medicaid. Some Plaintiffs are in private ICF or nursing facilities where they have been restricted to a category of wait-listed people that, due to lack of funding, is never expected to move up in priority. Some Plaintiffs reside in their families' homes and have been on the waiting list for more than five years. These Plaintiffs will not be prioritized for the Medicaid waiver until their caretakers succumb to incapacitation or death. Plaintiffs seek to compel Florida to

design and implement a comprehensive effective working plan to enroll Plaintiffs and all other people on the waitlist into the DD Medicaid waiver in a reasonably prompt manner. DOJ filed a Statement of Interest in opposition to the Defendants' Motion for Summary Judgment in December 2010. The Court denied the parties' motions for Summary Judgment on January 20, 2011, and the case proceeded to trial in February 2011. On January 3, 2012, the Court entered a permanent injunction in favor of one named Plaintiff and decertified the class.

On July 3, 2012, Florida signed a settlement agreement with Disability Rights Florida (DRF; the P&A) agreeing to more effectively and quickly transition individuals off of the waiver waiting list into community settings. Some provisions of the settlement include that Florida will:

- use current appropriations in the FY12 and FY13 ICF/DD budget to fund transitions of persons in ICF/DDs to the DD waiver.
- contact everyone on the DD waiting list who resides in an ICF/DD and providing transition support to those desiring to move.
- provide informed choice about the option of community based services to ICF/DD residents at annual reviews and every 6 months after during the continued stay reviews; and document choices made.
- provide DRF with monthly progress reports.
- request a similar mechanism from the legislature to transition people with DD who reside in nursing homes to the DD waiver.
- revise the procedure for crisis enrollment so that applicants approved for crisis enrollment will receive DD waiver-funded services within 90 days from the determination of crisis.
- develop a uniform statewide application for requesting individual family support services and provide data to DRF on whether the services were approved or denied and in what amounts.
- invite certain stakeholders (self-advocates, Family Care Council, DD Council, Centers for Independent Living, ARC, DRF, and others) to a waiting list workgroup that will consider developing ways to meet the needs of those waiting when it comes to housing, transportation, choice and community activities, investing in training for self-advocates, establishing peer connections, new training for waiting list support coordinators, and a means of tracking and projecting service demand and associated trends.
- add DRF to the state employment workgroup, which is charged with designing a system to support the employment objectives of people with DD who are waiting for DD waiver services.

- pay $200,000 in attorneys' fees and costs and the DRF portion of mediation expenses.

### *16. (GA) Knipp v. Deal (formerly Perdue)—10-CV-2850 (N.D. GA 2010)*

The Atlanta Legal Aid Society represented six individuals with mental illness whose community placements were terminated by the state as it cut back on a program known as SOURCE. SOURCE provides a personal care home placement with some nursing and case management support so that clients who otherwise might be institutionalized can live in these less restrictive community placements. The DOJ filed a Statement of Interest in support of Plaintiffs' motion for preliminary injunction, which the U.S. District Court granted, ordering the state to provide the services necessary to prevent the Plaintiffs' hospitalization. The case is currently pending.

### *17. (GA) Moore v. Reese (formerly Medows) (N.D.Ga. 2008) 08-13926, Slip Op, 2009 WL 1099133 (11th Cir. Apr. 24, 2009); (11th Cir. 2011).*

Action brought by the P&A on behalf of 12-year-old girl whose treating physician prescribed 94 hours of private-duty nursing care for her, but for whom Georgia Medicaid is only approving 84 hours of this service. The state argued that its Medicaid program caps nursing hours at 84, and because CMS approved its Medicaid program, than the cap is permissible. The P&A sought declaratory and injunctive relief to enforce the child's right under Medicaid's EPSDT provisions to the full number of prescribed nursing hours.

On an earlier remand, the Eleventh Circuit had reversed a District Court decision, 563 F. Supp. 2d 1354 (N.D. Gal 2008), which held the 1989 EPSDT amendments strictly limited the state's discretion not to provide treatment for individuals under age 21. In a very brief unpublished order, the Eleventh Circuit held that the state was not excluded from the determination of medical necessity, the private doctor's word was not the final decision, and both the state and provider had roles to play. Left unanswered was the question of what happens when there are conflicting opinions between the doctor and the state's medical experts, the District Judge held that the state's role was limited to determining whether the treating physician's prescription was the result of fraud or in conflict with reasonable standards of medical care.

The Eleventh Circuit concluded that the state can review the medical necessity of the amount of care prescribed by the treating physician and make its own determination of medical necessity. After that review, the state can limit services based on a medical expert's opinion of medical necessity so long as the limits do not discriminate on the basis of medical condition and services are provided in sufficient amount and duration to reasonably achieve the purpose of private-duty nursing. The Court remanded the case to allow evidence on *amount* to be presented and considered. On remand, the Court said the Plaintiff, under general civil rules in federal court, would bear the burden

of persuasion to establish by a preponderance of the evidence that 94 hours of nursing care are medically necessary (i.e., that the state's limits are not sufficient in amount duration and scope to reasonably achieve the treatment purpose). The Court rejected the position argued by an amicus in the case, WellCare of Georgia that, because of escalating Medicaid costs and the need to manage the public fisc, the state must be the "final arbiter" on coverage.

### *18. (GA) Hunter v. Cook (N.D. Ga. 2013) Ĵ*

The United States filed a Statement of Interest in *Hunter v. Cook*, in opposition to the state of Georgia's Motion to Dismiss. Georgia's Motion argues that serious risk of institutionalization is not a viable claim under the Olmstead mandate of the ADA. The Plaintiffs' suit is a proposed class action under the Integration Mandate of the ADA, the Medicaid Act, and the 14 Amendment. Plaintiffs are Medicaid-eligible children with significant medical needs who live at home with their families and receive home and community-based services, including nursing services, through Georgia's Medicaid program. Plaintiffs allege that the Defendant's administration of a new screening program to determine level of need for nursing services has resulted in reductions that go against doctor's orders and put them at risk of unnecessary confinement or out of home care.

On May 22, 2013, the District Court Judge denied state's motion to dismiss the ADA integration mandate claim and on September 27, 2013, granted a permanent injunction prohibiting further reduction of his private duty nursing. The defendant appealed the injunction and a decision is still pending for the one remaining Plaintiff who still has standing.

### *19. (HI) Hawaii Disability Rights Center v. State (State Circuit Court 2010)*

Action seeking an injunction to restore mental health community-based services offered to adult Medicaid beneficiaries. The P&A alleges that the state is placing hundreds of individuals at risk of unnecessary institutionalization by cutting mental health services in violation of the ADA integration mandate. Since 2009 Hawaii has cut the number of hours an adult can receive case management services, adopted new restrictive eligibility criteria for HCBS waivers, and fired most of the state mental health physicians. The parties are in settlement negotiations.

### *20. (IL) Radaszewski v. Maram (D. Ill 2000 and 7th Cir. 2004)—01-9551 slip op at 25-26.*

Action on behalf of a young adult, who had been receiving 16 hours of private-duty nursing each day through the Medicaid EPSDT program, but faced institutionalization as an adult because the Medicaid waiver program offering nursing services to adults is capped at a level well below his needs. Plaintiff requested additional nursing hours through the adult waiver as a reasonable accommodation under the ADA integration mandate and the Rehabilitation Act. In 2002, the District Court entered judgment in favor of Defendants, barring the ADA claim on Eleventh Amendment grounds and finding that the relief Plaintiff was seeking constituted a "fundamental alteration" of the adult waiver program. Plaintiff appealed and in 2004, the Seventh Circuit reversed, finding that the ADA integration mandate is not barred by the Eleventh Amendment and remanded to the District Court to determine whether the state could prevail on its "fundamental alteration" defense.

On April 18, 2008, the District Court ruled in favor of Plaintiff and found that it would be less expensive to provide the supports to Plaintiff in the community. The Court found that it would not be a fundamental alteration for the state to modify the waiver to cover more nursing hours to the Plaintiff. The Judge pointed out that the federal government encourages the use of community-based waivers in place of institutionalization.

### *21. (IL) Fisher v. Maram—1:06-cv-04405 (D.Ill. 2006)*

In Illinois, children with significant disabilities are able to get extensive home nursing services under a Medicaid waiver for children. When the child turns 21, he or she "ages out" of that waiver and becomes eligible for the adult home services program waiver. Illinois, however, does not provide the same level of home nursing services under the adult waiver. This action is on behalf of an individual who is aging out and at risk of institutionalization because the adult waiver will not cover the services she needs to remain in the community. The P&A argues that failure to provide the supports she needs is a violation of the ADA integration mandate and Section 504.

In August 2006, the District Court granted a temporary restraining order to ensure that the state will continue to provide the same level of home nursing services while the litigation is pending. The Court noted that Plaintiffs have demonstrated at the very least a greater than negligible chance of success on the merits on the ADA and Rehabilitation Act claims. Both parties filed a motion for summary judgment and both were denied.

### *22. (IL) Sidell v. Maram (C.D. Ill 2005)*

Plaintiff, is aging out of the EPSDT program and facing institutionalization because the Medicaid waiver for adults does not cover as many personal assistance service hours as had EPSDT. If Plaintiff wanted Medicaid to cover an increased level of care her only option was to move to an institution. Such a setting placed her at higher risk of death

because she would not be provided the constant monitoring that she currently receives through in-home services. The Plaintiff, represented by the P&A, seeks to maintain the current level of in-home supports, as a reasonable accommodation under the integration mandates of the ADA and Section 504. The District Court granted a motion for temporary restraining order, finding a likelihood of success on Plaintiff's ADA integration mandate and Section 504 claims. A trial on a permanent injunction ended in July 2008.

On January 14, 2009, the U.S. District Court ruled in Plaintiff's favor. In rejecting the Defendant defense that granting the reasonable accommodation would result in a fundamental alteration of its Medicaid waiver program, the Judge found that:

> *providing [Plaintiff] with this necessary level of care would not be a fundamental alteration of the State's program. Merely because [Plaintiff] requires this level of care, does not mean that the State would be required to provide the same level of care to all persons covered under the adult waiver program. Thus, allowing [Plaintiff] to remain in a community setting can be accommodated in light of Illinois resources and the needs of similar individuals.*

### *23. (IL) Stegemeyer v. Maram (D. IL 2009)*

Plaintiff is a young adult at risk of institutionalization because he is aging out of the children's medically fragile waiver and the State of Illinois is no longer willing to provide the same level of in-home nursing services as was provided under EPSDT. Soon after the P&A filed suit, the state agreed to the entry of a temporary restraining order that will allow the individual to maintain the same level of in-home nursing services during the pendency of the litigation. Eventually the Court granted a permanent injunction

### *24. (IL) Bertrand v. Maram (D.Ct.Ill. 2006)*

Plaintiffs are developmentally disabled individuals who are receiving Medicaid DD waiver services but were denied 24 residential supports. Plaintiffs meet the Medicaid plan criteria for these services but they did not meet the state's "priority population criteria," which determines the population who actually receive the supports. Plaintiffs have no anticipated date upon which they might receive these needed services. The District Court found that Defendants properly denied services pursuant to the "Priority Population Criteria," because these extra criteria do not outright exclude any eligible individual from receiving community residential services, but merely give service priority to eligible persons. The District Court partially relied on the fact that CMS had ratified the priority population criteria when it approved the state Medicaid plan. The Seventh Circuit affirmed the District Court's decision, holding that because CMS approved the use of "priority populations" in Illinois' waiver application, the state is allowed to use this approach.

### *25. (IL) Grooms v. Maram, 06 CV 2211 (N.D. Ill 2006)*

Plaintiff is ventilator dependent and highly fragile, requiring 24-hour care. Under the Medicaid program for children, Plaintiff received 116 hours of care per week, plus 336 hours of respite annually at a cost to the state of more than $17,000. At age 21, Plaintiff enrolled in the adult HCBS waiver, which capped benefits at $8,633. The P&A asked to allow Plaintiff to receive benefits at the level he received before turning 21, as a reasonable modification required by the ADA integration mandate. The P&A presented evidence that if Plaintiff was placed in a nursing facility he would need much more monitoring than the facility was equipped to provide and the cost of his care in the facility would be far beyond the average. The Court ordered not just restoration of service at pre-21 levels but also that rates be "sufficient to assure consistent competent skilled nursing services for the approved hours." The case lasted two years and the P&A was awarded generous attorneys' fees.

### *26. (IN) Maertz v Minott (S.D. IN. 2015)*

A class action brought by the ACLU of Indiana on behalf of individuals with developmental disabilities who had been receiving HCBS under the adults with disabilities Medicaid waiver, and were switched to the to the Family Services Medicaid waiver. When Indiana switched the plaintiffs to the new waiver, they cut the amount of Aide services available to plaintiffs. Plaintiffs argue that as a result of the way the state administers its Medicaid waiver program they are now at serious risk of unnecessary institutionalization in violation of the Integration Mandate. Indiana filed a motion for Summary Judgement on the grounds that plaintiffs must be institutionalized before they can bring and ADA integration mandate claim. The DOJ filed a statement of interest in favor of plaintiffs clarifying that the ADA integration mandate extends to persons at serious risk of institutionalization or segregation and is not limited to individuals currently in institutional or other segregated settings.

### *27. (KY) Michelle P. et al. v. Morgan et al. (E.D.Ky.2002). See Michelle P. v. Birdwhistell, 2008 WL 631202 (Slip Op., U.S.D.C.,E.D. Ky., March 4, 2008).*

Class action brought by the P&A alleging that Kentucky improperly waitlisted individuals for Medicaid services in violation of the Medicaid Act, the ADA, and Section 504. The class comprises all present and future Kentuckians with mental retardation and/or related conditions who live with caretakers who are eligible for, and have requested, but are not receiving medical assistance community residential and/or support services. After the state lost its Sixth Circuit challenge of class certification, the parties reached a settlement in 2006. The settlement required the state to double its current finding for DD community supports over five years and to take other steps to increase consumer directed services and downsize institutions.

Unfortunately, in 2007, the state notified the P&A that it no longer had the money to provide services negotiated under the settlement. The P&A filed a Motion to Enforce the Settlement in December 2007 and on March 4, 2008, the District Court granted the motion. Rather than appeal, the state agreed to an amended settlement, approved in May 2008. Under the new terms, the state agrees to serve 3,000 class members in the first year. This is 7,000 fewer than the original settlement required; however, the Amendment also requires the state to serve an additional 1,500 individuals each year until reaching 10,000 in the sixth year. The state also extends the waiver from a minimum of three years to a minimum of eight. Plaintiffs permitted the Defendants to reduce the current 50-hour-per-week maximum for certain waiver services to a 40-hour-per-week maximum. The state further agreed not to appeal the March 4 ruling, and the P&A agreed not to pursue attorney fees.

### *28. (LA) Wells v Kliebert, (M.D. LA 2014)*

In March 2014, the Louisiana P&A filed a class action challenging Louisiana Medicaid's denial of the full amount of home based service hours prescribed by the plaintiffs' doctors, and other children similarly situated. Plaintiffs claim that the denials place them at risk of unnecessary nursing facility placement, in violation of Medicaid EPSDT requirements and the ADA Integration regulation. They also claim the state violated the 14th amendment when it failed to provide plaintiffs with a reason for the denials, thus denying them a meaningful opportunity to understand or challenge the denial.

The ADA Olmstead claim that home health services for the person who brought the suit had been improperly reduced has not been resolved but the state has restored the named plaintiffs home health services. However parties have reached a settlement on the Medicaid claim that individuals where given insufficient notice of why their services were cut and of the opportunity to appeal the reduced hours.

The settlement requires that all notices: (A) Give the reasons for a denial or partial denial. The notices will be in plain language, with enough detail to tell what other information would help to get an approval. The notice will also tell how many hours or amounts of the item or service are approved and denied and help the person on Medicaid to understand the agency's assessment of his or her needs. (B) If the decision relies on a rule, it is not enough to say that the rule is not satisfied; the notice must explain why the individual's case does not satisfy the rule. (C) Reasons such as "the service is not shown to be medically necessary based on the documentation submitted," without giving a reason why the conclusion was reached, are not good enough. (D) If after DHH's doctor talks with the recipient's doctor, DHH says that the recipient's doctor now agrees that fewer services are okay, DHH must still give the detailed reasons why more services cannot be approved. (E) All reasons for denial must be given at the same time. If a person who gets Medicaid asks for a fair hearing about the denial or partial denial, DHH and its contractors cannot give new reasons for the denial that were not on the notice. (F) The service or item asked for should be described in the way that laypeople would describe it. The number of hours of services

a week asked for, approved, and denied must be included. And (G) If a request is not fully approved, the term "denied" or "denial" should stand out on the notice.

### *29. (MA) Hutchinson v. Patrick, ___F.3d___, 2011 WL 540538 (1st Cir. Feb. 17, 2011),*

A federal class action lawsuit brought on behalf of over 9,000 persons with acquired brain injuries unnecessarily confined to nursing facilities in Massachusetts. The case alleged violations of the ADA and the Medicaid Act and sought the development of integrated community-based services. In 2008, the court certified a class comprised of: All Massachusetts residents who now, or at any time during this litigation: (1) are Medicaid eligible; (2) have suffered a brain injury after the age of 22; and (3) reside in a nursing or rehabilitation facility or are eligible for admission to such a facility.

Later that year, a court-ordered Settlement Agreement established a plan to dramatically enhance community-based services in Massachusetts. That Agreement required the State to: 1) develop a new, comprehensive community service system for persons with brain injuries; 2) transition 1900 nursing and long term care facility residents to the community; and 3) conduct statewide education and outreach activities for consumers, families, providers and other stakeholders to inform them of these new opportunities.

In July of 2013, US District Court Judge Michael A. Ponsor approved an Amended Settlement Agreement, prompted by the Commonwealth's failure to secure federal grant funding for community-based services. Under the Amended Agreement, the state will use another federal grant project, the Money Follows the Person (MFP) Demonstration, as well as other waiver programs, to provide residential and non-residential supports for up to 1174 Medicaid-eligible people with brain injuries who are now in long-term rehabilitation facilities and nursing homes. The Amended Agreement will expand the existing home and community-based service system for people with brain injuries, allowing eligible class members to receive services in the most integrated setting appropriate to their needs – including their own apartments, family homes, shared living arrangements or group homes. In addition, the state must meet annual benchmarks for increasing waiver slots, and implement an extensive education and outreach initiative to ensure class members and their families know about the opportunities afforded under MFP and its waiver programs.

### *30. (ME) Suzman v. Harvey, 2008 WL 2945430 (D.Me. Jul. 25, 2008)*

Action by the P&A claiming that the state's denial of medically necessary personal assistance hours violates the "reasonable standards" provision of the Medicaid Act. Specifically, Plaintiff assessed as needing 80 hours of personal care per week. He purchased an additional 23 hours per week with his own resources, and sought an increase in coverage to the maximum of 86.25 hours per week. Citing his ability to pay for 23 hours per week, the agency instead reduced his coverage to 57 hours. Suzman prevailed before a hearing officer, but that decision was also reversed by the state,

relying on a regulation in the state Medicaid manual. The regulation states that a plan of care must consider "services provided by other public or private funding sources to assure non-duplication of services." The state filed a Motion to Dismiss on the grounds that the reasonable standards provision is unenforceable under either Section 1983 and the Preemption Clause.

A magistrate for Maine's federal District Court concluded that the Medicaid "reasonable standards" provision, 42 U.S.C. § 1396a(a)(17), is not enforceable through section 1983, but recommended against dismissing a claim that the provision preempted a state regulation, in addition to recognizing that a violation of (a)(17) can be asserted through preemption.

### *31. (MS) Troupe v. Barbour—10-CV-00153 (S.D. MS 2010) Ĵ*

The DOJ filed a Statement of Interest opposing Mississippi officials' Motion to Dismiss the complaint of Medicaid-eligible children with significant behavioral disorders who allege that the State of Mississippi fails to ensure that medically necessary services are provided to Medicaid-eligible children in the most integrated setting appropriate to their needs in violation of the ADA and the Early Periodic Screening, Diagnosis, and Treatment (EPSDT) provisions of the Medicaid Act. The motion to dismiss was heard by a magistrate judge who ruled in favor of the State and recommended dismissal of the Medicaid EPSDT claim. The plaintiffs filed an objection with the District Court, and the United States filed another Statement of Interest. The State responded to plaintiffs' objection. The Objection is pending before the Court.

### *32. (MO) Hiltibran v. Levy, 2:10-cv-4185 (W.D. Mo.) Ĵ*

The suit was brought by The National Health Law Program (NHeLP), Legal Services of Eastern Missouri, and a private attorney on behalf of four people ranging in age from 22 to 49, whose disabilities result in incontinence. Plaintiffs seek Medicaid coverage of adult diapers they say are necessary to prevent skin deterioration and infections and to maintain Plaintiffs' ability to live in the community. Missouri Medicaid argued that adult diapers do not constitute Durable Medical Equipment (DME) under its Medicaid home health category and that adult diapers are not "medically necessary" but rather a personal hygiene item. Plaintiffs argued that diaper must be covered as DME and that the state criterion for determining adult diaper coverage is unreasonable, in violation of Medicaid reasonable standards and medical necessity provisions. § 1396a (a)(17); §1396a(a)(10)(A). Further, Plaintiffs' argued that the state is violating the ADA integration mandate and Section 504 because Medicaid will pay for adult diapers in an institutional setting at a cost of thousands of dollars a month per person.

The United States filed a Statement of Interest supporting Plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment arguing that Missouri's policy not to provide the necessary supplies placed individuals at risk of institutionalization in violation of the ADA. The District Court agreed and granted a preliminary injunction. Parties are in discovery.

### *33. (MO) Lankford v. Sherman (D.MO 2005)*

Complaint in District Court challenging a state regulation that eliminated coverage of most durable medical equipment (DME) for all Medicaid recipients except those who are blind. On remand from the Eighth Circuit Court of Appeals, the District Court issued summary judgment and a permanent injunction in Plaintiffs' favor. The state is in the process of implementing medical equipment coverage in light of the ruling. The Eighth Circuit held that Missouri's DME regulation was unreasonable on the basis that it restricted available DME and offered no other procedures for obtaining it, as required by CMS. Like in earlier Eighth Circuit cases, the opinion explained that although the state had discretion to include certain optional services in its state plan, its failure to cover non-experimental, medically necessary services within the covered category is unreasonable and inconsistent with Medicaid's goals. Because Missouri had opted to cover DME as an optional service, the state could not arbitrarily choose which DME items to reimburse. The Court noted that although optional DME programs are not explicitly subject to Medicaid provisions regarding reasonable standards, and amount, duration, and scope, and against discrimination based upon diagnosis or condition, CMS maintains that the reasonable standards provision applies to all forms of medical assistance, including DME.

### *34. (NE) Bill M. et al. V. Department of Health and Human Services et al. (D.Neb. 2003; 8th Circuit May 2005) Ĵ*

Action filed on behalf of 800 individuals waiting for DD waiver services in Nebraska who claim that the state has a flawed process for determining how many service hours that individuals are eligible for under the HCBS DD waiver, in violation of the Medicaid Act. As a result, individuals do not receive enough hours and are at risk of unnecessary institutionalization in violation of the ADA integration mandate and Section 504. The Defendants are the Nebraska Department of Health and Human Services, and two Nebraska Department of Health and Human Services Directors in their official capacities. The case also includes Section 504, Medicaid Act, and state law claims.

The case went to the Eighth Circuit in 2005 on interlocutory appeal on the issue of whether the ADA integration mandate claim was barred under the Eleventh Amendment. The Court of Appeals reasoned that only Congress' authority to redress denial of access to courts was addressed in *Lane* and that any other applications of Title II continued to be governed by *Alsbrook*. The Court also rejected the suggestion that it was unnecessary to decide the Eleventh Amendment issue because Nebraska would still have to defend the "essentially identical" claim that Plaintiffs bring under Section 504, as well as the ADA claims brought against the Nebraska officials.

Fortunately, on April 17, 2006, the Supreme Court vacated and remanded the Eighth Circuit decision. On remand, the Supreme Court directed the Eighth Circuit to reconsider its decision in light of the Supreme Court's intervening decision in *U.S. & Goodman v. Georgia*. In *Goodman* the Court held that sovereign immunity was abrogated for Title II suits involving discrimination in state prisons, at least to the extent

that the discrimination also violated the Constitution (in that case, the Eighth Amendment). In June 2006, the Plaintiffs filed an amended complaint defining the class as "all residents of Nebraska with developmental disabilities whose service needs were determined by the state's 'Objective Assessment Process' or have been placed on a wait list for the DD waiver."

Plaintiff's motion to certify a new class was denied. In April 2008, the parties filed a joint motion to settle. The case was dismissed with prejudice, except related to attorneys' fees. Against the recommendation of the Nebraska P&A, the private attorneys for Plaintiffs filed a motion for attorneys' fees under the ADA and Section 504. In its fee petition the attorneys also asserted that the District Judge had unfairly coerced the parties into signing the settlement by threatening to dismiss the case if the extended deadline for signing a settlement was not met. The Plaintiffs argued that if they had not been under this time pressure, they would have insisted that the Court retain jurisdiction before signing the settlement. The District Court denied Plaintiffs' request for attorneys' fees on the grounds that Plaintiffs' settlement on its ADA claims did not entail the judicial approval and oversight required to be a judicially sanctioned change in the legal relationship between parties, and thus, Plaintiffs were not a prevailing party.

On appeal to the Eight Circuit, which also did not involve the P&A, the Court reviewed the case de novo on the question of whether Plaintiffs were the prevailing party. The Court affirmed the lower court and relied on the Supreme Court's decision in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001). The Eighth Circuit held that "[a prevailing party] is one that obtains a judicially sanctioned, material alteration of the legal relationship of the parties." Id. The order Plaintiffs agreed to was an admission that they were not prevailing parties by definition, but had rather agreed to a private settlement. On the question of the District Court's threat of dismissal if a settlement was not signed by a certain deadline, the Court ruled it was a legitimate legal tool and not unduly coercive.

## *(NC) Clinton L. v. Wos. (formerly Delia)—10-CV-123 (M.D.N.C. 1999)Ĵ*

The North Carolina P&A brought this action against state Medicaid agency and the local mental health authority to prevent the local authority from sharply cutting the reimbursement rate for the providers of the Plaintiffs' community residential services. Plaintiffs argue that these rate cuts limit the number of providers available in the community and they ultimately will be forced into an institution to receive the same services they currently receive in the community. The DOJ filed a Statement of Interest in support of Plaintiffs' Motion for Preliminary Injunction. The Court denied the Motion, but ordered the state to provide appropriate community-based services to the Plaintiffs so they could stay in their homes for the pendency of the lawsuit.

Defendants filed separate Motions for Summary Judgment on the ADA and Section 504 claims. Specifically, the local mental health authority argued that the rate cuts are not so much that Plaintiffs will have to go to an institution for care. Defendant Delia, Secretary of the Department of Health and Human Services, contended that there are

no genuine issues of material fact regarding whether the Department had satisfied its duty of oversight and monitoring of the local provider organization.

In response, Plaintiffs submitted the written report of a mental health professional finding that each Plaintiff faces a serious risk of institutionalization resulting from the rate cuts, which have already caused reductions to each Plaintiff's care. The report found that for one Plaintiff, behavior problems have resurfaced because of the cuts in care, and as a result, the Plaintiff ended up incarcerated for four days. The Judge denied Defendants' motions for summary judgment, ruling that there were questions about the impact of the rate cuts that needed to be explored at trial.

The Case went to trial and on August 28, 2014, the Court ruled in favor of the Defendents. The Judge found that "Plaintiffs have failed to demonstrate that [they are] at significant risk of institutionalization generally or that the Supervised Living reimbursement rate reduction specifically will likely cause a decline in health, safety, or welfare that would lead to [there] eventual placement in an institution".

### *35. (NC) Marlo M. v. Cansler, No. 09-CV-535 (E.D.N.C. 1999)*

Action brought by the North Carolina P&A seeking an injunction to prevent threatened state Medicaid cuts in services that would endanger Plaintiffs' community placements in violation of the ADA integration mandate. The DOJ filed a statement of Interest in support of the preliminary injunction. The Judge entered a Preliminary Injunction in January 2010. In his order, he held that the Plaintiffs had presented "a strong case that their funding is being terminated in violation of the ADA" and that the "decision to terminate funding does not appear to be supported by legal justification recognized under the ADA." The Judge also held that if Plaintiffs were to be forced to move from their current community setting, both would suffer irreparable injury, recognizing that the nature of their disabilities made them poor candidates for group housing and that they would "suffer regressive consequences if moved, even temporarily."

### *36. (OR) Lane v. Kitzhaber—12-CV-00138 (D. OR 2012) Ĵ*

Case challenging the unnecessary segregation of individuals with IDD in sheltered workshops. Plaintiffs argue that Oregon's failure to provide supported employment services in an integrated setting violates Title II of the ADA and the integration mandate. An "integrated setting" means:

> *a setting typically found in the community in which an individual with the most severe disabilities interacts with non-disabled individuals, other than non-disabled individuals who are providing services to that individual, to the same extent that non-disabled individuals in comparable positions interact with other persons. Id. § 363.6(c)(2)(ii).*

The Oregon Federal District Court granted the state Defendants' Motion to Dismiss the complaint. However, the Justice gave Plaintiffs the right to re-file the complaint using

different arguments, thus becoming the first Justice to recognize that Plaintiffs do have valid, cognizable claims under Title II of the ADA and that the integration mandate applies to the provision of employment-related services.

In reaching this conclusion, the Court carefully scrutinized the Defendants' arguments for dismissal, and gave deference to the U.S. Department of Justice's interpretation of the integration mandate, which prohibits the unnecessary provision of services in nonintegrated settings, including segregated sheltered workshops. The Court distinguished claims for a "discriminatory denial of services" versus claims for "providing inadequate services," holding that "a claim survives only if it truly alleges a 'discriminatory denial of services' and must be dismissed if it instead concerns the 'adequacy' of the services provided." In May 2013, The Judge granted DOJ's Motion for Intervention, in which the Agency claimed Oregon is over-relying on segregated employment settings. The Motion asserts that:

- 61% of people receiving employment services are in sheltered workshops; and only 16% are in individually. supported employment;
- People with intellectual disabilities remain in sheltered workshops an average of 11-12 years; and
- The lack of supported employment options creates a virtual pipeline from school to segregated employment

On June 20, 2014, the district court recently denied a motion to intervene that was brought by individuals and families who opposed integrated employment. The families were supported by the Oregon Rehabilitation Association -- the trade association of sheltered workshop providers. The motion claimed there was a right to remain in workshops under the ADA, which was threatened by the relief sought by both the plaintiffs. In denying the motion, the court concluded that there was no right impaired in this case, since no one would be forced out of a workshop against his/her will. The Court also found that proposed interveners were members of the class, since the class did not exclude those who opposed integration, but that there was an individualized administrative (ISP) process where issues of need, interest, and preference could best be determined.

### *37. Smith v. Department of Public Welfare of the Commonwealth of Pennsylvania (Pa. D. Ct. 2014). Ĵ*

On June 12, 2014, the United States filed a Statement of Interest in this case on behalf of Plaintiffs who allege that the Commonwealth of Pennsylvania put them at serious risk of institutionalization by reducing funding for Act 150, a state-funded program providing attendant care services in the community. The Statement of Interest highlights the legal principles governing ADA claims, including the fact that individuals who are at risk of entering an institution because of a state policy need not wait until they enter the institution in order to assert an ADA integration claim. The Statement of Interest also

addresses what constitutes a request for a reasonable accommodation for the purposes of bringing an ADA integration claim.

### *38. (NJ) New Jersey P&A v. Velez—3:08-cv-01858-AET-JJH (D.NJ 2008)*

The P&A filed this suit in its own name, claiming that the state implementation of its Medicaid waiting list for DD services violates the Medicaid Act and the ADA integration mandate. Individuals are living in the community with elderly parents and lack of services. The P&A seeks for the state to:

a. develop a community-based infrastructure responsive to individual needs of individuals with DD;

b. eliminate the waiting list within three years; and

c. establish a plan for providing waiver services to all current and future residents capable of living in the community.

The Commissioner filed a Motion to Dismiss on the grounds that the P&A lacked associational standing and that the suit was barred by sovereign immunity. In July 2009, the Court held that the P&A had satisfied the Supreme Court's associational standing test in *Hunt v. Washington State* Apple Adv. Com'n, 432 U.S. 333, 337 (1977), because the P&A's constituents could sue in their own right. The Court went on to find that the P&A had standing because the P&A's interest in obtaining better care and services for its constituents is germane to its interests, and that the injunctive and declaratory relief sought will take effect to the benefit of the P&A's constituents. The Court also held that the Defendant could be sued under the ex parte young for injunctive and declaratory relief to end continuing or ongoing violations of federal law. The case is proceeding on the merits. Parties are in discovery.

### *39. (NM) Serafin v. New Mexico Human Services Department Ĵ*

A Medicaid waiver participant was denied an increase in her budget. All medical evaluations agreed that she needed additional service hours, but state determined her care needs based on a standardized assessment tool with an arbitrary upper limit of service hours. In appeal, the Plaintiff lost the administrative hearing based on state rules. A second appeal followed, District Court, with ADA and Olmstead arguments.

The parties agreed to a settlement in spring of 2010, paying her caregivers from the 2007-2008 budget what they would have been due if that initial budget increase had been approved. A final check was issued to cover all back pay in September 2010.

### *40. (NY) Taylor v. Zucker (S.D.N.Y. July 14, 2014) Ĵ*

Class action in the Federal District Court of New York in which plaintiffs allege that the Medicaid managed care agency's termination or reduction of their home care services, despite the fact there had been no change in their condition, violates the ADA integration mandate and Section 504 of the Rehabilitation Act. The plaintiffs also claim violation of the Medicaid Act because the managed care agency terminated or reduced their home-care services without proper notice and failed to provide the services requested during the period of the plaintiffs appeal through the Agency's internal grievance process. No decision yet.

### *41. (NY) Strouchler v Shah (S.D.N.Y. 2012)*

Plaintiffs challenge that a new state law violates Medicaid law and the ADA, because changes how Medicaid home health "split shift" services are provided, and will dramatically reduce the number of home health hours an individual will receive. Plaintiffs seek declaratory relief invalidating the new statute.

The District Court issued a preliminary injunction ordering the city to stop reducing or terminating split-shift care for certain reasons, except when a physician had personally examined the patient and found a change in medical condition or if the city submitted a declaration that a mistake had been made. The judge wrote that there was strong evidence that care had been reduced or terminated in many cases without proper notice to patients and because of confusing and contradictory interpretations of state rules for Medicaid.

### *42. (NY) Forziano v. Independent Group Home Living Program, Inc. (E.D.N.Y. 2014)*

Defendants are a married couple who both have intellectual disabilities and receive Medicaid and housing supports from the state of New York. They claim that the group home provider that the state contracts with to provide services is discriminating against them on the basis of disability by not allowing them to live together in the group home. They argue the failure to change the group home policy against co-habitation, constitutes a failure to provide a reasonable accommodation in violation of the ADA and Section 504 integration mandate. The District Court dismissed these claims and appealed the case to the 2nd. Circuit, which upheld the dismissal.

### *43. (NC) L.S., et al. v. Delia, et al., No. 5:11-CV-354FL (E.D. N.C. Mar. 29, 2012)*

The case was brought by Disability Rights North Carolina (P&A), the National Health Law Program (NHeLP), and others on behalf of four Medicaid waiver recipients. The Plaintiffs identified with chronic DD requiring significant medical and personal care suffered a reduction in service hours once the state began using a new tiered system for determining level of need, even though their conditions had not changed. Plaintiffs argued that the state and its managed care contractor failed to provide them proper notice when their services hours were reduced in violation of 42 U.S.C. § 1396a (a)(3) of the Medicaid Act and the Due Process Clause of the Fourteenth Amendment.

The Medicaid Act requires participating states and managed care entities to provide each Medicaid recipient with adequate written notice and an opportunity for an impartial hearing before services are denied, reduced or terminated. §§ 1396a (a)(3) and 1396u-2 (a); 42 C.F.R. §§ 431.200 and 438. Plaintiffs specifically argued that the managed care agency's letter to waiver recipients about cuts in services did not include

> *…an individualized explanation of how or why the new service assessment tool, called the special needs matrix, caused their services to change; information about how to file a grievance or appeal to contest the service reduction; or any explanation of the right to continued benefits at the previously authorized level pending the outcome of a fair hearing.*

In response, Defendants argued that notification requirements did not apply in this situation because "there has been no action to terminate" Instead, Plaintiffs simply have "time-limited authorizations for [waiver] services that naturally expired."

The Court disagreed, and on March 29, 2012, granted a preliminary injunction and class certification temporarily halting reductions to Medicaid home based care, and restoring services for individuals on the DD waiver. The Judge certified a class of "participants in the waiver whose services will be denied reduced or terminated" as a result of the scoring system.

### *44. (OH) G.D. v. Riley—2:05-cv-980 (S.D. Ohio 2007).*

Class action alleging that Ohio failed to properly notify children of the EPSDT services available to them outside of those provided under Ohio's Medicaid state plan and to provide a system for applying for these services in violation of Medicaid "reasonable promptness" and EPSDT notice provisions.

In October 2007, the Judge denied Defendants motion for summary judgment. The state had argued that:

1) EPSDT notice requirements could not be enforced by health care providers;

2) because the Sixth Circuit ruling in *Westside Mothers v. Olszewski*, 454 F.3d 532 (2006) that the Medicaid Act guarantees payment only for those services, not payment for services as the Plaintiffs allege; and

3) Plaintiffs' Medicaid claims are not enforceable under 42 U.S.C. § 1983.

The Judge ruled that the state is has a duty to ensure that EPSDT beneficiaries are aware of the full range of serves available to them, including making sure that providers are informed of the breadth of the EPSDT program, and that Ohio is also using the *Westside Mothers* argument inappropriately. The Plaintiff's allegation is not that the state failed to actually arrange for access to services. Additionally, the Judge found that "Failure to implement procedures that enable Plaintiffs access medically necessary services is distinguishable from a failure to provide those services directly." Finally, the Judge rejected the state's argument that Medicaid reasonable promptness and notice provisions are unenforceable under Section 1983. In May 2008, all motions were stayed.

### *45. (OH) Parents League for Effective Autism Services (PLEAS) v. Jones Kelley (S.D.Oh. 2008).*

The Ohio P&A filed this action on behalf of an autism provider organization seeking motions for Injunctive and declarative relief on the grounds that, Ohio's use of a newly narrowed definition of "rehabilitation services" in its EPSDT program, instead of the broader federal definition, violates federal Medicaid law. Specifically, in July 2008, Ohio amended its Medicaid plan, creating a new definition of "rehabilitation services" that requires these services to provide for the "maximum reduction of mental illness and are intended to restore an individual to the best possible functional level." The new definition effectively stops all coverage of applied behavioral analysis, an autism therapy provided by the Plaintiffs for children with autism. Plaintiffs had received Medicaid funding for providing applied behavioral analysis (ABA) as a rehabilitative service. Plaintiffs argued that the new definition of rehabilitation services violates federal Medicaid regulations, which do not require that rehabilitative services reduce mental illness. The District Court granted injunction relief, ordering the state to refrain from implementing the new definition and finding that Plaintiffs have a reasonable chance of establishing that ABA is covered by Medicaid and that the state rehabilitative services definition is violating Medicaid law.

On July 29, 2009, the Sixth Circuit ruled in favor of Plaintiffs. According to the Circuit Court, this case involved an alleged conflict between an "ambiguous" federal Medicaid provision and amendments to Ohio administrative rules. The "ambiguities" in 42 USC 1396d(a)(13), the provision that describes rehabilitative services, "make a definitive determination on coverage of specific treatment a difficult proposition, especially without the input of CMS on these issues." Accordingly, the ambiguity did not weigh strongly for or against the injunction. The Sixth Circuit joined other Courts of Appeals (Fifth, Eighth, and Ninth Circuits) to issue a clear statement confirming EPSDT's broad coverage requirements. The Court cited three EPSDT provisions:

- 42 USC 1396d(r), which defines the EPSDT screening services;
- 1396a(a)(43)(C), which requires the state to provide for corrective treatment when needed; and
- 1396d(r)(5), which defines the scope of benefits and establishes the correct or ameliorate standard.

It then stated, "Taken together, these provisions require Ohio to provide EPSDT-eligible children all of the services in subsection § 1396d(a) that are determined to be medically necessary" and "[t]hough § 1396d(a)(13) does not explicitly address the [SBSA] services ... it arguably does so when the services are medically necessary." Importantly, the Court rejected Ohio's argument that ABA services are exclusively habilitative and, thus, not covered by 1396d(a)(13), which applies only to rehabilitative services.

The Court quoted from the District Court decision which found that this "dichotomy has no relevance to medical or remedial services for children when the treatment has been recommended by a physician or other licensed practitioner for the maximum reduction of a physical or mental disability." The state agency had also focused on the fact that the federal definition includes a requirement that the rehabilitative service "restore the individual to the best possible functional level" and had argued that "restoring in this context excludes ABA therapy because the children it serves did not ever have a functional level that the therapy is attempting to restore." Quoting the District Court, the Sixth Circuit noted that 1396d(a)(13) "reflects the extremely broad EPSDT obligation."

### *46. (OR) Freeman v. Goldberg (D. OR. 2008)—6:08-cv-6168-TC*

Action on behalf of a person who has quadriplegia and uses a ventilator and tracheotomy tube, claiming the state is violating Medicaid law by failing to provide a sufficient supply of trained caregivers to meet his approved 24/7 care. The state had historically paid a higher wage rate to his caregivers because of the extremely complex level of care (including medical care) that he requires. The state had also provided money for experienced caregivers to train new caregivers. Both practices stopped, primarily as a result of a union contract that imposed a single rate for all caregivers. Plaintiffs seek a higher caregiver wage rate, paid training for caregivers, and a respite system that enables emergency coverage when workers were unavailable.

A temporary restraining order and preliminary injunction was granted June 5, 2008, increasing the wage rate by $3/hour and requiring the state to provide training for caregivers. The preliminary injunction remains in place until the case is finally decided. On September 29, 2012, the Court approved a Settlement Agreement between the parties.

### *47. (OR) Watson v. Goldberg (formerly Weeks) (D. Or. 2003 and 2008 on remand from the 9th Circuit).*

Action on behalf of nine HCBS waiver recipients challenging that the states attempt to narrow eligibility for the HCBS waiver violates the ADA because it places Plaintiffs at risk of institutionalization and the Medicaid Act because it fails to provide a reasonable standard for determining eligibility under federal law. Specifically, the state, due to budgetary constraints, redefined eligibility for nursing facility (and thus HCBS waiver) by changing its scoring system. So, for example, before the change, an individual assessed at levels 1 through 17 qualified. Afterwards, an individual assessed at levels 1 through 10 qualified. So, those scoring at 11-17 were eliminated. Plaintiffs also charge that Defendants did not properly notified individuals that their eligibility would be terminated. The District Court rejected the Plaintiffs claims, stating that Oregon was free to reduce its HCBS waiver program because it is an optional Medicaid service not in the state plan, and that Medicaid beneficiaries do not have an enforceable right to these services. Plaintiffs appealed the decision to the Ninth Circuit.

In 2006, the Ninth Circuit held that individuals who were receiving long-term services under the Medicaid HCBS waiver and lost those services as a result of Oregon budget cuts can challenge the cuts as a denial of their right to nursing facility services under the Medicaid Act. However, the Court found that a second provision of the Medicaid Act, requiring states to use "reasonable standards" to determine eligibility, does not create individual rights and is too vague and amorphous to be enforceable through Section 1983. The case was remanded to the District Court.

The District Court, on remand, ruled that the state's decision as a result of budget concerns to terminate eligibility for some people receiving long-term care services under the HCBS waiver did not violate the Medicaid Act. States may establish their own criteria for services and are not "compelled to provide services to any Medicaid beneficiary asserting a need..." The amendments to the state's waiver to eliminate care services to people in certain eligibility groups were approved by CMS. The case was dismissed with prejudice.

### *48. (RI) DOJ Findings Letter to Rhode Island (January 2014)Ĵ*

DOJ issued a statewide Findings Letter in January 2014 concluding that the State of Rhode Island is violating Title II of the ADA by unjustifiably and unnecessarily segregating persons with intellectual or developmental disabilities (I/DD) in its day activity service system, including in sheltered workshops and facility-based day programs, instead of providing such persons the opportunity to receive integrated supported employment and integrated day services that would enable them to interact with non-disabled individuals to the fullest extent possible. The letter concluded that the State places youth with I/DD at risk of unnecessary segregation in sheltered workshops and facility-based day programs. The Department recommended that the State implement certain remedial measures, including the development of sufficient supported employment and integrated day services to enable those individuals

unnecessarily segregated, or at risk of unnecessary segregation, to be served in integrated settings (See also, U.S. v Rhode Island and the City of Providence Section IV(C) (*DOJ As Party in Litigation*).

On April 8, 2014, in *U.S. v. Rhode Island,* DOJ entered into the nation's first statewide settlement agreement regarding the unnecessary segregation of people with disabilities in sheltered workshops and facility-based day programs.

Under the terms of the agreement, Rhode Island will provide supported employment placements to approximately 2,000 individuals, including at least 700 people currently in sheltered workshops, at least 950 people currently in facility-based non-work programs, and approximately 300-350 students leaving high school. Individuals in these target populations will receive sufficient services to support a normative 40 hour work week, with the expectation that individuals will work, on average, in a supported employment job at competitive wages for at least 20 hours per week. In addition, the State will provide transition services to approximately 1,250 youth between the ages of 14 and 21, ensuring that transition-age youth have access to a wide array of transition, vocational rehabilitation, and supported employment services intended to lead to integrated employment outcomes after they leave secondary school.

The settlement agreement provides relief to approximately 3,250 people with intellectual and developmental disabilities over a ten year period. The parties have jointly filed the settlement in federal district court and have requested that it be entered as a court-enforceable Consent Decree.

### *49. (SC) Doe v. Kidd, No. 10-1191, 2011 WL 1058542 (4th Cir. Mar. 24, 2011) (not for publication)*

In 2003, Plaintiff was determined eligible for the state's DD waiver. A plan of care was developed calling for residential habilitation services in a Community Training Home (CTH) I facility. The state offered Plaintiff services at a particular CTH facility, but Plaintiff turned down the placement because of her belief that it could not provide an appropriate level of service. The state did have other CTH I facilities that would be satisfactory to the Plaintiff, but the state refused to offer that placement. Instead the state offered her temporary services at a CTH II facility which was a more restrictive setting. Plaintiff filed suit when the state failed to look for other options besides the CTH I hospital she had turned down. The suit claimed, among other things, that the state failed to provide appropriate residential habilitation services with reasonable promptness.

In 2010, the District Court denied this claim and issued a decision that relied on the ruling in the Seventh Circuit case *Bruggeman* In *Bruggeman* the Seventh Court held that Medicaid's reasonable promptness provision obligated states to provide prompt payment for services, not the prompt delivery of the specific services themselves. The

District Court found that the state had paid for some residential habilitation services, and it did not matter if they were not consistent with the Plaintiff's plan of care.

The Fourth Circuit overturned on appeal, concluding that the state was offering CTH II services that were more restrictive and thus not equivalent to the CTH I services required in the Plaintiff's plan of care. The Court stated that the Medicaid Act "…places the burden on Defendants to work with Doe to find or establish an acceptable setting which they, so far, have utterly failed to do…Defendants have violated the Medicaid Act reasonable promptness provision through their ongoing refusal to finance residential habilitation services at an acceptable placement of [Doe's] choice." The Court also granted attorneys' fees.

### *50. (SC) Peter B. v. Sanford, (D. S.C. - 2013.*

Action requiring the state to temporarily stop Medicaid from limiting or capping certain Medicaid waiver home health and personal care services for three individuals living in the community. Plaintiffs, argued that the proposed caps would result in their unnecessary institutionalization in violation of the integration regulation of the ADA and Rehabilitation Act of 1973. The district court adopted in large part the Report and Recommendation of the magistrate supporting the need for a preliminary injunction.

The court reviewed and rejected the state's two main arguments against granting the preliminary injunction. First, the state argued that their proposed flat cap on service hours for home-based, personal assistance, and nursing services is necessary as a result of "severe state budget reductions, and is intended to eliminate disparities between people with similar disability needs, and to reduce superfluous and redundant services." Thus, having a defense to the suit because not allowing the cap would fundamentally alter the way the state runs its waiver program. The court rejected this defense and cited to the findings of the November 2010 magistrate report which concluded that:

> …[P] laintiffs have put forward evidence that in all material respects it is less costly to provide] the community-based, in-home services than institutional ones … Not only do the plaintiff's not request any alteration, fundamental or otherwise, but they beg for a returned status quo, which is apparently cheaper for the State, and better for the individuals…." *Id*. at *6-*7.

The state's second main argument was that plaintiffs cannot prove that the caps on service hours, when applied to the plaintiffs, would result in their institutionalization. The Judge dispatched this as recommended by the Magistrate by relying on *Fisher v. Oklahoma Health Care Authority* (10th Cir. 2003) (finding that imposition of cap on

prescription medications placed on participants in community-based program at high risk for premature entry into nursing homes in violation of the ADA), stating: "Critically, a State's failure to provide services to a qualified person in a community-based setting as opposed to a nursing home or institution presents a violation of Title II of the ADA."

Defendants filed a motion for Circuit Court appeal which was denied.

### *51. (TN) Crabtree v. Goetz (D. Tenn. 2008)*

Action on behalf of numerous individuals with physical disabilities or TBI who reside in the community. Plaintiffs had been receiving home health and private-duty nursing services through Medicaid. In August 2008, Tennessee Medicaid notified Plaintiffs that as of September 2008, these services would be reduced or eliminated. Specifically, private-duty nursing would be provided only to individuals who are tracheotomy dependent or use a ventilator for 12 or more hours per day. The cap is inflexible regardless of medical need. Tennessee Medicaid does have a waiver with open slots, but it does not cover home health services and Plaintiffs were not referred to the waiver. Plaintiffs claim the policy violates the ADA and Section 504 because it forces them into an institution to access services. Plaintiffs also allege that Tennessee Medicaid instructed its managed care providers "to change their orders to reflect no more home health than the new limit, or their patients will receive no care at all." Plaintiffs seek an injunction until appropriate community-based services are available.

On December 18, 2008, the Tennessee District Court granted a preliminary injunction suspending an inflexible 35-hour-per-week cap on Medicaid home health and private-duty nursing services regardless of medical need. The majority of the Judge's 50 page memo is a detailed analysis of "fundamental alteration" case law and completely rejected the state's fundamental alteration defense. Some cite-worthy findings include:

The state's estimation of the cost of lifting the Medicaid home health and private-duty nursing service cap should consider the cost of lifting it for Plaintiffs as well as other Medicaid beneficiaries with similar disabilities and medical needs. Tennessee may have to increase state expenditures as a reasonable accommodation to comply with the integration mandate. The state may not assume that a nursing facility can provide appropriate services for Plaintiffs likely to be institutionalized as a result of the reduction in private-duty nursing services. Instead the state must individually assess the medical needs of each Plaintiff and consider the possible injury that institutionalization could have on their mental and physical health. To be a defense to an Olmstead suit, a state's plan for compliance must be "specific and measurable" and "operational."

One of the reasons the Judge found Tennessee's pro-offered plan not likely to be effective is because of Tennessee's poor "past performance" expanding access to community-based alternatives to institutions. The Preliminary Injunction directs the state to suspend the home health and private-duty nursing cuts until individualized assessments are made of Plaintiffs service needs.

### *52. (TN) John B. v. Goetz, __F.3d__, 2010 WL 4823837(6th Cir. Nov. 30, 2010) Ĵ*

Case seeking state compliance with a decade-old consent decree requiring Tennessee's Medicaid managed care program to provide appropriate services to children as required under Medicaid's EPSDT program. The state fought this up to the Sixth Circuit arguing that, since 2000 when the decree was ordered, some courts have found the Medicaid provisions relied on in the consent decree to be unenforceable under Section 1983. The Sixth Circuit did vacate the portion of the decree enforcing the Medicaid Equal Access provision, 42 U.S.C. § 1396a(a)(30), finding that it generally has been held unenforceable, but held that "the status of other provisions of the decree remains uncertain." The Circuit Judge ordered the District Court, on remand, to consider whether the Sixth Circuit's decision in *Westside Mothers v. Olszewski*, 454 F.3d 532 (2006) (holding that Medicaid requires only payment for services not the actual provision of services) may be applicable to the EPSDT provision. Following this remand from the Court of Appeals the DOJ filed a Statement of Interest in support of a Consent Decree remedying alleged failures by Tennessee officials to provide adequate health services and treatment to thousands of Medicaid-eligible children in violation of EPSDT.

On March 1, 2011, the U.S. District Court for the Middle District of Tennessee entered preliminary findings, concluding that, because the EPSDT provisions of the Medicaid Act at issue in the case are privately enforceable and requires States to provide services and treatment to Medicaid-eligible children, the majority of the Consent Decree should remain in effect.

In October 2012 Tennessee sought District Court permission to be released from the consent decree on the grounds that the State has vastly improved its Medicaid program and is indeed compliant with all the relevant provisions of federal law. The District Court agreed and vacated the decree.

The plaintiffs appealed the decision to the 6th Circuit, citing areas where the state has not complied with Medicaid law and the consent decree. In a March 14, 2013 ruling the Sixth Circuit disagreed and upheld the District Court, vacating the decree and returning control of the Medicaid program to Tennessee.

### *53. (TN) Brown et al. v. Tennessee J*

On July 13, 2000, Plaintiffs filed this action and alleged that the State of Tennessee was violating the Medicaid Act by failing to enroll individuals from the waiting list into a Medicaid Waiver program with reasonable promptness. Plaintiffs sought declaratory relief, injunctive relief, and attorneys' fees and costs.

The litigation was certified as a class action on May 7, 2003. The parties reached a settlement agreement with a five-year settlement term. That Settlement Agreement was entered by the District Court on June 17, 2004. During the first and second years of the

settlement period, the parties agreed to specific enrollment numbers. During years three through five of the settlement, the Defendants agreed to substantially reduce or eliminate the waiting list as permitted by funding and slot limitations. In addition to specific enrollment issues, Defendants agreed to expand the service provider network and to provide interim support funding for certain categories of individuals before support funding to certain categories of individuals throughout the settlement period. When the parties later failed to reach an understanding on enrollment numbers for implementation of years three through five of the settlement, litigation resumed in early 2007. Since that time, multiple motions have been filed by both sides including Defendants' Motion to Vacate the Settlement and Dismiss.

Plaintiffs successfully defeated Defendants' Motion to Vacate and Dismiss in both the Federal District Court and Sixth Circuit. Taken together, the Court rulings on that motion make clear that this Settlement Agreement's provisions regarding enrollment were intended to achieve enrollment into funding for services, not enrollment into the services themselves. Although the Federal District Court did partially grant Defendants' Motion to Vacate upon remand from the Sixth Circuit by vacating requirements for Defendants to continue building provider infrastructure and to substantially reduce or eliminate the waiting list, that Court did leave the Settlement Agreement in effect for the remainder of the settlement period. As a result of the Court's granting Defendants' Motion for Summary Judgment on the issue of fulfillment of the Settlement Agreement during years three through five and denying Plaintiffs' Motion in regard to the same, at this time no issues remain and the Settlement Agreement will terminate on December 31, 2009, as set out by its own terms.

As a result of this lawsuit:

- more than 3,000 people on the waiting list have been enrolled into a Medicaid waiver program;
- the number of providers of waiver services has grown;
- people on the waiting list have received more than $15 million in consumer-directed support funds; and
- the state has informed more people who may be eligible for a Medicaid Waiver program about these programs and the waiting list.

### *54. (TX) Frazar v. Ladd (5th Cir. 2006), cert denied, 127 S.Ct. 1039 (2007), later decision (E.D. Tex. July 9, 2007).*

In 2000, a class, represented by the P&A, of more than 1.5 million indigent, EPSDT-eligible children in Texas moved to enforce multiple provisions of a consent decree with which Defendants allegedly had not complied. The District Court found that abundant evidence was presented showing Defendants' violations. The evidence was sorted into five categories: evidence of class members' lack of knowledge of Defendants' services,

evidence related to Defendants' transportation system, evidence that Plaintiffs do not often obtain services after having received outreach contacts, evidence of Plaintiffs' low participation in Defendants' programs, and evidence of Defendants' insufficient staffing of their outreach programs.

In 2002, Fifth Circuit Court of Appeals found that the District Court had exceeded its jurisdiction by enforcing the consent decree where the Plaintiffs had failed to show any violation of the Medicaid statute and the state did not waive sovereign immunity. The U.S. Supreme Court reversed the Circuit Court's holding finding that the federal Courts had the authority to enforce their orders, and the case was remanded for further proceedings. On remand, the District Court denied Defendant's motion to dissolve the consent decree.

On appeal, the Fifth Circuit affirmed the trial Court's refusal to dissolve the decree. Contrary to Defendants' claim, compliance with federal law was not the sole object of the consent decree. Instead, the object was to require Defendants to implement the Medicaid statute in a highly detailed way. Because the object of the decree was not satisfied, the Court affirmed the denial of the motion.

On July 9, 2007, the District Court approved a settlement of the 14-year-old class action case. The approval followed a decision by the Texas legislature to allocate more than $700 million over the next two years to improving children's health services. The settlement contains 11 corrective actions, including agreements by the state to improve transportation services, increase dental and physician payments, provide case management services to children who request them, and to improve outreach efforts to families. The state also agreed to hire more case workers.

### *55. (TX) Jonathon C. v. Hawkins (D.Tex. 2006)*

The case contests a Medicaid managed care practice not uncommon in other states. In short, the Plaintiff was found eligible for Medicaid coverage of private-duty nursing services in April 2000 and until September 2004 received 80 hours of services per week. In November 2004, Texas switched to Medicaid managed care and as a result, required that prior authorization for private-duty nursing be obtained every 60 days. The Plaintiff requested prior authorization for September to November 2004 and again for November to January 2005. Both times the state denied the request for the full 80 hours. On December 15, 2006, a fair hearing officer found no change in the Plaintiff's care needs, and ordered Texas to provide the 80 hours requested. Texas covered the hours for the remainder of that 60-day prior authorization period, yet after that reduced the hours approved for three successive prior authorization periods. On appeal to federal District Court, the Plaintiff alleged violation of the U.S. Constitution and Medicaid Due Process requirements. The District Court held that, while utilization controls are allowable under Medicaid, Texas did not provide the notice and hearing opportunity required by *Goldberg v. Kelly* as applied in Medicaid regulations, 42 C.F.R. 431.205(d), and 42 CFR part 431. The Court granted Summary Judgment.

### *56. (TX) Knowles v. Traylor (formerly Horn), 10246 (N.D. Tex 2008; 5th Cir. 2010)Ĵ*

The Plaintiff, represented by the P&A, is a multiply disabled young man who aged out of the Texas Medicaid EPSDT program and its MDCP waiver and denied eligibility to the HCBS program because his medically necessary 18 to 20 hours of nursing care per day exceeded the program cost cap. Upon administrative appeal, the Hearing Officer ruled that he could not issue a decision on the cost cap issue. The Plaintiff requested, and was denied, General Revenue funding available under Texas Budget Rider 45, now Rider 36. Plaintiffs filed for a temporary restraining order in U.S. District Court to keep services pending a final hearing. The Texas Department of Aging and Disability Services had proposed moving the Plaintiff from his home to a state-supported living center. The District Court granted the temporary restraining order and a subsequent Summary Judgment, finding the state violated ADA, Section 504, Due Process claims related to the denial of a fair hearing and Rider 45 funds, and violation of the Texas's Persons with Mental Retardation Act.

The state first appealed to the Fifth Circuit and then filed an unopposed motion to withdraw the appeal.

### *57. (TX) Amal v. Texas Department of Aging and Disability Services (D. tex. 2010)Ĵ*

Plaintiff is a medically fragile woman who, when she was under the age of 21 qualified for, among other services, 24 hours a day of private-duty nursing care through the Texas Health Steps Comprehensive Care Program (CCP). CCP provides all medically necessary services to Medicaid-eligible children younger than 21. Plaintiff's services included private-duty nursing and DME. However, after she turned 21, her CCP services were scheduled to end. The Texas Department of Aging and Disability Services informed the Plaintiff that her ability to remain at home depended upon her being eligible for a Medicaid waiver program. Unfortunately, the particular Medicaid waiver program Plaintiff qualified for did not provide enough funding to meet her nursing care needs—even though her medical needs had not changed. Based on the waiver's cost cap or limit, she qualified for only approximately five hours per day of private-duty nursing care. Accordingly, the state's only recommendation was to move Plaintiff to either an ICF or a nursing facility. Neither placement would provide the around-the-clock nursing care she was receiving at home. A preliminary injunction was granted and parties agreed to a settlement. Plaintiff now receives private-duty nursing services 24 hours a day.

### *58. (WA) M.R. v. Quigley (formerly Dreyfus) (9th Cir. 2012). Ĵ*

Action brought by the Washington State P&A on behalf of approximately 45,000 individuals with disabilities who receive personal care services through Washington State's Medicaid program, the United States filed a Statement of Interest in Support of

Plaintiffs' Motion for Preliminary Injunction in January 2011. The United States supported the Plaintiffs' request to stop the state from reducing personal care services in a manner that places individuals at risk of institutionalization. The Court denied Plaintiffs' motion on February 9, 2011, and Plaintiffs appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals reversed and granted a preliminary injunction for the 12 individual named Plaintiffs. The Ninth Circuit rejected the argument that individuals with disabilities must be already institutionalized in order to invoke the protections of the ADA, and held that a "serious risk" of unnecessary institutionalization is enough to obtain injunctive relief. Washington State considered appealing to the U.S. Supreme Court on this issue, but decided not to.

The Court approved a final settlement which commits Washington to a 5 year plan that will improve Medicaid community-based mental health services for children. The proposed agreement provides, in part, that the state will:

- Amend its Medicaid plan to begin to cover wrap-around intensive services comprised of intensive care coordination, community based services, and mobile crisis intervention and stabilization services. These services will be coordinated by child and family teams that place the child and his or her caregiver at the center of the decision-making process.
- Develop a protocol for identifying, screening, and referring at-risk youth for these wrap-around services; and a manual for providers on how to provide these wrap-around supports.
- Establish due process procedures to ensure Plaintiffs and their families understand their right to challenge Medicaid determinations; and
- Modify regulations, issue directives, and require that Prepaid Inpatient Health Plans monitor and collect data, in order to ensure due process compliance.

### *59. (WA) Samantha A. v. Dep't of Soc. and Health Servs. (Wash S.. Ct. 2011)*

Class action alleging that two state regulations that reduced children's personal care hours based upon generic assumptions about their age violates Medicaid requirements The State Supreme Court held that Washington's Department of Social and Health Services must assess children's needs for Medicaid personal care services individually, rather than based upon generic assumptions about children's age and living situation. The P&A also alleged that the state's regulations violate Medicaid EPSDT requirements, but the Judge declined to reach a decision on this claim. The

decision is expected to benefit more than 3,000 children who receive personal care services under the state's Medicaid's program.

The Court's decision re-affirmed its prior holding in *Jenkins v. Department of Social and Health Services,*, that "[o]nce a person is assessed to require and receive a certain number of [Medicaid personal care] hours, the assessment cannot be reduced absent a specific showing that fewer hours are required." In *Jenkins,* below, this Court invalidated a state Medicaid regulation, known as the "shared living rule," that had automatically reduced a recipient's benefits by 15 percent because they lived with their paid caregiver.

### *60. (WA) Boyle, et al. v. Dreyfus, et al. (D.WA 2006) USDC C-01-5687 JKA*

Class action in which Disability Rights Washington (P&A) and co-counsel Columbia Legal Services represent the rights of Medicaid recipients on the HCBS waivers administered by the Division of Developmental Disabilities. The claims are limited to rights under the Medicaid Waivers and the order details a need for the state to comprehensively assess individual need, plan for the assessed need, and deliver services to meet that need with reasonable promptness, while providing due process and quality assurance. The case was originally settled in 2006. Among other services, Disability Rights Washington and Columbia Legal Services investigated the employment services delivered to waiver participants in 2009. Several problems were discovered relating to adequate response to individual need, access to qualified employment vendors, adequate notice and due process relating to employment service decisions, and oversight of employment services. In 2010 the parties negotiated an amended Order and Settlement Agreement to allow the state additional time to come into compliance.

In 2014, Disability Rights Washington and Columbia Legal Services have met with the state and reviewed reports describing their efforts to improve the service system so that it protects waiver recipient's rights and does not exclude any eligible clients. As an example, the state has modified the way it reimburses employment support providers in an attempt to avoid discriminatory practices that favor serving easy-to-employ clients over others that require more services; the state has changed policies to provide more consistent credentialing of providers; and has changed law to give people more service options when the current services offered are not meeting their needs. DRW and co-counsel will continue to assess the quantity and quality of beneficial change generated from the improvement efforts the state has been implementing.

### *61. (WA) Jenkins v. Dept of Social and Health Services (S.Ct. Wash. 2007)*

On May 3, 2007, the Washington State Supreme Court affirmed the lower court in finding that that state policy of automatically reducing the allowed amount of Medicaid reimbursable home care hours by 15 percent when a paid caregiver resides with the

client violates Medicaid law. Plaintiffs represented by Northwest Justice Project and Columbia Legal Services argued that their actual need for help with household tasks should be evaluated and not automatically deemed met by their shared living arrangements.

Specifically, Plaintiffs argue that the regulation violates 42 USC 1396a(a)(10)(B)(i)) of the Medicaid Act, which requires states to ensure that the medical assistance it provides for any categorically needy individual shall not be less in amount, duration, or scope than the assistance it provides to any other categorically needy individual. The state argued that it had not violated the Medicaid "comparability" provision since it obtained a waiver from the state from compliance with this and several other beneficiary protections. The Appellate Court had ruled that the state completed a boilerplate waiver application, created by CMS for general use by states, and that this boilerplate language waiving comparability did not give states complete freedom to provide different services to different people.

The Supreme Court had a different focus from that of the Appellate Court, simply stating that the Department's interpretation of the comparability provision was wrong and not entitled to Court deference. The Supreme Court found that:

> *the comparability provision is specific in demonstrating Congress' intent to provide comparable services to similarly situated recipients… [therefore, the regulation] violates comparability when it allocates paid services using the presumption of the shared living rule, rather than an individualized determination of each recipient's need for paid services.*

### *62. (WI) Amundson v. Wisconsin DHS (7th Circuit 2013)*

Action filed by Disability Rights Wisconsin on behalf of individuals with I/DD living in community based group homes with funding from Wisconsin's Family Care managed long-term program. In 2011, the managed care providers began reducing services in a manner that results in the highest care users receiving the largest absolute cuts. In particular, individuals with I/DD living in group homes bore the brunt of the cuts compared to people with disabilities living in other settings. Plaintiffs claim that the cuts have a disparate impact on individuals with I/DD living in group homes and place residents at risk of institutionalization in violation of the ADA integration mandate. Plaintiffs seek an injunction to restore the funding to 2011 levels prior to the cuts.

The Federal District Court of Wisconsin dismissed the ADA claims, finding: first, plaintiffs did not have the authority to bring a claim ordering a state (or state official) to pay money; second, Plaintiff's integration mandate claims are pre-mature because no-one subject to the cuts has yet moved to an institution; rather they have found placements in other less expensive group homes; and third, 7th Circuit precedent establishes that that "discrimination among disabled persons never violates the ADA or

the Rehabilitation Act." Plaintiffs appealed dismissal of the ADA claims to the 7th Circuit.

Ultimately, the 7th Circuit upholds the lower court and dismisses the ADA claims, but not before disagreeing with the lower courts finding in several positive ways. On the question of whether plaintiffs have the authority to seek an injunction requiring the state to pay funds, the Circuit Court agrees the answer is no and dismisses the claim, but not before ruling that Plaintiffs would have had the authority to bring an ADA claim if they had sought, not restoration of funding for the program at 2011 amounts, but rather: "other *forms of relief … For example, an injunction might require the state to treat developmentally disabled persons no worse than persons with other disabilities—for example, by making the same reductions across the board."*

Next, the Circuit Court examines the lower court's finding that Plaintiff's integration mandate claims are pre-mature because no-one subject to the cuts has yet moved to an institution. On these grounds, the 7th Circuit agrees with the District Court that the ADA claims are not ripe because so far everyone affected by the Medicaid cuts, has found placements in less expensive group homes.

# Appendix A: Common Claims Raised In Cases In This Docket

Although all of the cases in this docket raise a violation of the ADA integration mandate, many simultaneously raise other statutory claims. The most common of these is for violation of Section 504 of the Rehabilitation Act. Section 504 has an "integration mandate" virtually identical to the ADA Title II integration mandate, meaning that unjustified segregation by a federally funded program would constitute disability discrimination under Section 504, and a state program receiving federal funds must comply with both Section 504 and Title II of the ADA.

Almost as frequently raised as a Section 504 violation is violation of federal Medicaid law, in particular that reductions or changes to Medicaid services violate Medicaid requirements. Medicaid does not explicitly define the minimum level of each service to be provided. Instead, states are required to:

(1) establish reasonable standards, comparable for all eligibility groups, for determining the extent of medical assistance.

(2) ensure that services are "sufficient in amount, duration and scope to reasonably achieve their purpose"; and

(3) not "arbitrarily deny or reduce the amount, duration, or scope of such services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition."

Lastly, many Plaintiffs (for purposes of this docket, "Plaintiff" means the person(s) bringing suit for alleged violation of the ADA) will also claim violation of Fourteenth Amendment Due Process because of the state's failure to provide proper notice and hearing when prior home and community based services are reduced services are cut or reduced.