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

NANCY MARTIN,
et al.,

Plaintiffs,

vs.

ROBERT TAFT
et al.,

Defendants.

Case No. C-89-362
Judge Edmund A. Sargus, Jr.
Magistrate Judge Norah McCann King

MOTION TO DECERTIFY CLASS BY JOEL MARTIN OBJECTORS

Pursuant to Rule 23(c) and (d) of the Federal Rules of Civil Procedure, **class members** Joel Martin, Constance Leichty, Rachel Bailey, Meskerem Begashaw, Justin Blackburn, John Patrick Bluchs, Jeff Bowie, Mary Elizabeth Brown, Callie Brate, Christopher Corcoran, James Coulombe, Craig Cousino, Dennis Delaney, Jason Dial, Jr., Scott Dickson, Christie Frasure, Josef Freese, Kristi Lynn Gray, Robbie Heidrich, Terry Helton, Brady Honican, Rick King, Matthew Leigh, Brian Maloney, Colin McMillan, Jim Michelson, Mildred Miller, Christina Moehr, Melissa Nichols, David Joseph Ochs, Karen Sue Ochs, Larisa Penny, Philip Peters, Douglas Preston, Dwight Richardson, Melanie Rogers, Kristin Ruddy, Carl Schreiber, Cameron Sellers, Susan Shafer, Ron Showes, Laura Shuman, Kyle Joseph Simmons, Mikel Steele, Jason Thurkill, Penny Tracey, Kalisha Tyner, Danny Vaughn, Katie Weinheimer, Carole Winters and Lisa Wong (hereafter the "Joel Martin Objectors") **move this Court to decertify the class previously certified in this case in 1990** (see **Exhibit A**).

The Joel Martin Objectors attach to this Motion their Memorandum Of Law In Support Of Motion To Decertify Class.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DECERTIFY CLASS

A. Introduction

Due to conflicts within the "class", this case no longer meets the criteria for class certification set forth in Rule 23 of the Federal Rules of Civil Procedure.[1] Therefore, this Court should decertify the class:

- The Due Process Clause prevents plaintiffs who are dissatisfied with services being provided by a defendant from adequately representing in a class action individuals who are satisfied with those services, and also prevents one counsel from representing both individuals challenging the services and those satisfied with the services (Part B);
- Not only is there such a conflict among class members in this case (some satisfied and others not satisfied with services), but there are numerous other conflicts among class members (Part C);
- Class counsel has an obligation to notify the court in which the class action is proceeding of such conflicts (Part D);
- Moreover, there is no practical need for a class action in this case (Part E);
- Regardless of whether class counsel notifies the court, the court has an obligation to decertify the originally certified class when there are such conflicts, no matter the stage of the litigation (Part F); and
- As a result of the numerous conflicts among class members here, this Court must decertify the class approved in this case in 1990, when the circumstances were significantly different (Part G).[2]

B A Class Cannot Consist Of Both Individuals Who Are Satisfied And Not Satisfied With The Services In Question

It violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution to allow a case to proceed to judgment as a class action

[1] Whether class certification was valid in 1990, when the circumstances were significantly different, is not an issue that the Court needs to address. See part F of this Memorandum.

[2] Attached **Exhibit B** identifies the legal guardians speaking for each class member in these Objections and the private ICFMR that is the home of each of these class members

when the representatives of a group denominated a "class" are dissatisfied with the services at issue in the suit, but the class includes individuals who are satisfied with the services. The genesis of that principle is Hansberry v. Lee, 311 U.S. 32 (1940), a case in which certain landowners had sued to enforce a restrictive land covenant prohibiting transfer of land in a particular area to "any person of the colored race". The defendants – who disliked the restrictive covenant - argued that a prior state court judgment (upholding the restrictive covenant in a suit that the Illinois Supreme Court had labeled a class action) did not bind the defendants in Hansberry.

The Supreme Court agreed with the defendants, observing that some of the landowners in the state court "class" wanted to enforce the restrictive covenant, whereas other landowners did not, and that one group of those landowners could not act as representatives of the other group, even though both were landowners. The Court held, "[s]uch a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, **does not afford that protection to absent parties to which due process requires.**" *Id.* at 45 (emphasis added).

Courts recognize, in other words, that "a class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class." Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir. 2000). In Pickett, the District Court had certified a class of all cattle producers who had sold a certain type of cattle directly to meat packers since a particular date, and the plaintiffs were challenging the defendant's use of "forward contracts and marketing agreements." However, the class

of plaintiffs included cattle producers who had entered into forward contracts and marketing agreements and liked those agreements, not simply cattle producers who had sold on the spot market and disliked forward contracts and marketing agreements. The Eleventh Circuit reversed the class certification, because "the class includes those who claim harm from the very same acts from which other members of the class have benefited." *Id.*

Each Circuit that has ruled on this issue has concluded that where some class members believe they have benefited from the conduct challenged by the class representatives, there is no valid class action.[3] For instance, in Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988), *cert. denied* 490 U.S. 1080 (1989), the Seventh Circuit affirmed the District Court's denial of certification of an alleged class of landowners near O'Hare Airport, because "[s]ome of these [landowners] undoubtedly derive great benefit from increased operations at O'Hare, which make the area attractive for business and may increase the value of land, even as they make land less attractive for residential purposes."

The conflict does not have to be between individuals who are satisfied and not satisfied in order to defeat class certification. For instance, in Morris v. McCaddin, 553 F.2d 866, 870-871 (4th Cir. 1977), the Fourth Circuit affirmed the District Court's denial of certification of a class of employees whose jobs were being eliminated but who could compete for other positions with that employer. The Fourth Circuit upheld the denial, because "the interests of the named plaintiffs would have been

[3] Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181, 1190 (11th Cir. 2003)("To our knowledge, no circuit has approved of class certification where some class members receive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class").

antagonistic to the interests of many of the unnamed members of the class." Similarly, in Phililps v. Klassen, 502 F.2d 362, 366 (D.C. Cir. 1974), *cert. denied* 419 U.S. 996 (1974), quoting Dierks v. Thompson, 414 F.2d 453, 460 (1st Cir. 1969), the D.C. Circuit said **"[u]nless the relief sought by the particular plaintiffs** who bring the suit can be thought to be what **would be desired by the other members** of the class, **it would be** inequitable to recognize plaintiffs as representative, and a **violation of due process to permit them to obtain a judgment binding absent plaintiffs."** (Emphasis added).[4]

Here there is no speculation. Thousands of class members object to the relief sought by the class representatives.[5] The class previously certified in this case is not valid.

It is not important that the relief in Martin v. Taft under the proposed Consent Order does not technically end the ICFMR system, but "simply" commits the class and defendants to try to end ICFMR funding. For instance, in Martin v. American Medical Systems, Inc., 1995 WL 680630 (S.D.Ind. 1995), the District Court denied the plaintiff's motion for certification of an alleged class of all persons who had purchased a certain type of implant from the defendant and had the implant surgically placed in their bodies.[6] The damages sought would not have prevented the defendant from continuing to manufacture the implant. Nevertheless, the District Court denied class certification, because "potential class members who are satisfied with their implants are likely to want

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[4] Due to the "potentially antagonistic" positions of the former employees, the D.C. Circuit in Klassen affirmed the denial of certification of a proposed class of former employees "coerced" into early retirement. *Id.* at 364.

[5] Presumably not all the objectors are satisfied with the services being received, but they are clearly opposed to the alternative in the proposed Consent Order.

[6] The District Court in Martin v. American Medical Systems concluded the plaintiffs could not adequately represent the alleged class members satisfied with the implants. Other courts have concluded that such conflicts meant the claims of the named representative were not typical of the claims of the class. Under both principles, the courts agree that class certification is not appropriate.

the opportunity to receive AMS implants in the future," at *5, and such damages could have deterred the manufacturer from continuing to manufacture the device, for fear of future litigation. The court added that the "Martins are pursuing claims and seeking relief that would conflict directly with the interests of satisfied recipients in the proposed class. Thus, the Martins could not fairly and adequately protect the interests of the proposed class as a whole." Id.

The same is equally true here. **The named representatives are now pursuing relief directly contrary to the wishes of the majority of class members.**[7] As a matter of Due Process, "no class should be certified where the interests of the members are antagonistic, because the preclusive effect of the verdict may deprive unnamed class members of their right to be heard." In re American Medical Systems, Inc., 75 F.3d 1069, 1083 (6th Cir. 1996), quoting Smith v. Babcock, 19 F.3d 257, 264, n. 13 (6th Cir. 1994). Here, because of the different desires and interests of members of the so-called class, the Due Process Clause of the Fourteenth Amendment prohibits the named representatives from pursuing as a class action the relief sought in the proposed Consent Order.

C. The Conflicts Among Class Members Requires Decertification Of The Class

1. The named plaintiffs

The conflict among class members in this case is apparent. The named plaintiffs, apparently dissatisfied with the services they may be receiving, have approved

[7] *See, e.g.*, part C below; the position statement of People First, an organization for individuals with disabilities (**Exhibit C**); the position statement of ARC, an organization of parents, many of whom are the guardians of class members (**Exhibit D**); the position statement of APSI, the corporate guardian for over 2,000 class members (**Exhibit E**); and objections previously submitted by individual Joel Martin Objectors (**Exhibit F**).

a settlement in which they agree to use their best efforts to convince the Ohio General Assembly to eliminate ICFMR funding.

2. The Joel Martin Objectors

In contrast, the Joel Martin Objectors are class members who reside in private ICFMRs and are satisfied with the services they are receiving. OLRS never consulted with any of the Joel Martin Objectors or his or her guardians about the proposed Consent Order. **None of the guardians of the Joel Martin Objectors**: (a) would ever have signed the proposed Consent Order, (b) would ever have authorized an attorney to sign the proposed Consent Order, (c) would ever have agreed to the elimination of ICFMR funding or the provision in the proposed Consent Order about seeking approval of elimination of ICFMR funding, and (d) would ever have agreed to using their "best efforts to seek the enactment of Governor Taft's Executive Budget on these issues." (¶1d of proposed Consent Order)

The Joel Martin Objectors are medically fragile or otherwise at risk individuals who cannot withstand the disruptions in services that the restructuring of the mental retardation delivery system allowed by the proposed Consent Order would inevitably entail (see attached **Exhibit G** for snapshots of some of the Joel Martin Objectors). Their lives will be at risk not because the Defendants intend to throw class members onto the streets as a result, but because the Joel Martin Objectors are among the most vulnerable individuals in society. The wholesale restructuring of the service delivery system contemplated in the proposed Consent Order would inevitably lead to

disruptions in their lives. The Joel Martin Objectors could not withstand such disruptions safely.[8]

3. Objections Of People First of Ohio

People First of Ohio, an advocacy organization for people with disabilities, has stated that "we **do not** agree with the Consent Order as written, because it tells self-advocates the goal is to eliminate **(do away with)** the ICFRMR program, **then** replace it with a waiver."

4. Individual Objections of Guardians

Over two thousand other class members have objected to the proposed Consent Order for a variety of reasons.[9] There are many individual letters providing a variety of different objections.

5. Klein Objectors

The Klein Objectors are 27 class members who reside in state developmental centers (**Exhibit H**). They state that "Institutional Care Must Continue For The Klein Parties" and believe that such care "is threatened by the proposed settlement." The President of the Parent & Friends Volunteer Association of Mt. Vernon Developmental Center has objected to the proposed Consent Order and indicated that 95% of the residents of Developmental Centers are satisfied with the services they are receiving (**Exhibit I**).

6. Objections of Advocacy and Protective Services, Inc. ("APSI")

[8] In its Objections to the proposed Consent Order, the ARC of Ohio said "we also know from experience, that wholesale elimination of any program for our constituents, without advance planning and enforceable written documents, can result in emotional harm, physical injury and even death." The Joel Martin Objectors agree.

[9] See, e.g., Docket Entries in this case numbered 457, 458, 462-465, 468-474, 480, 482-550, 552, 555-562, 566-585, 588-593 and 595-603. Some of these objections were filed by the individuals who are members of the Joel Martin Objectors and the Klein Objectors, and perhaps some of the individual Objectors are also members of ARC of Ohio.

APSI is the largest guardianship organization in Ohio and is guardian for 2,347 class members. APSI has objected to the proposed Consent Order, because it does not include the following protections: "1. specific assurances regarding comparability of available services; 2. assurances regarding due process protections to ensure that the rights of individuals are protected; and 3. assurances that a pilot project will be included as part of a phased-in approach to implementing the order." (**Exhibit E**).

7. Objections of ARC of Ohio

ARC of Ohio has stated it has "no objection to the proposed consent decree from a philosophical point of view", but objects to the proposed Consent Order for a variety of reasons, including the lack of "[w]ritten provisions regarding individuals who are waiting for services. **These individuals represent a majority of the class and their needs have not yet been met or address in any manner in the context of the proposed settlement agreement." (Exhibit D)**

8. Summary

The positions of ARC, the Joel Martin Objectors and the Klein Objectors are significantly different on a key issue in this case. ARC does not believe there should be 75 bed facilities, whereas the Joel Martin Objectors and the Klein Objectors are not necessarily opposed to them. Yet the ARC, the Joel Martin Objectors and the Klein Objectors are all opposed to the proposed Consent Order.

In litigation, one attorney could not even represent: (a) the guardians who agree with ARC that there should not be large facilities for mentally retarded individuals; (b) the Joel Martin Objectors, who believe that such facilities may be appropriate and in

fact the most integrated setting for such individuals; and (c) the Klein Objectors, who also agree that large facilities can be appropriate. Yet one counsel, OLRS, has purported to negotiate the proposed Consent Order on behalf of not only the named plaintiffs, but all the diverse, conflicting groups of guardians speaking for class members, including ARC, the Joel Martin Objectors, the Klein Objectors, APSI and People First.[10] One counsel, OLRS, has purported to negotiate the proposed Consent Order calling for elimination of all ICFMR funding, even though none of the Joel Martin Objectors would have agreed to such provision. One counsel, OLRS, has purported to negotiate the proposed Consent Order calling for class members to use their best efforts to support the Governor's next executive budget, even though none of the Joel Martin Objectors would have agreed to such provision.

OLRS has known of conflicts within the "class" for years. Indeed, in opposing the suggestion of OPRA for additional notice of the proposed Consent Order, OLRS said a "copy of the notice and the proposed consent order was sent by class counsel directly to ... the largest organized group of parent guardians who oppose facility/DC closure, the Ohio League for the Mentally Retarded." (Emphasis added) Not only has OLRS recognized for years this as one of the conflicts within the class, but OLRS recognizes that OLRS is not representing that part of the class. OLRS should have notified the Court of conflicts among the "class".

D. OLRS Had A Duty To Notify This Court Of The Conflicts Among Class Members

When a conflict develops among class members, counsel for the class has a duty to notify the court. For instance, In Pettway v. American Cast Iron Pipe Co.,

[10] It is not apparent that the named plaintiffs are representative of any other class members.

576 F.2d 1157, 1176 (5th Cir. 1978), *cert. denied* 439 U.S. 1115 (1979), the Fifth Circuit said that "a core requirement for preventing abuse of the class action device is some means of ensuring that the interests and rights of each class member receive consideration by the Court." The Court added that "When a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs. In such a situation, the attorney's duty to the class requires him to point out conflicts to the Court so that the Court may take appropriate steps to protect the interests of absentee class members." (Emphasis added). Id. at 1177.

The duty to notify the court of conflicts continues throughout the litigation, and includes conflicts at the remedy stage. For instance, in National Ass'n of Regional Medical Programs, Inc. v. Weinberger, 551 F.2d 340 (DC Cir. 1976), *cert. denied* 431 U.S. 954 (1977), the conflict developed after judgment in favor of the class of plaintiffs in connection with the award of attorneys' fees. The court concluded that "[c]ounsel has the obligation to report conflicts of interest among class members should they arise during the course of litigation." *Id.* at 346, n. 31. In Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987), the conflict arose after trial at the remedy stages because of the conflicts between two classes in two different cases, both class represented by the same counsel. The First Circuit disqualified the class counsel and said in footnote 4 that the "fact that the conflict arose due to the nature of the State's settlement offer, rather than due to the subject matter of the litigation of the parties involved, does not

render the ethical implications of NHLA's multiple representation any less troublesome." *Id.* at 829, n. 4.[11]

OLRS failed in its duty to notify this Court of conflicts within the "class."

E There Is No Practical Need For A Class Action Here, Since The OLRS Can Represent Individuals For Whatever Relief It Or Its Clients Desire

Sometimes courts will certify a class when it appears as a practical matter there is no other way for a litigant to pursue the issue. For instance, in Martin v. American Medical Systems the District Court distinguished the situation in which a class action was the plaintiff's "only economically viable route to obtain a relief." 1995 WL 680630 at *9. Similarly, in Coleman v. General Motors Acceptance Corp., 296 F.3d 443, 449 (6th Cir. 2002), the Sixth Circuit held that "class treatment of claims is most appropriate where it is not 'economically feasible' for individuals to pursue their own claims ...." The Sixth Circuit added that the primary justification for class treatment of these claims is largely absent in this case because the ECOA's provision for the award of attorney's fees and costs to successful plaintiffs eliminates any potential financial bar to pursuing individual claims."[12]

Here OLRS is bringing the Martin v. Taft case for one named plaintiff as best friend of that plaintiff, Kathy R. (see ¶71 of Third Amended Complaint). Interestingly the footnote to ¶71 in the Third Amended Complaint (footnote 9) provides

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[11] *See also*, League of Martin v. City of Milwaukee, 588 F. Supp. 1004, 1011 (E.D. Wisc. 1984), citing Pettway and Regional Medical Programs ("counsel for the class have a duty to notify the Court of any conflicts of interest among class members that arise during litigation."); In re Austrian and German Bank Holocaust Litigation, 317 F.3d 91, 103-104 (2nd Cir. 2003); Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2nd Cir. 1995); and In re Agent Orange Product Liability Litigation, 800 F.2d 14, 18 (2nd Cir. 1986).

[12] *Id.* Coleman did involve individualized claims for damages not present here, as well as a request for injunctive relief. However, the need here for individualized determinations of appropriate services and the different individual interests and desires of class members makes the reasoning in Coleman that class treatment was not warranted applicable here.

that APSI is the medical only guardian for Kathy R. Certainly the proposed Consent Order will affect the delivery of medical services to class members, and APSI objects to the proposed Consent Order. If OLRS has the right to bring this case and negotiate relief in the form of the proposed Consent Order as best friend of Kathy R. without consulting with and over the objections of Katy R's medical guardian, APSI, OLRS certainly does not need the class action device. Moreover, OLRS has the wherewithal to bring and prosecute the case as best friend for one individual, or as the attorneys for the other named plaintiffs. In short, there is no practical reason to allow this case to continue to proceed as a class action, since OLRS can pursue it on behalf of the named plaintiffs.

F. A Court Must Decertify A Class Act Any Time Class Certification No Longer Is Appropriate

As litigation proceeds, courts may reconsider an earlier certification of a class and decertify the class. In General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982), the Court said, "[e]ven after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." Most significant is "the potential unfairness to the class members bound by the judgment if the framing of the class is overbroad. Id. at 161.

This Court has a duty to address conflicts of interest in class actions whenever they develop.[13] In National Association of Regional Medical Programs, 551 F.2d at 344-345, the D.C. Circuit held that "[b]asic consideration [sic] of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where

[13] Regardless of whether or not OLRS knew of the conflicts.

absent members will be bound by the Court's judgment."[14] One area subject to continuing examination is that "the named representative must not have antagonistic or conflicting interests with the unnamed members of the class." Citing Senter v. General Motors Corp, 532 F.2d 511, 524-525 (6th Cir. 1976), *cert. denied* 429 U.S. 870 (1976)(in order to meet the adequate representation requirement, the "representative must have common interests with unnamed members of the class…").

The rule about decertifying class actions applies to 23(b)(2) class actions as well as other class actions. For instance, in Barney v. Holzer Clinic, Ltd., 110 F.3d 1207, 1214 (6th Cir. 1997), a Rule 23(b)(2) class action, the Sixth Circuit held that the "district court's duty to assay whether the named plaintiffs are adequately representing the broader class does not end with the initial certification; as long as the court retains jurisdiction over the case 'it must continue carefully to scrutinize the adequacy of representation and withdraw certification if such representation is not furnished.'"[15] *Accord*, Rector v. City and County of Denver, 348 F.3d 935, 942, 949 (10th Cir. 2003).[16]

G. Conclusion

This Court must decertify the existing class. First, a majority of the class members in this case object to the proposed Consent Order. Second, the named plaintiffs do not adequately represent the "class" members. Third, although the majority of class members object to the proposed Consent Order, in many cases their reasons

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[14] The Fifth Circuit added that this requirement was particularly important, due to the broadened res judicata effects accorded class actions under the amendments to the Federal Rules of Civil Procedure in 1966. *Id.* at 345, n. 22.

[15] quoting Grigsby v. North Mississippi Medical Center, Inc., 586 F.2d 457, 462 (5th Cir. 978). *See also* In re Cincinnati Policing, 214 F.R.D. 221, 222 (S.D. Ohio 2003)(Dlott, J.)("After certifying the class, the court must continue to ensure the adequacy of class representation and may issue whatever orders may be necessary to fulfill that responsibility"), citing Barney.

[16] See also, Newburg On Class Actions, 4th Edition, stating that the "ability of a court to reconsider its initial class rulings … is a vital ingredient in the flexibility of courts to realize the full potential benefits flowing from the judicious use of the class action device." §7:47 at page 159.

for objecting differ, and these objecting class members have conflicting interests and wishes on key subjects in this litigation, including ICFMR funding and institutions. There in fact is no class.

The fact that this Court should decertify the class does not suggest that what has happened in this case for the previous 15 years has been wasted effort. It has not. Over the last 15 years, the amount and diversity of services for mentally retarded individuals in the community has expanded significantly, no doubt in some definite but unquantifiable amount due to the impetus and work of OLRS and the decisions of this Court in this case. However, that fact does not justify continuing the case as a class action, when the conflicts among the so-called class members are as significant as they are here.[17]

The Joel Martin Objectors respectfully request that this Court grant their Motion To Decertify The Class.

Respectfully submitted,

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[17] When the case was initially filed as an attempt to increase community services, there may have been no conflict, but that is not an issue that needs to be determined here. Community services, whatever that term is defined to mean, have increased, and the issue presented now is a restructuring of the service delivery system, in which the conflicts are apparent.

CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2004, I served this document electronically on the following counsel:

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EXHIBIT LIST

A. Class Certification Order

B. List Of Joel Martin Objectors, Their Guardians And The Homes Of The Joel Martin Objectors

C. People First Position Statement

D. ARC Position Statement

E. APSI Position Statement

F. Other Letters Submitted By Joel Martin Objectors to Court

G. Snapshots Of Some Joel Martin Objectors

H. Statement Of Klein Objectors

I. Statement Of President Of Parents & Friends Volunteer Association of Mt. Vernon Developmental Center