IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

NANCY MARTIN, *et al.*,	:	
	:	CASE NO. 89-CV-00362
Plaintiffs,	:	
	:	JUDGE SARGUS
vs.	:	
	:	MAGISTRATE JUDGE KING
BOB TAFT, *et al*.,	:	
	:	
Defendants.	:	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Defendants respectfully move for summary judgment because there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law concerning Plaintiffs' Third Amended Complaint. A memorandum and affidavits in support follow.

Respectfully submitted,

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The Supreme Court held in *Olmstead v. L.C.*, 527 U.S. 581, 604 (1999) that "the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk." Neither the ADA nor the *Olmstead* case creates an absolute right to receive services in community settings, *see Rodriguez v. City of New York*, 197 F.3d 611, 618 (2nd Cir. 1999), nor do they mandate the provision of new benefits. *Id.; see also Townhend v. Quasim*, 328 F.3d 511 (9th Cir. 2003). While Plaintiffs contend that community services cost less on average than institutional services, *Olmstead* "requires a far more involved inquiry than cost per individual; it directs the Court to consider all the demands on the State's mental health budget, as well as the State's legitimate interest in maintaining a broad range of services to address the different needs of individuals." *Martin v. Taft*, 222 F. Supp. 2d 940, 983 (S.D. Ohio 2002) (R. 416); *see also Olmstead*, 527 U.S. at 604. Defendants' expert has calculated the costs of the relief sought by Plaintiffs as costing in excess of $500 million, using conservative estimates as to "cost savings" and the numbers of individuals who would qualify. Under no set of facts is that a reasonable modification.

As this Court noted in its 2002 opinion, one way in which a State can show that it has already provided a reasonable accommodation to address the needs of the plaintiff class is to demonstrate that it has a "comprehensive, effectively working plan for placing qualified persons

with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." 222 F. Supp.2d at 982, quoting *Olmstead* 527 U.S. at 605-06. When such a plan exists, Courts have been reluctant to issue orders that would force an agency to disrupt or abandon its long-term compliance efforts. *Pennsylvania Protection and Advocacy v. Pennsylvania Dept. of Public Welfare*, 402 F.3d 374, 381 (3rd Cir. 2005). In such a case, judicial relief should not be granted when the requested change would require a "fundamental alteration" of a comprehensive plan for deinstitutionalization. *Sanchez v. Johnson* , 416 F.3d 1051, 1068 (9th Cir. 2005); *Arc of Washington State v. Braddock,* 427 F.3d 615, 620-22 (9th Cir. 2005).

The ADA does not require states to provide identical services to all persons with mental retardation and developmental disabilities ("MR/DD") regardless of the severity of their medical or behavioral needs. Even when a State has a comprehensive and accommodating plan for deinstitutionalization of individuals with MR/DD, barriers to community placement can remain, including "the existence of complex and difficult behaviors, and serious and life-threatening medical conditions requiring 24-hour nursing care." *Sanchez v. Johnson*, 416 F.3d at 1066.

The undisputed facts in this case demonstrate that Ohio has already reasonably accommodated Plaintiffs' needs. Ohio has a comprehensive, effectively working plan for placing qualified persons with mental disabilities in community settings and has actively been implementing this plan through the development of home and community based Medicaid waivers. Also, Ohio has reduced the number of individuals with MR/DD living in developmental centers or other institutions.

The Plaintiffs base their Due Process claims, in part, on Ohio Rev. Code §§ 5123.62, 5123.64 and 5123.182. These claims can only succeed if these state law provisions rise to the level of entitlements that trigger rights to notice and a due process hearing. *Logan v. Zimmerman Brush*, 455 U.S. 422, 428 (1982). Nothing in these state statutes requires that the Plaintiffs' needs be served in community residential facilities. Accordingly, these statutes do not create an entitlement to community residential services that rises to the level of a property or liberty interest requiring procedural due process protections.

The Plaintiffs allege that the Defendants have violated the constitutional limits regarding the conditions of confinement in an institution, as set forth in *Youngberg v. Romeo*, 457 U.S. 307 (1982). This Court has already correctly determined that *Youngberg* does not give rise to a right to residential placement, and that *Youngberg* claims could only be asserted by members of the plaintiff class who have been involuntarily institutionalized. 840 F. Supp at 1207. However, in the Plaintiffs' view, the absence of action by the Defendants (in their alleged failure to provide sufficient numbers of community placements) becomes an affirmative act in holding the Plaintiffs "against their will." This theory has no support in the cases interpreting the substantive

The Plaintiffs cite a provis ion of the ADA, 42 U. S.C. § 12101(a)(7), in alleging that they are a protected class for purposes of Equal Protection analysis. However, in *City of Cleburne, Texas v. Cleburne Living Center* , 473 U.S. 432, 440 (1985), the Suprem e Court found that mental retardation is no t a su spect or quasi-suspect classifi cation which would call for m ore exacting judicial review. The enactm ent of the ADA did not change the level of scrutiny, because "it is the resp onsibility of [the U.S. Supreme] Court, not Congress, to define the substance of constitutional guarantees." *Board of Trustees v. Garrett*, 531 U.S. 356, 365 (2001). Since there is a rational relationship between the h ealth and safety needs of the Plaintiffs and the services that they receive, su mmary judgment should be granted in favor of the Defendants on the Plaintiffs' Equal Protection claim.

Defendants submit this memorandum of law in support of their motion for summary judgment under Fed. R. Civ. P. 56. There are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law.

INTRODUCTION

Plaintiffs are a class of "all persons in Ohio with mental retardation or developmental disabilities who are or will be in need of community housing and services which are normalized, home-like and integrated." *Martin v. Taft*, 222 F. Supp. 2d 940, 946 (S.D. Ohio 2002) (R.416). Defendants, sued in their official capacity, are the Governor of the State of Ohio; the Director of the Ohio Department of Mental Retardation and Developmental Disabilities ("ODMR/DD"), which administers programs for individuals with MR/DD in the State, and the Director of the Ohio Department of Job and Family Services ("ODJFS"), which administers the state Medicaid program. Most of the programs for MR/DD individuals are funded through Medicaid, and there is a subclass of Plaintiffs defined as "all persons who, in addition to being members of the class, are or will be recipients of Medicaid." *Id*.

As this Court has previously noted, the essence of the relief Plaintiffs seek is "to enjoin the Defendants to create over a reasonably short, fixed time, not to exceed five years, the community housing and support services for each Plaintiff and class member as determined by the needs of the class member." *Id.* at 959, quoting Third Am. Compl. (R. 331) at 71. The plaintiff class, though sizeable, does not encompass all individuals in the State with mental retardation or other developmental disabilities who are served through the various programs administered by the State. In its Order of Nov. 28, 2005, this Court clarified that "If an individual with mental retardation or other developmental disabilities is not, or will not be, in

need of community housing and services, they are not members of the class, lack standing to pursue a judicial resolution, and will not be bound by any decision of this Court." (R. 736, p. 5.)

Plaintiffs filed their initial complaint over seventeen years ago, in April 1989, and their Third Amended Complaint was filed in January 2000, over six years ago. During that time, the facts have changed substantially from those alleged, [1] and they will continue to change. For example, Nancy Martin is a person diagnosed with Mild Mental Retardation, Cerebral Palsy with Quadriplegia, Scoliosis, and Depression. She is pleased with her current placement at the Lorain Manor Nursing Home. This facility is located in a residential neighborhood in Lorain, Ohio.

Claude Martin is a person diagnosed with Mild Mental Retardation and Cerebral Palsy. (C. Martin Depo. p. 5). He has resided in the community since 1997. Third Am. Compl. p. 16 ¶ 132. His funding is provided by the Individual Options Waiver. *Id.* He shares this community placement with his wife, who is currently in a nursing home due to health issues, and other roommates. (C. Martin Depo. pp. 4 and 6).

Warren B. suffered a traumatic brain injury in a car accident when he was 8 years-old. (Kepler Depo. p. 106). He has resided in the community since 2003. His funding is provided by the Individual Options Waiver. He shares this placement with three other room mates; where each of them have their own room. (*Id.* at 115). This placement is approximately fifteen to twenty minutes away from his mother's home. (*Id.* at 119). Warren requires one-on-one staff by an individual trained in traumatic brain injury care. (*Id.* at 115).

[1] Among other things, the Third Amended Complaint alleges deficiencies in three programs that no longer exist in Ohio: the OBRA waiver (*see* ¶¶ 390—393), the Residential Facilities Waiver (*see* ¶¶ 394—411) and Community Alternative Funding Services (CAFS) (*see* ¶¶ 432—438). Since these programs no longer exist, the Plaintiffs cannot show that they will again be subjected to the same alleged "illegality." Accordingly, the Plaintiffs' allegations as to these programs are moot and cannot be a basis for prospective, injunctive relief. *See,* e.g., *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

Kathy R. is a person diagnosed with Moderate Mental Retardation, undifferentiated schizophrenia, scoliosis, fibrocystic breast disease, GERD and hiatal hernia. (Murray Depo. p. 15). In May of 2006, Kathy visited a six-bed group home, but she declined the placement. (*Id.* at 48-49). She currently resides at Mountain Crest nursing home, in Cincinnati, Ohio. (*Id.* at 17).

There have also been considerable developments in the law under which Plaintiffs assert their claims, particularly regarding the extent of a State's obligations under Title II of the Americans with Disabilities Act ("ADA"), 42 U. S.C. § 12132, as it relates to the provision and funding of home and community-based services to individuals with developmental and other disabilities. The development of the case law now makes it abundantly clear that the ADA (and the other laws under which Plaintiffs have brought their claims) do not compel the relief Plaintiffs seek.

Defendants have the weighty obligation of administering and seeking funding for numerous programs that serve Ohio citizens in need of all manner of assistance. Individuals with disabilities are among those served; individuals with developmental disabilities are a subset of those; and individuals with developmental disabilities seeking and qualified for home and community-based services are a further subset. While balancing these many different needs, priorities, and desires, Defendants have made steady and impressive strides to make community-based services available to individuals with MR/DD who want those services. Defendants plan to continue to do so. There is no genuine issue of material fact that would support Plaintiffs' claim that the law requires the State to provide community housing and support services over no more than five years to every class member. As further explained below, in light of the undisputed facts and the law, Defendants are entitled to summary judgment.

STATUTORY AND REGULATORY BACKGROUND

Although the Court is familiar from its prior decisions with the principal statutes and regulations which Plaintiffs claim as the basis for relief, we briefly summarize the key provisions below.

A. Title XIX of the Social Security Act (Medicaid)

While not all class members are enrolled in or eligible for Medicaid, most of them are. Medicaid is by far the predominant government program providing long-term care to the disabled, in Ohio as well as every other State. The Plaintiffs acknowledge that "Medicaid is a major source of public funding for services to persons with developmental disabilities, including those with mental retardation." Third Am. Compl., p. 63 ¶ 413. Because of the availability of federal funds, Ohio has sought to maximize the use of the Medicaid programs in providing services to individuals with MR/DD.

A state Medicaid program can pay only for the types of medical assistance authorized by statute. 42 U.S.C. § 1396d(a). *See* (Engquist II-4 to II-5); *see also* Samuel R. Bagenstos, *The Future of Disability Law*, 114 Yale L.J. 1, 61-62 (2004). With respect to the disabled and others requiring long-term care, Medicaid initially provided for such care only in institutions. For example, when Congress enacted Medicaid in 1965, it included nursing facility services as one of the few mandatory services that must be offered in every state Medicaid program. 42 U.S.C. § 1396d(a)(4)(A). In 1971, Congress added, as an optional benefit, services provided by intermediate care facilities for the mentally retarded ("ICF/MRs"). 42 U.S.C. § 1396d(a)(15). Nearly every State, including Ohio, exercised this option.

The authority of States to provide long-term care services to the disabled in non-institutional settings began in 1981 with the enactment of Section 1915 under Title XIX. 42 U.S.C. § 1396n(c). That section authorizes the Secretary of HHS to waive certain requirements

of the Medicaid statute in order to allow a State that so requested to provide "home or community-based services" to beneficiaries who would otherwise qualify for institutional care. 42 U.S.C. § 1396n(c)(1). Under a 1915(c) waiver, the Secretary can authorize a State to provide "case management services, homemaker/home health aid services and personal care services, adult day health, habilitation services, respite care, . . . day treatment or other partial hospitalization services, psychosocial rehabilitation services, and clinic services . . . for individuals with chronic mental illness." 42 U.S.C. § 1396n(c)(4)(B). States can also seek the Secretary's approval for additional services not listed in the statute. *Id.* The statutory language in Section 1915 illustrates the wide range of services that can be necessary when a severely disabled individual is cared for in the home or community, rather than an institution. Unlike nursing facility or ICF/MR services, a State cannot pay for room or board under Section 1915.

A state Medicaid agency cannot unilaterally decide to offer the services authorized under Section 1915. Instead, it must apply to the Secretary to approve its request and to waive the statutory requirements that would otherwise prohibit it from covering those services. Before a waiver can be approved, a State must demonstrate to the Secretary that the individuals who will receive services under the waiver would be eligible for institutional care covered by Medicaid if they did not receive the waiver services, and that the costs of serving those individuals in the home would not exceed the costs of caring for them in an institution. 42 U.S.C. §§ 1396n(c)(2)(A), (2)(D), (4)(A). In other words, Medicaid will support home and community-based services only when such services allow the program to avoid the costs of institutionalization. No person can be moved into home and community-based services if he or she would prefer care in an institution. States are therefore required to ensure that institutional care remains an available alternative.

Although by statute Medicaid benefits must be offered to all Medicaid recipients and must be uniform throughout the State, Section 1915 expressly contemplates that waiver services will be offered to a limited group, and that the uniformity requirements such as statewideness and comparability will be waived. 42 U.S.C. § 1396n(c)(3). If granted, home and community-based services waivers last for an initial period of three years and may be extended for additional five year periods. *Id*.

Only recently, as part of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, did Congress determine to give States the authority to provide waiver-like services under their state plans. That option will become available to States as of January 1, 2007. Even then, the new services are the only state plan services for which the State may limit the number of individuals eligible for the service. Pub. L. No. 109-171, Section 6086. A State may not cap the number of individuals who receive other state plan services, such as nursing facility or ICF/MR services. Thus, even as Medicaid has moved away from its historic institutional bias, Congress has continued to give States the authority to control the number of individuals to whom it will provide home and community-based services.

B. Americans with Disabilities Act

Plaintiffs in this case seek relief under Title II, which provides in part as follows:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such agency.

42 U.S.C. § 12132. As this Court has previously noted, two regulations implementing this provision are particularly important to Plaintiffs' ADA claims. The first is the integration regulation, which states: "A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28

C.F.R. § 35.130(d). The second is the reasonable modifications regulation, which provides: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate conclusively that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

In 1999, the U.S. Supreme Court considered a public entity's obligation under Title II as applied to the provision of institutional and community-based services to individuals with mental disabilities. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Court held that it would be discrimination under the ADA for a State to keep an individual in an institution "when the State's treatment officials have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State, and the needs of others with disabilities." *Id.* at 587.

Because a State need only make "reasonable modifications," the obligation to make community services immediately available is not absolute. When a State claims that a certain modification would require it to "fundamentally alter" the nature of a program, a court should consider "in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably." *Id.* at 597.

A plurality of four justices[2] further refined this point, noting that in light of the State's responsibility to provide for the care and treatment of a large and diverse population of persons with mental disabilities, the State must maintain a range of facilities and administer services with an even hand:

> If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable- modifications standard would be met… In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions." *Id.* at 605-06.

STATEMENT OF FACTS

Shortly after the *Olmstead* case was decided, Governor Taft charged key state agencies--Department of Job and Family Services, Department of Mental Health, Department of Mental Retardation and Developmental Disabilities, Department of Aging, Department of Health and Department of Alcohol and Drug Addiction Services--responsible for serving people with special needs to undertake a comprehensive review of Ohio's long-term service and support system. This review resulted in the creation of Ohio's *Olmstead* Plan, appropriately titled, "Ohio Access for People with Disabilities." *See* Joint Exhibit 1, Final Report to Governor Taft, Feb. 28, 2001. The Report's vision is to improve and expand community based long-term services and supports for individuals with disabilities. Ohio's report was recognized by the National Conference of States Legislatures as one, along with three other states, that stands out because it contained a

[2] Lower courts construing *Olmstead* have adopted the plurality opinion in their reasoning. In *Townhend v. Quasim*, 328 F.3d 511, 519 (9th Cir. 2003), the court held that this is appropriate because the plurality opinion relied upon narrower grounds than Justice Stevens' concurrence or Justice Kennedy's concurrence, both of which reached the same result. *See also Williams v. Wasserman*, 164 F. Supp. 2d 591, 631-32 (D. Md. 2001).

clear vision for systems change, specific strategies and goals, and specified the agencies responsible for implementing each strategy within a given timeline and budget. (Engquist Aff.; Engquist III-2.[3])

At the time Ohio Access was issued in 2001, nearly 38,000 people, including the elderly, and individuals with MR/DD, were served by waivers. When Ohio Access was updated in February 2004, (*See* Joint Exhibit 2, Ohio Access, Governor Taft's Strategy Plan to Improve Long-Term Services and Supports for People with Disabilities), 42,468 Ohioans were served by home and community based waivers, an increase of 19 percent. In fact, over 30,000 Ohioans over 60 years old were able to avoid a nursing home and remain in the community through the Passport and Home Care Waivers.

Ohio is updating its Ohio Access Report this year. Currently, over 52,000 individuals are now receiving home and community based waivers, with the largest increase occurring in the MR/DD system, which now has over 20,000 waiver slots. (Oliver Trial Depo., pp. 23-24.) The rapid growth in waiver capacity for individuals with MR/DD has occurred even though Ohio has experienced a very challenging fiscal crisis over the past six years. (Oliver Trial Depo., pp. 28-29.) Governor Taft has been firmly committed to implementing the goals of Ohio Access, which include providing individuals with disabilities choice, quality and value for the services they receive. (Ritchey Aff. ¶ 4.); (Oliver Trial Depo., pp. 14-17.) This vision has been implemented by expanding home and community based waivers, depopulating ICFs/MR, increasing funding for community services and creating necessary assistance programs that help ensure the health and safety of individuals that live in the community.

[3] Citation to Dr. Engquist is made through her affidavit to her attached report. Further citation will be made directly to the report.

1. The Expansion of Home and Community Based Services Waivers

The number of individuals served by Medicaid Section 1915(c) waiver programs has grown substantially over the last several years. (Lewis-Day Aff. ¶ 2.) From 1995 to 2004 the number of individuals with MR/DD receiving Home and Community Based Services ("HCBS") waivers increased from 2,593 to 10,424, an increase of 302%. (Engquist, III-6.) From 2004 to 2005, the number of individuals served by waivers increased from 10,424 to 16,473. As of June 2006, 16,885 individuals are served by MR/DD waivers (Engquist III-6) with an additional 4,019 expected to be enrolled before the end of the year. (Lewis-Day Aff. ¶ 2.) Each of the waivers has some unique characteristics, while all serve the ultimate goal of safely placing or keeping individuals in the community.

WAIVER GROWTH BY YEAR

Year	1995	2000	2002	2004	June 2006
Enrollment	2,593	5,624	7,858	10,424	20,904[4]

a) Individual Options Waiver

The Individual Options waiver ("IO waiver") is considered to be the premier waiver administered by ODMR/DD.[5] (Lewis-Day Aff. ¶ 3.) It provides services to individuals living with their family, in their own home or apartment, in small group settings of four individuals living together, and in larger group homes. The IO wavier benefit package provides a wide array of services. The IO wavier offers homemaker personal care, transportation, specialized medical equipment and supplies, environmental accessible adaptations, institutional respite care, social

[4] Figure includes the 4,019 individuals that have been assigned an MRDD waiver but not yet officially enrolled.

[5] Individual Options Waiver--http://jfs.ohio.gov/ohp/bca/individualoptionswaiver.pdf

work, home delivered meals, interpreter, supported employment and nutrition, and day habilitation.[6]

An important feature of the IO waiver is its aggregate cost cap. *Id*. This means that individuals can receive services above the Medicaid mandated cost cap (i.e., the cost of the institutional service the waiver service is replacing) as long as the total service costs of all individuals enrolled in the waiver do not exceed the specified cap. Ohio Admin. Code § 5123:2-13-02(B)(5); (Lewis-Day Aff. ¶ 3.) As a result, this waiver is able to accommodate individuals with more severe disabilities in community placements, even though it may cost more to serve them in the community than in an ICF/MR. (Lewis-Day Aff. ¶ 3.)

Enrollment in the IO waiver has grown substantially. The waiver was approved by the Centers for Medicare & Medicaid Services ("CMS") on July 1, 1991, with 450 individuals being enrolled in fiscal year 1992.[7] By 2000, enrollment grew to 2,500 individuals. Ohio increased the number of individuals served on the IO waiver to 7,569 in 2002, and 9,535 in 2003. In 2004, approximately 3,000 individuals were added as a result of the transfer of individuals from the Residential Facility waiver (described below) to the IO waiver. As of May 2006, 11,620

[6] Homemaker personal care includes a wide array of tasks that help individuals meet their daily living needs including personal hygiene, meal preparation, skill development, medication assistance, and household cleaning. Specialized medical equipment and supplies include devices, controls or appliances, which enable individuals to increase their abilities to perform activities of daily living, or to perceive, control or communicate with the environment in which they live. Environmental accessibility adaptations are physical adaptations to the home required by the individual's plan of care for health and safety reasons, or which enable the individual to function with greater independence in the home. Respite care is services provided to individuals unable to care for themselves, furnished on a short-term basis because of the absence or need for relief of those persons normally providing care. Supported employment consists of paid employment for persons for whom competitive employment at or above the minimum wage is unlikely, and who, because of their disabilities, need intensive ongoing support to perform in a work setting. Day Habilitation is services designed to assist individuals in acquiring, retaining and improving the self-help, socialization and adaptive skills necessary to reside successfully in the community.

[7] The State fiscal year begins July 1 and ends June 30. For example, State fiscal year 1992 runs from July 1, 1991 to June 30, 1992.

individuals are served in the community through the IO waiver. *Id.* An additional 684 individuals have been assigned an IO waiver placement and will be enrolled in the near future. *Id.*

b) Residential Facilities Waiver

The Residential Facility waiver ("RFW") was developed as a mechanism to shift the funding of ODMR/DD's group home program from pure state and local dollars to a Medicaid funded waiver program. *Id.* at ¶ 4. This waiver was originally approved on July 1, 1997, providing several services including homemaker personal care, transportation, supported employment and medical assistive equipment and supplies. By 2001, 3,043 individuals were enrolled in the RFW. *Id.*

ODMR/DD converted the RFW to the IO waiver program effective July 1, 2006. This conversion was beneficial to the individuals served by RFW. The RFW was a facility-based waiver, meaning an enrollee could only remain on the waiver if he lived at a specific facility, utilizing that facility's employees to provide support services. *Id.* Also, the RFW had a "hard cap" equal to the average cost of services provided in an ICF/MR. Thus, no single individual was permitted to exceed the cost cap. By converting to the IO waiver, the RFW enrollees became part of the IO waiver "money follows the person" approach. They could live wherever they wanted and change providers and still remain on a waiver. Moreover, waiver eligibility was no longer dependent on a hard cost cap. All of the approximately 3,000 RFW enrollees were successfully transitioned to the IO program. *Id.*

c) Level One Waiver

This waiver was approved by CMS on May 1, 2003. Level One waivers offer basic services and supports for individuals with MR/DD who require an ICF/MR level of care but want to live at home or have a network of family, friends, neighbors and professionals who can

provide the needed services safely and effectively.[8] Waiver participants may receive up to $5,000 per year in homemaker personal care, respite, and transportation services; up to an additional $6,000 over a three-year period for environmental accessibility adaptations, specialized medical equipment and supplies, and personal emergency response system (PERS); and up to an additional $8,000 over a three-year period for emergency assistance. (Lewis-Day Aff. ¶ 5.) The Level One waiver was amended on July 1, 2005 to include day habilitation and supported employment services, the cost of which does not count towards any of the other caps. Participation in this waiver has increased over the three years of its existence. *Id.* As of June 2006, it has grown to accommodate 3,104 individuals in the community. *Id.* Enrollment is expected to increase to 5,100 by the end of 2006. *Id.*

d) Transitions Waiver

Unlike the three ODMR/DD administered waivers described above, the Transitions waiver is administered by ODJFS. This waiver offers many services to individuals that require an ICF/MR level of care, including nursing, assistance with daily living, skilled therapies (occupational therapy, physical therapy, and speech & hearing therapy), home-delivered meals, home modifications, supplemental adaptive/assistive devices, out-of-home respite, adult day health services and nutritional counseling. (Williams Aff. ¶ 2.) Individuals enrolled in the waiver are assigned a cost range based on the dollar amount of services that is necessary to meet each individual's needs.

The Transitions waiver was approved by CMS on January 1, 2002. (Williams Aff. ¶ 3.) That year 1,867 individuals were enrolled. *Id.* In 2005, 2,161 individuals were served under this waiver at a cost of $49,799,669. *Id.* ODJFS recently received approval to expand the number of

[8] Level One Waiver-- http://jfs.ohio.gov/ohp/bca/hcbswaiver.pdf

slots for this waiver to 3,500 to accommodate individuals transferring from another Medicaid home and community-based program. *Id.*

2. The Decrease in Individuals served in ICFs/MR

As the number of individuals served by community waivers has increased, there has been a decrease in the number of individuals receiving services in ICFs/MR. There are two general categories of ICFs/MR in Ohio. The first are ODMR/DD operated ICFs/MR known as Developmental Centers ("DCs"). The second are so-called "private ICFs/MR," most of which are owned and operated by private entities, while some are owned and operated by county MR/DD boards. Overall, the number of individuals served in ICFs/MR has decreased significantly as more and more individuals have moved to the community.

a) ODMR/DD Operated ICFs/MR: Developmental Centers

The DCs are dispersed throughout the State in order to make the services they offer accessible to people in each part of the State. (Snow Aff. ¶ 3.) While they are considered institutions, they do not represent the environment of a traditional "institution." *Id.* Each DC is comprised of multiple residences (generally small in nature) that are arranged on properties with space for outdoor activities. *Id.* Since they are home to several communities of individuals with MR/DD, they provide a natural social network for the residents, with readily available programmatic activities, and facilities like a gym and swimming pool. *Id.* In addition to the direct care staff, each DC employs physicians, psychologists, nurses and other health care professionals to provide medical care and programmatic habilitation to the residents. *Id.* The residents interact with the community on a regular basis, going to work, attending movies, shopping at the mall and going out to eat, to name just a few community experiences afforded.

Id. Overall, the DCs are much more like a campus, where individuals are cared for and taught in a safe and secure environment. *Id.*

Since October 1999, Ohio's DCs have maintained a role of providing a regional resource to the local county boards of MR/DD and providers . This role has been focused on the support of individuals residing in community programs by providing resources to help them remain in the community, provide short term stabilizations, and/or long term care and treatment as needed. Through these efforts, the DCs are known to serve the toughest of Ohio's vulnerable population. (Snow Aff. ¶ 4.)

Although DCs have many of the comforts of home, Ohio has acknowledged that many individuals with MR/DD prefer to have their own living quarters within the community as opposed to a DC. As Ohio has moved toward providing more living choices, the number of individuals with MR/DD that live in DCs has decreased dramatically. (Snow Aff. ¶ 5.) In 1981, 4,965 individuals lived in DCs. By 1991 the DC census decreased to 2,491. In 2000, the DCs housed 2,004. *Id.* As of June 2006, only 1,607 individuals are living in DCs, a 20% reduction from 2000 to the present. *Id.*; (Engquist, III-9.) As part of the census decrease, since 1981, Ohio has closed 5 out of its 15 DCs. (Snow Aff. ¶ 5.) This includes the recent closure of Springview Developmental Center in 2005 and Apple Creek Developmental Center in 2006.

As part of the depopulation of DCs, in 2005 ODMR/DD announced Warrensville Development Center would reduce its capacity. *Id.* At the time of the announcement, the census at Warrensville Developmental Center was 218. As of June 2006, 180 individuals reside there, which is expected to decrease to 150 within the next two years. *Id.*

Prior to any plans to close Springview and Apple Creek, ODMR/DD put forth a specific initiative called the DC Self-Determination project. (Snow Aff. ¶ 6.) This program was

designed to move individuals who wanted to leave the DCs and put them on a waiver. This program began in 2001, and resulted in 42 individuals leaving the DCs. *Id.* Each of these individuals was enrolled on a waiver and moved to the community.

In February 2003, the Governor announced that Springview and Apple Creek would close. ODMR/DD engaged in extensive planning in order to safely transfer the residents to other living environments. (Snow Aff. ¶ 7.) Part of this plan included offering each of the residents a choice of whether they wanted to live in another DC, a "private" ICF/MR, or receive a waiver placement. *Id.* ODMR/DD conducted the movement process in a transparent manner. Plaintiffs' counsel, the Ohio Legal Rights Service, was very involved, providing oversight to the individuals as they progressed through the process and were transitioned to the new living arrangement. Of the 236 residents that left these DCs, 134 chose to go to other DCs, 62 to private ICFs, and 40 transitioned to a waiver. *Id.* In order to create DC placements for the transferring residents, 31 individuals left other DCs and were placed on a waiver. In order to free up space in the private ICFs for residents moving from the closing DCs, 39 individuals in the private ICFs transitioned to a waiver. Therefore, the closure of the two DCs resulted in 110 individuals moving from an ICF/MR to a waiver (40 directly from the closed DCs, 31 from other DCs, 39 from private ICFs). *Id.* ODMR/DD provided the non-federal Medicaid payment for the waiver, as well as the extra cost associated with transitioning individuals into a waiver setting. *Id.*

The movement of individuals from DCs to the community has also been accomplished by using non-Medicaid funding sources. From 2002 to 2005, the discharge of 55 individuals from DCs to the community was accomplished through the Supported Living Program, which is funded by state and local dollars. (Snow Aff. ¶ 8; Engquist IV-6.) During that same time, an

additional 24 individuals have moved out of DCs through non-public funding sources. (Snow Aff. ¶ 8.) Overall, the dramatic decrease in the DC population shows that the State is committed to moving individuals that prefer to live in the community out of DCs.

DC POPULATION BY YEAR

Year	1981	1991	2000	June, 2006
Population	4,965	2,491	2,004	1,607

Following the Governor's announcement that two DCs would close, ODMR/DD contracted with an independent consultant to examine the future role of the 10 remaining DCs in Ohio's continuum of care. (Snow Aff. ¶ 9.) On July 5, 2006 ODMR/DD responded to the consultant's findings by submitting to the Governor's office a Strategic Plan for the future role of the DCs. Key elements include: regional planning to identify needs of special populations, communications plans, developing specific admission criteria for the DCs, and budget and management controls. *Id.* Thus, ODMR/DD is preparing for the future role of the DCs, and the demand for DC services throughout the State. It is expected that the Strategic Plan will be updated quarterly.

b) Private ICFs/MR

The capacity of private ICFs/MR varies greatly from facility to facility. Most of them are licensed for 4 to 8 beds, while some contain 9 to 16 beds, and others greater than 16. (Fischer Aff. ¶ 3.) Under Medicaid regulations, facilities with 16 or fewer beds are generally considered community placements. *See* 42 C.F.R. § 435.1009. Currently, of the 5,898 private ICF/MR beds in Ohio, 2,597 of those placements are in facilities with 16 beds or less. (Fischer Aff. ¶ 3.) Accordingly, there are only 3,301 so-called "institutional" placements in private ICFs/MR in the State.

While the number of individuals that reside in private ICFs/MR has remained constant over the last six years, more individuals reside in smaller, community ICFs/MR. In 2000, there were 306 ICFs/MR with 16 or fewer beds, housing 2,502 residents. (Fischer Aff. ¶ 4.) Today, there are 330 ICFs/MR with 16 beds or less, housing 2,597. *Id.* In fact, the trend has been to downsize facilities to 8 or fewer beds. *Id.* From 2000 to 2006, the number of ICFs/MR with 4 to 8 beds increased from 231 to 264. *Id.*

Adding the DCs and the private ICFs/MR together, the overall population of individuals living in "institutional" placements has decreased significantly over the last several years. As of June 2006 there are only 4,908 "institutional" placements in the State (1,607 in DCs and 3,301 in private ICFs/MR with more than 16 beds). By contrast, there are 23,535 people that are served in community placements (20,904[9] on waivers and 2,597 in ICFs/MR with 16 or fewer beds).

NUMBER OF INDIVIDUALS SERVED IN COMMUNITY AND INSTITUTION PLACEMENTS

Community	Institution
23,535	4,908

3. Ohio Continues to Increase Funding for Waiver Placements while Offering Other Programs

Waiver expenditures have far exceeded the State's overall budgetary growth rate. In 2000, Ohio's total state budget was $38.82 billion, and is projected to be $54.55 billion in 2007, representing a net increase of 41% over the period. (Engquist, III-7.) Ohio's total Medicaid waiver spending in 2000 was $182.39 million and is projected to be $703.55 million in 2007, thereby representing a net increase of 286%. *Id.* As such, a greater proportion of total funds are dedicated to waivers each year. It should also be noted that private ICF/MR expenditures and total spending on DCs only increased 39.8% and 4.5% respectively over the same period.

[9] Figure includes the 4,019 individuals that have been assigned an MR/DD waiver but not yet officially enrolled.

(Ritchey Aff. ¶ 6.; Engquist, III-8.) Therefore, waiver expenditures have greatly outpaced the State's budget (286% to 41%), while ICF/MR expenditures have stayed in line with the budget's growth (44% to 41%).

The State's ability to substantially increase waiver expenditures over this period of time has been due in large part to Medicaid refinancing. (Ritchey Aff. ¶ 7.) Prior to the expansion of the Medicaid waiver program in Ohio, community placements were mostly funded by State and local dollars. *Id.* By moving these placements within the Medicaid program, the State was able to "draw down" federal dollars to contribute approximately 60% toward the cost of providing the services to individuals in the community. However, Medicaid does not contribute funds for waiver recipients' room and board. As a result, state and local dollars are used in conjunction with other federal support programs (e.g. Social Security, food stamps) to fund the cost of room and board for community placements. (Lewis-Day Aff. ¶ 6.)

Furthermore, although ICFs/MR are an optional Medicaid service, if a State chooses to include them in its Medicaid plan, they are a Medicaid entitlement, meaning that the State cannot refuse to pay for ICF/MR services provided to a Medicaid recipient by a qualified provider who wishes to participate in the Medicaid program. *See* 42 U.S.C. § 1396a(a)(23) and 42 C.F.R. § 431.51(b) (requiring, as a condition of Medicaid state plan approval, that a recipient must be able to obtain Medicaid state plan services from any qualified and willing provider, with limited exceptions); (Lewis-Day Aff. ¶ 7.) Significantly, the last two executive budgets proposed the elimination of the ICF/MR program as a Medicaid state plan service, but this proposal was not adopted by the Ohio legislature. (Ritchey Aff. ¶ 10.) As a result, the State is still required by law to fund ICF/MR placements. It cannot simply eliminate the ICF/MR service category and divert the funds to increase waiver opportunities.

While Ohio has used Medicaid waivers as its primary means of providing community based services, the State continues to offer, through county MR/DD boards, programs that are not Medicaid funded. (Ritchey Aff. ¶ 11.) For example, with State and local funding, county MR/DD boards can serve individuals, including those who are not eligible for Medicaid waivers, through the Supported Living Program, Ohio Rev. Code §§ 5126.40 – 5126.47, and the Family Support Services Program. Ohio Rev. Code § 5126.11; (Ritchey Aff. ¶ 11.) County MR/DD boards also can provide adult and early childhood services. Ohio Rev. Code §§ 5126.01(A)(1) and (F), 5126.05(A)(3); (Ritchey Aff. ¶ 11.) Finally, some county MR/DD boards operate school programs as well. Ohio Rev. Code §§ 5126.04(D) and (E), 5126.05(A)(4); (Ritchey Aff. ¶ 11.)

Even though Ohio had experienced a severe Budget crisis, the waiver programs for individuals with MR/DD have substantially grown. (Oliver Trial Depo. pp. 28-29.) Certainly, this represents Ohio's commitment to providing more opportunities for its MR/DD population.

4. Building a Community Infrastructure to Support Individuals in the Community

Moving individuals to the community is not just about increasing waiver opportunities, depopulating ICFs/MR and funding waivers. (Ritchey Aff. ¶ 12.) A community infrastructure must be established that contains the supports necessary to help ensure some of our most vulnerable citizens can be successful in the community. *Id*. In 2001, ODMR/DD established an enhanced system to report, investigate, review, remedy and analyze incidents adversely affecting the health and safety of individuals with MR/DD and to monitor preventative actions taken to ensure health and safety. Ohio Admin. Code § 5123:2-17-02; (Ritchey Aff. ¶ 13.) ODMR/DD works with the county boards to ensure that any incident that potentially impacts an individual's health and safety can be reported and investigated. This enhanced incident reporting system was

recognized in the CMS "promising practices" publication (May 2003, Vol. 1, No. 2), which is intended to highlight specific programs that are likely to be beneficial in each state. *Id.*

Individuals that live in the community must have a qualified set of providers to assist them in the community. ODMR/DD certifies appropriate applicants that seek to become providers for individuals in the community. (Fischer Aff. ¶ 6.) ODMR/DD and the county boards regularly monitor these providers to help ensure the individuals they serve are receiving appropriate care. If necessary, ODMR/DD will take corrective action against any provider that violates the rules and regulations governing their conduct. *Id.*

In addition, ODMR/DD has established a new waiver reimbursement system based on the administration of the Ohio Developmental Disabilities Profile (ODDP). Ohio Admin. Code 5123:2-9-06. The ODDP assesses the level of care that each individual needs and assigns a corresponding funding range. (Lewis-Day Aff. ¶ 8). This system enables similarly situated individuals to access comparable services under the waiver. *Id.* If an individual believes he or she needs additional services not available at the assigned funding range, he or she can request the additional services through a prior authorization process. Ohio Admin. Code § 5123:2-9-06(B)(12). Ultimately, each individual has the right to have the funding range determined through an administrative hearing.

ODMR/DD is also developing a system to measure the quality of services provided to individuals on waivers. (Freeze Aff. ¶ 3). ODMR/DD representatives are analyzing how information from the service delivery system can be used to increase efficiency and improve the effectiveness of the supports available to individuals with MR/DD. *Id.* It is anticipated that successful execution of this project will yield the following results: 1) improvement in the availability of useful information for individuals and families; 2) implementation of a

comprehensive statewide quality framework that outlines anticipated outcome measures for the service system; 3) utilization of data to determine training initiatives, technical assistance methodologies, public policy, effectiveness and efficiency measures, improved state and local resource deployment, and statistically-based trends and analysis. *Id.* This will enable ODMR/DD to better assess the needs of individuals on waivers, and how services can be more effectively arranged.

Of course, the most basic part of community living is finding a place to live. Many individuals live separate from their family home, and may require financial assistance for their room and board. In fact, Medicaid provides funds for room and board only for residents that live in ICFs/MR. In order to move additional people to the community, there must be sufficient adequate housing. In an effort to increase the housing supply, ODMR/DD biannually allocates funds for the purchase and renovation of homes as well as for modifications to make homes accessible for persons with disabilities. (Snow Aff. ¶ 10.) In State fiscal year 2004, ODMR/DD distributed to county MR/DD boards housing funds totaling $5,384,019, of which $1,195,056 were available to provide homes for individuals leaving DCs. *Id.* In State fiscal year 2005, the available funds totaled $7,355,878 with $2,397,874 earmarked for DC residents moving to the community. *Id.*

Therefore, in order to provide community placements, a number of initiatives must come together to form the services and supports necessary to maintain individuals' health and safety.

5. Maintaining the Waiting List for Waiver Services

The day-to-day administration of the waiting list for waiver services is conducted by the county MR/DD boards, with the State providing oversight, technical assistance and fiscal analysis to project waiver growth. (Lewis-Day Aff. ¶ 9; Engquist, IV-4.) Each county board has

its own county-specific waiting list. A positive aspect of this design is that county boards know their population and can produce a comprehensive list of individuals in their communities who are getting and/or need services. (Engquist, IV-4.) Furthermore, CMS has approved this approach as part of its approval of the Individual Options Waiver. (Lewis-Day Aff. ¶ 9.)

Selecting individuals from the waiting list is based on criteria in Ohio Rev. Code § 5126.042 and Ohio Admin. Code § 5123:2-1-08, with individuals who constitute emergencies (e.g. loss of caregiver, risk of self-harm or harm to others if action is not taken within 30 days) placed first, followed by other priority categories (e.g. individuals who are under age 22 and whose needs are unusual in scope or intensity). (Lewis-Day Aff. ¶ 9; Engquist IV-4.) Thus, the waiting list is designed to ensure that individuals with the greatest need for services are moved off the waiting list first. *Id.*

ODMR/DD monitors the local administration of the waiting list pursuant to Ohio Rev. Code § 5126.055, and through periodic directives issued to the county boards. (Lewis-Day Aff. ¶ 9.) These regulations provide guidelines that county MR/DD boards must follow or risk losing local administrative authority. ODMR/DD also provides technical assistance to counties that have questions on the proper implementation of the waiting list regulations. *Id.*

ODMR/DD further manages the waiting list by collecting data from the counties. The Preliminary Implementation Component Tool (PICT) contains each county board's plan for waiver service delivery. *Id.*; (Engquist IV-4.) It is currently used by ODMR/DD to allocate waiver slots among the counties and will be used in the future to project and pace waiver growth based on budgetary projections. *Id.*

Accordingly, the State provides necessary oversight of the waiting list, while the county boards provide the day-to-day functions that affect the individuals in their area.

6. Continuing the Commitment to Increase Choice in the MR/DD System

Two new programs are being established to increase community placements. The first is funded by the Independence Plus Real Choice System s Change Grant. This federal grant will enable the State to develop a new waiver entitled "Independence Plus." (Charlton Aff. ¶ 3.) The waiver will emphasize individual self-direction, person-centered planning, choice, as well as control over an individual budget with assistance from support staff. *Id.* The person-centered planning process and support staff will ensure collaboration between the individual and his or her personal support system. Ultimately, the waiver is intended to enable adults to live, work and participate in the community. ODMR/DD will be submitting this waiver to CMS for approval in the Fall of 2006. *Id.* Enrollment is expected to increase each year of the program, with 71 individuals served in year one; 91 more in year two; and an additional 94 in year three; resulting in a total of 256 individuals served. *Id.*

Another waiver program being established is the ICF/MR Conversion Pilot Program. This program was created as a compromise in the state legislature during the last budget process. *See* Ohio Rev. Code § 5111.88 et seq. While the legislature rejected the Governor's proposed elimination of ICFs/MR as a state plan service, it did approve this program, which will enable ODMR/DD to apply for a new waiver designed to transfer individuals from ICFs/MR to the community. (Lewis-Day Aff. ¶ 10.)

In addition to these new programs, Ohio intends to expand enrollment in the Individual Options and Level One waivers based on available funding. (Lewis-Day Aff. ¶11.) Therefore, the State's commitment to expanding community placements continues to move forward by increasing options for individuals that want to live in the community.

7. The Impact of Plaintiffs' Requested Relief

Currently, there are approximately 4900 individuals in DCs and private ICFs with 16 or more beds, some but not all of whom are class members. (Engquist, IV-10.) Class members also include individuals living in the community. There are over 22,000 individuals with MR/DD on county board waiting lists for waiver services. *Id.* The State's *Olmstead* plan reports that there are over 4,500 people with MR/DD living at home with aging caregivers and over 6,500 on waiting lists for residential services. *Id.*

Defendants' expert, Dr. Engquist, has analyzed the costs of care specific to Ohio and has included the full costs of the relief Plaintiffs' seek. These include the costs of additional Medicaid services; the costs of room and board; the loss of recipient share-of-costs contributions; the costs of successfully transitioning an individual from an ICF/MR to the community; the number of individuals not in institutions who would qualify for community services; and the need to keep ICF/MR services in place for those individuals who need them. *Id.* at IV-8 to IV-10. Assuming that half of the individuals on the waiting list will meet eligibility requirements, Dr. Engquist calculates the additional costs to the State of providing class members with community housing and support services to be in excess of $550 million. If all of the waitlist is included, the additional costs exceed $1 billion. *Id.* at IV-11.

ARGUMENT

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see TriHealth, Inc. v. Board of Commissioners,* 430 F.3d 783, 786 (6th Cir. 2005). A dispute is "genuine" only if premised on evidence upon which a reasonable jury could return a verdict in favor of the non-moving party. *Hedrick v. W. Reserve Care Sys.,* 355 F.3d 444, 451 (6th Cir. 2004). A factual dispute concerns a "material" fact only if its resolution might affect the outcome of the suit under the governing substantive law. *Id.* Summary judgment is appropriate if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In this case, there is no genuine dispute of material fact because the laws under which Plaintiffs bring their claims do not entitle them to the relief that they seek.

As this Court has previously observed, "[t]he claims at issue are largely based on the integration provisions of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and the United States Supreme Court decision of *Olmstead v. L.C.*, 527 U.S. 581 (1999)." (R. 736, p. 1). In addition to this principal claim, Plaintiffs have also asserted claims under other federal laws, including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.[10] We address each of these below and show that there is no genuine dispute of material fact under which Plaintiffs could be awarded the relief that they seek.

[10] The Plaintiffs had also asserted claims under nine separate provisions of the Medicaid Act, 42 U.S.C. §§ 1396 *et seq.* *See* Third Amended Complaint ¶¶407-415 (p. 62-65). They have recently

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' ADA AND SECTION 504 CLAIMS.

Neither the ADA nor Section 504 compels the provision of community housing and support services for all class members within no more than five years. Summary judgment is appropriate in this case, because there are no genuine issues of material fact regarding the State's operation of services for individuals with MR/DD. The issues raised are legal ones: whether Ohio's system reasonably accommodates the needs of the Plaintiffs, and whether the relief desired by the Plaintiffs would constitute a fundamental alteration in the State's program.

A. The Nature of Plaintiffs' Claims

Title II of the ADA states that no qualified individual with a disability shall, "by reason of such disability," be excluded from participation in, or be denied the benefits of, a public entity's services, programs, or activities. 42 U.S.C. § 12132. Section 504 states that "[n]o otherwise qualified individual with a disability in the United States…shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]" 29 U.S.C. § 794(a). Because the laws impose similar requirements, both can be examined through the ADA and the prism of the *Olmstead* case.

In their Third Amended Complaint, p. 50, ¶¶ 439-440, the Plaintiffs assert that many Ohio citizens with MR/DD have requested to be served in community settings, and qualify for such placements, but they have been "segregated unjustly in institutions run or licensed and paid for by the defendants." The Plaintiffs allege that individuals who live in "segregated institutions" are placed on waiting lists or "service substitution lists" and are not afforded prompt

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dismissed all of those claims. *See* Stipulation of Dismissal of Certain Claims (Medicaid), filed with this Court on July 14, 2006 (R. 754).

access to community residential services. *Id*. at p. 50, ¶¶ 442-445; *see also id.* at pp. 8-9, ¶¶ 65-69. They also challenge the professional asse ssments that are conduc ted by the facilities' professionals, asserting that the ass essments "generally fail to consider whether an individual meets the e ssential eligibility requirements for habilitation in a community based program ." Third Am. Compl., pp. 12-13, ¶ 101 (Kathy R.) and p. 15, ¶127 (Claude Martin). The Plaintiffs also assert that they were never inf ormed of any feasible alternatives for services under the waiver programs, and were not given the choi ce of eith er institutional care or hom e and community based services. *Id*. at p. 13, ¶ 102 (Kathy R.), p. 15, ¶ 128 (Claude Martin) and p. 21, ¶ 191 (Warren B.)[11]

The Plaintiffs further allege that the following subgroups within the MR/DD population have been discriminated against under the Defendants' policies because of disabilities they suffer in addition to MR/DD, which make them more likely to reside in institutional placements:

- Class members with emotional or behavior handicaps or with mental illness. *Id.*, ¶¶ 449-452 (p. 51).
- Class members who have problems walking in addition to their MR or DD. *Id.*, ¶¶ 453-458 (pp. 51—52).
- Class members with medical handicaps. *Id.*, ¶¶ 459-462 (p. 52).
- Class members with severe physical handicaps in addition to their MR or DD. *Id.*, ¶¶ 463-466 (pp. 52—53).
- Class members with severe and profound MR. *Id* ., ¶¶ 467-470 (p. 53).

After they filed their Third Amended Complaint, Plaintiffs moved for summary judgment on their ADA claim, and this Court denied the motion in 2002 on the grounds that genuine issues

[11] The "feasible alternatives" allegations appear to have been based upon the Plaintiffs' claims under 42 U.S.C. § 1396n(c)(2)(C), which have been voluntarily dismissed by the Plaintiffs along with all their other Medicaid claims. *See* Stipulation of Dismissal of Certain Claims (Medicaid) (R. 754).

of material fact still existed on the issues of whether the Plaintiffs were qualified to participate in community programs, whether their requests for community services could be reasonably accommodated, and which class members actually desired to receive services in the community. 222 F. Supp. 2d at 981-987 (2002) (R. 416). The Court also concluded that even if Plaintiffs could establish that their request for services could be reasonably accommodated, the State's fundamental alteration defense would also entail a fact-intensive inquiry. *Id.* at 986. At the same time, the Court noted that "matters of concern . . . continue[] to change and develop," *id.* at 947, and appeared to leave open the possibility that ultimately these matters could be decided on summary judgment once discovery was complete. *See, e.g., id.* at 983-985 & n.43; *see also id.* at 979 (noting that "complex cases . . . are not necessarily inappropriate for summary judgment").

Recently, in similar cases where Plaintiffs have sued States under the ADA to make community services available to every individual with MR/DD, courts have granted summary judgment for the State on the ground that the relief sought was not required by the statute or the *Olmstead* opinion interpreting it. *See, e.g., ARC of Washington State, Inc. v. Department of Social & Health Servs.,* 427 F.3d 615 (9th Cir. 2005) (affirming grant of summary judgment for State of Washington); *Sanchez v. Johnson,* 416 F.3d 1051 (9th Cir. 2005) (affirming grant of summary judgment for State of California). *But see M.A.C. v. Williams,* No. 02:02CV1395DAK, slip op. at 19 (D. Utah Feb. 28, 2006) (judgment in favor of the State of Utah, after trial). This case, too, can be decided on summary judgment.

B. The Relief Sought is Not a Reasonable Modification.

The Supreme Court held in *Olmstead* that "the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk." *Id.* at 604. For some individuals, "no placement outside the institution may ever be appropriate." *Id.* at 605. Neither the ADA nor the *Olmstead* case creates an absolute right to receive services in

community settings, *see Rodriguez v. City of New York*, 197 F.3d 611, 618 (2nd Cir. 1999), nor do they mandate the provision of new benefits. *Id; see also Townhend v. Quasim*, 328 F.3d 511 (9th Cir. 2003). Most saliently, as the Ninth Circuit has stated, *Olmstead* does not require "the immediate, state-wide deinstitutionalization of all eligible developmentally disabled persons[.]" *Sanchez v. Johnson*, 416 F.3d 1051, 1067-68 (9th Cir. 2005). Yet that is the crux of Plaintiffs' complaint.

In their earlier motion for summary judgment, Plaintiffs claimed their request could be reasonably accommodated by asserting that it costs the State less to offer community-based services than it does to provide the same services in institutions. As this Court noted, however, *Olmstead* "requires a far more involved inquiry than cost per individual; it directs the Court to consider all the demands on the State's mental health budget, as well as the State's legitimate interest in maintaining a broad range of services to address the different needs of individuals." 222 F. Supp. 2d at 983; *see also Olmstead*, 527 U.S. at 604. Establishing that the relief sought can be reasonably accommodated is the Plaintiffs' burden. 222 F. Supp. 2d at 982, *citing Vinson v. Thomas,* 288 F.3d 1145, 1154 (9th Cir. 2002).

Looking at all the demands on the State, Defendants' expert has calculated the costs of the relief sought by Plaintiffs as costing in excess of $500 million, using conservative estimates as to "cost savings" and the numbers of individuals who would qualify. Under no set of facts is that a reasonable modification.

C. Ohio Has a Comprehensive, Effectively Working Plan for Placing Qualified Persons with Mental Disabilities in Community Settings

As this Court noted in its 2002 opinion, one way in which a State can show that it has already provided a reasonable accommodation to address the needs of the plaintiff class is to demonstrate that it has a "comprehensive, effectively working plan for placing qualified persons

with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." 222 F. Supp.2d at 982, quoting *Olmstead* 527 U.S. at 605-06. The Court did not state that this was the only way for a State to establish that it has made reasonable modifications; however, the lower courts interpreting Olmstead have focused on this example as a concrete way of measuring a state's progress in moving toward community settings.

If a state is found to have a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, courts have been reluctant to impose relief that would interfere with the operation of the existing plan. " When such a plan exists, a remedy that would force the agency to abandon or alter its long-term compliance efforts could sacrifice widespread compliance for immediate, individualized relief. Imposing such a remedy might be penny-wise and pound-foolish." *Pennsylvania Protection and Advocacy v. Pennsylvania Dept. of Public Welfare*, 402 F.3d 374, 381 (3rd Cir. 2005).

Ohio has been operating under its *Olmstead* plan, known as the Ohio Access Plan, since 2001. (Engquist, III-2.) Ohio's plan is working. From 1995 to 2004 the number of individuals with MR/DD receiving waiver services increased from 2,593 to 10,424, an increase of 302%. (Engquist, III-6.) From 2000 to 2004, Ohio's growth rate was 71%, higher than the national average of 41%. From 2004 to 2005, the number of individuals served by waivers increased from 10,424 to 16,274. *Id.* As of June 2006, 16,885 individuals are served by waivers.[12] (Engquist, III-6.) In 2000, there were over 1,990 individuals with MR/DD who lived in DCs. Today, only 1,607 individuals are living in DCs, a reduction of about 20%. (Engquist, III-8 to

[12] As of May 2006, there were 12,344 IO waiver slots and 5,100 Level One waiver slots allocated to the counties for enrollment of waiver participants. Under the Transitions Waiver, 3,500 waiver participants may be served in 2006 for a grand total of 20,944 waiver slots.

III-9.) Two DCs have closed in the last two years, leaving only ten (10) DCs which are located throughout the State. *Id.*

While the number of individuals that reside in private ICFs/MR has remained constant over the last six years, more individuals reside in smaller, community ICFs/MR, with many facilities serving only 8 or fewer residents. (Engquist, IV-2.) Since 2002, more individuals are served in the community than in all private ICFs/MR and developmental centers combined. *Id.* Today, more than twice as many individuals with MR/DD are served by Level One, Individual Options and Transitions Waivers (16,885) than are served in ICFs/MR and developmental centers of any size (7,472). *Id.* Furthermore, Ohio now serves more than three times (344%) the number of individuals in the community (16,885) relative to placements in facilities with greater than sixteen (16) beds (4,980).[13] *Id.*

Not surprisingly, waiver expenditures have greatly outpaced the State's budget (286% to 41%), while ICF/MR expenditures have stayed in line with the budget's growth (44% to 41%). (Engquist, III-8.) Finally, the Independence Plus Real Choice Systems Change Grant and the ICF/MR Conversion Pilot Program have been implemented to further increase the range of home and community-based services. Although the Plaintiffs would like the waiting lists for Medicaid waivers to move at a more rapid pace, there is no genuine dispute that Ohio's waiting lists are "not controlled by the State's endeavors to keep its institutions fully populated." *See Olmstead*, 527 U.S. at 605-06.

In similar circumstances, courts have rejected invitations to "tinker" with a State's plans for expanding home and community-based services. *See, e.g., Arc of Washington State,* 427

[13] If the 2,564 individuals who reside in ICF/MR facilities of less than sixteen (16) beds are added to the community placements (16,885), then Ohio serves almost four (4) times the number in the community (19,449) relative to placements in facilities of greater than sixteen (16) beds (4,908).

F.3d 615, 620-22 (9th Cir. 2005), where the plaintiffs argued that the state violated the ADA by limiting the number of people with disabilities who could participate in a home and community-based services waiver. The court declined to "tinker" with a waiver program that it found

> (1) is sizeable, with a cap that has increased substantially over the past two decades; (2) is full; (3) is available to all Medicaid-eligible disabled persons as slots become available . . . (4) has already significantly reduced the size of the state's institutionalized population, and (5) has experienced budget growth in line with, or exceeding, other state agencies.

Id. at 621-22. Under these circumstances, the court found that "forcing the state to apply for an increase in its Medicaid waiver program cap constitutes a fundamental alteration, and is not required by the ADA." *Id*. at 622.

Likewise, in *Sanchez v. Johnson,* 416 F.3d 1051, 1067 (9th Cir. 2005) the court held that the State of California had a comprehensive deinstitutionalization scheme when waiver expenditures had increased, the State had applied for increased placements under the waiver program, there were ongoing plans to close at least one developmental center, and the population in institutions had been reduced by twenty percent. The court found that "when there is evidence that a State has in place a comprehensive deinstitutionalization scheme, which, in light of existing budgetary constraints and the competing demands of other services that the State provides, including the maintenance of institutional care facilities, *see Olmstead*, 527 U.S. at 597, is 'effectively working,' *id.* at 605, the courts will not tinker with that scheme." *Sanchez* at 1067-68. The court concluded that the requested relief under the ADA and Section 504 would "disrupt this working plan and…restrict impermissibly the leeway that California is permitted in its operation of developmentally disabled services under *Olmstead*," and require a "fundamental alteration" of a comprehensive plan for deinstitutionalization. *Id*. at 1068.

Other courts have likewise been reluctant to impose judicial relief when states are found to be operating under an effective plan for expanding community services and reducing reliance on institutions. *See e.g., M.A.C. v. Williams,* No. 02:02CV1395DAK, slip op. at 19 (D. Utah Feb. 28, 2006) (declining to order State to reduce waiting list where, among other things, such an order would have "interfere[d] with a comprehensive, effectively working process"); *Mandy R. v. Colorado Assoc. of Community Centered Bds.,* No. 00-M-1609, slip op. at 18-20 (D. Colo. Feb. 28, 2005) (refusing to order State to fund additional waiver slots, on the ground that such an order would "pose insurmountable problems of enforcement" and "intrude into the authority and responsibility" of state officials); and *Williams v. Wasserman,* 164 F. Supp. 2d 591, 633-37 (D. Md. 2001) (holding that State had an effectively working plan, in light of its long history of supporting community based treatment, the closure of institutions, the reduced number of disabled persons in institutions, the increased provision of community-based services, and the need to maintain the availability of institutional care).

In their Third Amended Complaint, ¶¶ 449-475 (pp. 51-54), the Plaintiffs also maintain that the Defendants practice "discrimination" because people with intense behavioral or medical needs are less likely to reside in community settings. Neither the ADA nor *Olmstead* requires or assumes that community treatment is appropriate for everyone. *See Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring)("It would be unreasonable, it would be a tragic event, then, were the [ADA] to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision.") The ADA requires States to provide "reasonable accommodations" to "qualified" individuals who meet the "essential eligibility requirements" for the receipt of services. *See* 42 U.S.C. 12132; 45 C.F.R. 84.3(k). It does not prohibit States from offering a

range of community-based services, some of which are intended and appropriate only for individuals with less intense needs. Nor does the ADA require States to create entirely new settings or programs tailored to individual needs. *See Rodriguez v. City of New York*, 197 F.3d 611, 619 (2nd Cir. 1999) ("*Olmstead* reaffirms that the ADA does not mandate the provision of new benefits.")

In any case, the fact that individuals with more intensive needs may wait longer for community services is not evidence of discrimination. Even when a State has a comprehensive and accommodating plan for deinstitutionalization of individuals with MR/DD, barriers to community placement can remain. These include "the opposition of an individual's family to community placement, the existence of complex and difficult behaviors, and serious and life-threatening medical conditions requiring 24-hour nursing care." *Sanchez v. Johnson*, 416 F.3d at 1066. The greater needs can make it more difficult for a State to serve a person's needs in the community.[14]

Despite these obstacles, the State has persevered in expanding community services for individuals with different levels of service needs. The IO waiver, which does not have individual cost caps and the use of state funds to develop housing options, amply demonstrate that the State is not discriminating against those with higher needs but is creatively and actively working to meet those needs.

In sum, the undisputed facts in this case demonstrate that Ohio has already reasonably accommodated Plaintiffs' needs because it has a comprehensive, effectively working plan for placing qualified persons with mental disabilities in community settings, and has been actively

[14] The record in *Sanchez,* 416 F.3d at 1067, established that those persons remaining in developmental centers were more than 4 times as likely to have serious medical problems and 6 times as likely to have severe behavior problems. Additionally, 69% of developmental center residents were among the top 10% of all persons with the most acute levels of retardation.

implementing this plan through the development of home and community based Medicaid waivers and the reduction of the number of individuals with MR/DD living in developmental centers or other institutions.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CONSTITUTIONAL CLAIMS

A. Due Process

The Plaintiffs base their due process claims on two distinct sources of law: (a) state statutes providing a "bill of rights" for individuals with MR/DD, specifically Ohio Rev. Code §§ 5123.62, 5123.64 and 5123.182, and (b) the constitutional limits regarding the conditions of confinement in an institution, as set forth in *Youngberg v. Romeo*, 457 U.S. 307 (1982). A different set of allegations is brought under each of these two sources of law. Neither creates a property or liberty interest to the immediate provision of state-funded home and community-based services, and summary judgment should be granted to Defendants.

1. State Law Does Not Create a Protected Property or Liberty Interest Requiring the State to Provide Home and Community-Based Services.

As the Plaintiffs observe, Ohio Rev. Code § 5123.62 is known as the state "bill of rights" for individuals with MR/DD. It sets forth a list of twenty-four "rights" that such persons have as a matter of state law. In ¶ 423 of the Third Amended Complaint (pp.66-67), the Plaintiffs allege that several of these "rights" have been violated by the Defendants. These "rights" range from the concrete (access to ancillary services such as physical therapy, *see* Ohio Rev. Code § 5123.62(B)), to the more amorphous (*e.g.*, access to "opportunities that enable individuals to develop their full human potential," *see* Ohio Rev. Code § 5123.62(L)). The Plaintiffs also cite to Ohio Rev. Code § 5123.64(B)(3), which authorizes a legal action to enforce rights under Ohio Rev. Code §§ 5123.60-5123.64, and 5123.182(D), which requires OD MR/DD to "plan and request additional appropriations for the provision of residential services" for MR/DD

individuals eligible for residential services who are on waiting lists for those services. Third Amended Complaint, ¶¶ 419, 423 (pp.66-67).

The Plaintiffs cannot enforce these provisions directly in the present case, because the Eleventh Amendment prohibits federal courts from enjoining state officials to conform their conduct to the requirements of state law. *Pennhurst State School and Hospital v. Halderman* (Pennhurst II), 465 U.S. 89, 106 (1984). In its 1993 decision, this Court ruled that *Pennhurst II* does not bar the Plaintiffs' due process claim based on alleged violations of state law because "Plaintiffs do not assert their claims on the sole basis of violation of state law. Rather, they allege violation of due process under the Fourteenth Amendment via § 1983." 840 F. Supp. at 1204 (R. 186). Thus, the Plaintiffs' due process claims based on Ohio Rev. Code § 5123.62, 5123.64, and 5123.182 can only succeed if these state law provisions rise to the level of entitlements that trigger rights to notice and a due process hearing.

A two-step inquiry is necessary to determine whether the Plaintiffs can maintain an action under the procedural aspect of the Due Process Clause. *Logan v. Zimmerman Brush*, 455 U.S. 422, 428 (1982). First, they must establish that they have been deprived of a federally-protected liberty or property interest. *Id.* If the Plaintiffs can surmount this initial hurdle, they also have the burden of establishing that "the available state procedures were inadequate to compensate for the alleged constitutional deprivation." *Collyer v. Darling*, 98 F.3d 211, 223 (6th Cir. 1996).

In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Supreme Court explained that, to have a federally-protected property interest in a benefit, a person clearly must have more than an abstract need, desire or unilateral expectation of it. "He must, instead, have a legitimate claim of entitlement to it." *Id.* Property interests and their dimensions are defined by "existing rules or

understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims to those benefits." *Id.*

Nothing in Ohio Rev. Code §§ 5123.62, 5123.64 or 5123.182 requires that the Plaintiffs' needs be served in community residential facilities. Any of the rights set forth in Ohio Rev. Code § 5123.62 could be met in an institutional setting as well as a community residential setting. These state statutes do not create an entitlement to community residential services that rises to the level of a property or liberty interest requiring procedural due process protections.

The Plaintiffs allege that Ohio Rev. Code § 5123.182 "creates a property interest by requiring planning for residential services for those members of the plaintiff class who are on waiting lists for those services." Third Amended Complaint, ¶ 417 (p. 65-66). The state statute provides, in relevant part:

> The department [of mental retardation and developmental disabilities] shall plan and request additional appropriations for the provision of residential services for all mentally retarded or developmentally disabled persons eligible for residential services who are on waiting lists for those services.

(Emphasis added.) Clearly this statute does not create any absolute "right" to residential services for all persons who may be eligible for such services. The statute requires only that ODMR/DD "plan" and "request additional appropriations" to provide them.[15] Thus, the state statute does not bestow any liberty or property right to the actual provision of community residential services, which is the relief that they seek.

Ohio Rev. Code § 5123.64(B)(3) sets forth remedies available to any individual with MR/DD who believes that his rights under Ohio Rev. Code § 5123.62 have been violated. In its

[15] The Plaintiffs allege that they have a property interest in "planning for residential services" under Ohio Rev. Code § 5123.182, see Third Amended Complaint, ¶ 417 (pp. 65-66), but have not asserted a property interest in requesting additional appropriations from the Ohio General Assembly. The Ohio Access Plan meets the planning mandate of Ohio Rev. Code § 5123.182.

1993 decision, this Court found that determining the adequacy of these remedies "would require a complex factual inquiry." 840 F. Supp. at 1206. However, such an inquiry is unnecessary, because nothing in any of the state statutes cited by Plaintiffs, Ohio Rev. Code §§ 5123.62, 5123.64, or 5123.182, creates an entitlement to community services. Accordingly, summary judgment should be granted in favor of the Defendants regarding the Plaintiffs' attempts to enforce these state statutes under the procedural aspect of the Due Process Clause.

2. *Youngberg v. Romeo* Does Not Require the Creation or Expansion of Home and Community-Based Services

The Plaintiffs also allege that the Defendants have violated the constitutional limits regarding the conditions of confinement in a institution, as set forth in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, the Supreme Court considered the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment. It held that a mentally retarded person who is involuntarily committed to the State's custody has constitutionally protected liberty interests, under the Due Process Clause, to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, and such minimally adequate training as reasonably may be required by those liberty interests. These minimal requirements do not apply to persons who do not live in institutions, or who reside in institutions or nursing homes on a voluntary basis. This Court has already correctly determined that *Youngberg* does not give rise to a right to residential placement, and that *Youngberg* claims could only be asserted by members of the plaintiff class who have been involuntarily institutionalized. 840 F. Supp. at 1207.

Defendants are entitled to summary judgment because there is no genuine dispute that the conditions at the DCs and private ICFs are unconstitutionally unsafe. Those class members who are involuntarily committed have a "constitutionally protected interest in the conditions of

reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by those interests." *Youngberg*, 457 U.S. at 324. But, Plaintiffs are not challenging the "conditions of confinement" for those class members: they are challenging the fact of confinement. Under the Plaintiffs' theory, the Defendants' alleged failure to provide sufficient community placements "threatens the Plaintiffs…with confinement in state-operated institutions," "impose(s) limitations on the freedom of the Plaintiffs…to act on their own behalf" and "remain against their wills in institutional settings not appropriate for them." Third Am. Compl., ¶¶ 429-431 (p. 68).

In the Plaintiffs' view, the absence of action by the Defendants (in their alleged failure to provide sufficient numbers of community placements) becomes an affirmative act in holding the Plaintiffs "against their will." This theory has no support in the cases interpreting the substantive aspect of the Due Process Clause. *See Youngberg*, 457 U.S. at 317. ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border."); *see also DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

The Due Process Clause does not guarantee the setting in which Medicaid or other MR/DD services will be delivered. *See Williams v. Wasserman,* 164 F. Supp.2d at 627 (D. Md. 2001). Accordingly, the Defendants are entitled to summary judgment on the Plaintiffs' due process claim based on *Youngberg*.

B. Equal Protection

The Plaintiffs allege that the Defendants have violated their rights under the Equal Protection Clause of the Fourteenth Amendment by "establishing, subsidizing, and otherwise sanctioning in de jure fashion, enactments, programs, policies and practices that have excluded, separated, and segregated persons with mental retardation or developmental disabilities." Third Am. Compl., p. 69, ¶ 435. Specifically, the Plaintiffs allege that Defendants have violated the

Plaintiffs' Equal Protection rights by denying community residential services to certain groups of class members, including the non-ambulatory; those who are emotionally or behaviorally handicapped; and those who reside in nursing facilities. *Id.*, pp. 69-70, ¶ 436.

In analyzing a claim under the Equal Protection Clause, the general rule is that government action is presumed to be valid, and will be sustained "if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). This general rule gives way when a statute classifies a suspect class, such as race, alienage, or national origin, or a quasi-suspect class such as gender. In the *City of Cleburne* case, the Supreme Court found that mental retardation is not a suspect or quasi-suspect classification which would call for more exacting judicial review. The Court reasoned that "those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be continually cared for." *Id.* at 442-43. Thus the Court acknowledged that it may be legitimate for the State to treat some groups of persons with mental retardation differently than others. The Court further noted that legislators on both the national and state levels have outlawed discrimination against the mentally retarded, and required states to provide a free and appropriate education to children with retardation as a condition of receiving federal education funds. *Id.* at 443. The Court found that such laws "reflect[] the real and undeniable differences between the retarded and others…Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from oversight in shaping and limiting their remedial efforts." *Id.* at 444.

The Plaintiffs allege that they are a protected class "because Congress has found that individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." Third Am. Compl. ¶ 434 (p. 69), citing 42 U.S.C. § 12101(a)(7). In its 1993 decision, this Court agreed with the Plaintiffs' theory and found that Congress changed the level of scrutiny for Equal Protection claims when it enacted the ADA. The Court found that classifications for purposes of providing community residential services are subject "at least to intermediate heightened scrutiny," and thus "to be sustained, the classifications at issue in this case must at least be substantially related to a legitimate state interest." 840 F. Supp. at 1210 (R. 186).

Subsequent to the issuance of this Court's 1993 decision, the U.S. Supreme Court decided *City of Boerne v. Flores*, 521 U.S. 507 (1997). In that case, the Supreme Court struck down the Religious Freedom Restoration Act (RFRA), which prohibits the government from substantially burdening religion unless it can demonstrate that the burden was (1) "in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. The statute was found unconstitutional because it did not merely enforce the Fourteenth Amendment, it also attempted "a substantive change in constitutional protections." *City of Boerne*, 521 at 532. The *City of Boerne* case "confirmed the long-settled principle that it is the responsibility of [the U.S. Supreme] Court, not Congress, to define the substance of constitutional guarantees." *Board of Trustees v. Garrett*, 531 U.S. 356, 365 (2001).

The *Garrett* Court made it clear that the Fourteenth Amendment does not require a State to make special accommodations for the disabled; such a requirement could only come from

"positive law" such as the ADA. 531 U.S. at 367-68. Thus, both *City of Boerne* and *Garrett* have the effect of reaffirming the Court's holding in *Cleburne* that the rational basis test applies to Equal Protection challenges when the government makes classifications on the basis of mental retardation. To the extent that Congress attempted to change this level of review by enacting its "findings" regarding individuals with disabilities in 42 U.S.C. § 12101(a)(7), Congress exceeded its power to enforce Section 5 of the Fourteenth Amendment.

Under rational-basis review, a legislative choice "is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320; *see also Garrett*, 531 U.S. at 367. The burden is on the Plaintiffs to rebut "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* To prevail, the Plaintiffs must disprove the rationality of every conceivable justification for the alleged different treatment of some individuals with MR/DD from others. *See Ross v. Duggan*, 402 F.3d 575 (6th Cir. 2004).

The *Cleburne* Court acknowledged that it may well be permissible to treat some people with mental retardation differently than others:

> First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.

473 U.S. at 442-43 (footnotes omitted). Even in *Olmstead*, the Court acknowledged that placement in a community-based residence may be appropriate for some individuals while "[f]or

other individuals, no placement outside the institution may ever be appropriate." 527 U.S. at 605, citing Brief for the American Psychiatric Association. These statements hardly support the Plaintiffs' theory that the U.S. Constitution forbids the State to treat some individuals with MR/DD differently than others based on the severity of their needs.

State officials could rationally find that some individuals with MR/DD need different services than others based on the severity of their physical and psychological needs. Indeed, it would be irrational for the Defendants to find otherwise, given the need to meet health and safety needs for each person on a Medicaid waiver. *See* Ohio Rev. Code § 5111.851(B)(7). "When matters of health and safety are at issue, great judicial deference is owed to the legislative judgment." S*anders v. Kansas Dept. of Social and Rehabilitation Services*, 317 F. Supp. 2d 1233, (D. Kan. 2004), citing *Williamson v. Lee Optical*, 348 U.S. 483, 487—88 (1955). Since there is a rational relationship between the health and safety needs of the Plaintiffs and the services that they receive, summary judgment should be granted in favor of the Defendants on the Plaintiffs' Equal Protection claim.

CONCLUSION

For the reasons given above, Defendants are entitled to Summary Judgment on all counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Motion for Summary Judgment was filed electronically with this Court on this 21st day of July 2006. Counsel may access this document through the Court's electronic filing system.

/s/Roger Carroll
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