

PHILIP McGANN, an Altoona Center Resident :
 by his next friends, MR. AND MRS. PAUL :
 McGANN; :
 :
 each of the foregoing persons are institution :
 residents, unnecessarily institutionalized :
 :
 AMERICAN ASSOCIATION ON MENTAL :
 RETARDATION, PENNSYLVANIA :
 CHAPTER; :
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 PA TASH, THE PENNSYLVANIA CHAPTER :
 OF TASH; :
 :
 PENNSYLVANIA PROTECTION AND :
 ADVOCACY, INC.; :
 :
 THE ARC OF PENNSYLVANIA; :
 :
 AUTISM NATIONAL COMMITTEE, :
 PENNSYLVANIA CHAPTER; :
 :
 NATIONAL COALITION ON :
 SELF-DETERMINATION; :
 :
 SPEAKING FOR OURSELVES; :
 :
 VISION FOR EQUALITY, INC., :
 :
 :
 Applicants for Intervention :

MOTION TO INTERVENE OF RIGHT AS PLAINTIFFS

In accordance with Rule 24 (a), Fed.R.Civ. P., the above named Pennsylvania Protection and Advocacy Agency, nine individual persons with disabilities, seven disability organizations, on behalf of themselves, their members, and their members’ clients,— each and all of whom are as a practical matter so situated that their statutory interests under Title II of the Americans With

Disabilities Act, Section 504 of the Rehabilitation Act of 1973 and the state Mental Health and Mental Retardation Act of 1966, and their Constitutional liberty, property, and equal citizenship interests under the Fourteenth Amendment in the subject of this action have been and may be further impaired by the Preliminary Injunction issued herein on January 30, 2006, and would be further impaired should that Preliminary Injunction be made final, and whose ability to protect their interests has been and may be further impeded by this action—respectfully request that this Honorable Court permit them to intervene as of right in this action, or in the alternative, permissibly, as plaintiffs. Applicants’ interests have not been and are not adequately represented by original plaintiffs or by Commonwealth defendants. Applicants are identified and described more fully below at paragraph 20 and following.

In support of this Motion. Applicants by counsel say as follows:

1. On January 30, 2006, the Court filed a Memorandum Opinion and Order that denied original Plaintiffs’ Motion for a Preliminary Injunction prohibiting Defendants from closing Altoona Center, conditional upon Defendants’ compliance with certain protocol requirements which were entered by the Court in its Order, tantamount to the grant of a Preliminary Injunction, requiring, inter alia, that:

- a. No resident be transferred to a community-based care facility without the written consent of a resident’s legal guardian (Conclusion of Law #18 (c) pages 11-12; Order C, page 13);
- b. All legal guardians shall communicate their decisions in writing as to the chosen placement of their wards no later than March 8, 2006 (Order at 3rd to last phrase, last sentence);

- c. Where legal guardians do not indicate their decision to transfer their ward on or before March 8, 2006, such wards shall not be transferred to community-based care but shall be transferred to Ebensberg Center, provided that such placement is consistent with that ward's individual support plan (Order at D and Order at last phrase, last sentence);
- d. Defendants may begin the immediate transfer of any resident once the placement chosen by the legal guardian has been communicated by Plaintiffs' counsel in writing to Defense counsel. (Order at second to last phrase, last sentence); and
- e. Legal guardians shall be sought for the remaining residents who do not have such representation (first phrase, last sentence).

2. Contrary to the Court's Memorandum Opinion and Order, settled law based in the United States Constitution, in particular, the Due Process, Equal Protection and Equal Citizenship Clauses of the Fourteenth Amendment; and based in federal statute, in particular, Title II of the Americans With Disabilities Act, 42 U.S.C. § 12132 et seq. and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and based in Pennsylvania statute, in particular, the provisions of its Decedents, Estates & Fiduciaries Law; Ch.55, Incapacitated Persons; subchapter D, Powers, Duties and Liabilities of Guardians, 20 P.S. § 5521(f)(1), all consistently applied in an unbroken line of decisions by the United States Supreme Court, the Court of Appeals for this, the Third Circuit, as well as other Courts of Appeals, and by federal District Courts throughout the land is that neither guardians nor parents have, nor can they be accorded, veto power over the provision of community-based services to a person with disabilities who qualifies for community

services and who can handle and would benefit from them, nor can they admit any person with a disability to state institutions for the mentally retarded. This law, binding here, is set forth in the following paragraphs.

3. Subchapter D, Chapter 55 of Pennsylvania's Decedents Estates and Fiduciaries Law, 20 P.S. § 5521(f)(i), expressly denies to guardians the power to place a person in a state center for the mentally retarded:

§ 5521 Provisions concerning powers, duties and liabilities

(f) Powers and duties not granted to guardian—The court may not grant to a guardian powers controlled by other statute, including, but not limited to, the power:

(1) To admit the incapacitated person to an inpatient psychiatric facility or State center for the mentally retarded.

4. The "other statute" which controls services to people with disabilities and places of such services, "The Mental Health and Mental Retardation Act of 1966", provides at § 201, 50 P.S. § 4201, that:

"The department shall have the power, and its duty shall be:

(1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race color, national origin, settlement, residence, or economic or social status."

Pennsylvania's 1966 Act was among the first state statutes enacted in response to the invitation in President Kennedy's February 3, 1963, Special Message to the Congress:

"[T]here is . . . a desperate need for community facilities and services for the mentally retarded. We must move from the outmoded use of distant custodial institutions to the concept of community-centered agencies. For those retarded children or adults who cannot be maintained at home by their own families, a new pattern of . . . services is needed. [S]ervices to the mentally retarded must be community based." 109 *Cong. Rec.* 1838, 1841.

The message called upon Congress and the States:

“To reduce, over a number of years, and by hundreds of thousands, the persons confined to these institutions.

“To retain in and return to the community the . . . mentally retarded, and there to restore and revitalize their lives through better health programs and strengthened educational and rehabilitation services; and

“To reinforce the will and capacity of our communities to meet these problems in order that the communities, in turn, can reinforce the will and capacity of individuals and individual families.” 109 *Cong. Rec.* 1842; *Public Papers of the Presidents*, 128, 137 (1964)

Adopted unanimously by both Houses of the Pennsylvania General Assembly, the 1966

Act’s prime sponsor, Senator Pechan, stated the MH/MR Act’s purpose:

“The object of this legislation is to make it possible for every mentally disabled person to receive the kind of treatment he needs, when and where he needs it. It will make those services available to every citizen in every community which are now available only to a lucky few in the more progressive communities. . . . Diagnosis and evaluation of his condition will precede the disposition of his case, and everything possible will be done for him in his hometown.” PA Legislative Journal, p. 76 (September 27, 1966).

In In Re Joyce Z., 1975 PA D & C. LEXIS 118, Judge Maurice B. Cohill Jr., then Presiding Judge of Allegheny County Family Court, subsequently Chief Judge of the federal District Court for Western Pennsylvania, held that a profoundly retarded teenager in need of placement outside of her home could not under Pennsylvania statute and the United States Constitution be committed to an institution, there Western Center, but instead was required to be provided by state and county retardation authorities with a community placement in foster care as well as other necessary community services and supports. Reciting the 1966 MH/MR Act, 50 P.S. § 4201, set forth above in the first paragraph of this Allegation #4, the Allegheny County Court wrote:

“These are brave words. We mean to see that the State, acting through the Department of Public Welfare, abides by them.

“Joyce has a right to life given to her by the Constitution of the United States; she has the right to treatment given to her by the Mental Health and Mental Retardation Act of Pennsylvania; this court may order that course of [community] treatment best suited to meet Joyce’s needs.” 1975 PA.D.& C. LEXIS at p. 6.

See also the late Judge Max Rosenn’s Opinion in Frederick L. v. Department of Public Welfare of Pennsylvania, 422 F.3d 151 (3rd Cir. 2005), one of his last for the Third Circuit, in which, for the Court, Judge Rosenn wrote:

“Many years before the enactment of the ADA, Pennsylvania adopted the enlightened . . . Mental Health and Mental Retardation Act of 1966 [which] set the stage for the deinstitutionalization, whenever possible, of . . . the mentally retarded . . .”

“The MH/MR Act requires DPW to ‘assure the availability and equitable provision of adequate . . . services’, 50 P.S. § 4201(1), and ‘to consult with and assist each county in carrying out . . . duties and functions imposed by this act.’ 50 P.S. § 4201(3). Therefore, we can see no other appropriate alternative but to require DPW to ensure that the state and the counties comply with the mandates of the MH/MR Act and the applicable federal laws.” 422 F.3d at 159-60.¹

Frederick L. and its holdings under the ADA and Olmstead v. L.C. & E.W. ex rel Zimring, 527 U.S. 581 (1999) are fully set forth below in this Motion.

5. In Olmstead, *supra*, the Supreme Court’s plenary construction of Title II of the Americans With Disability Act, 42 U.S.C. § 12132², the two plaintiffs were adults with

¹Judge Rosenn was Pennsylvania’s Secretary of Public Welfare when the 1966 Act was adopted and was the first Secretary responsible for its implementation.

²“Title II provides:

“no qualified individual with a disability shall, by reason of such 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 entity.”

Congress instructed the Attorney General to issue regulations implementing the

significant disabilities”, in particular: significant retardation and also, in one instance, schizophrenia, and in the other, a personality disorder. Treatment professionals had found that the needs of both could be met in the community-based programs which the State supported. Despite this professional judgment, both persons remained institutionalized. *Id.* at 2183. The Court explained that its holding that unnecessary institutionalization is a form of discrimination prohibited by the ADA was propelled by two judgments:

“First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life . . .

“Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” 527 U.S. at 581.

6. The Olmstead Court held that:

provisions of Title II, including § 12132's discrimination proscription. See § 12134(a) (“[T]he Attorney General shall promulgate regulations in an accessible format that implement this part.”). The Attorney General’s regulations, Congress further directed, “shall be consistent with this chapter and with the coordination regulations. . . applicable to recipients of Federal financial assistance under [§ 504 of the Rehabilitation Act].” 42 U.S.C. § 12134(b). One of the § 504 regulations requires recipients of federal funds to “administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.” 28 CFR § 41.51(d)(1998).

As Congress instructed, the Attorney General issued Title II regulations, see 28 CFR pt. 35 (1998), including one modeled on the § 504 regulation just quoted; called the “integration regulation,” it reads:

“A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 CFR § 35.130(d) (1998).

The commentary to the Attorney General’s Title II Regulation defines “the most integrated setting appropriate to the needs of qualified individuals with disabilities” to mean: “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.” 28 CFR pt. 35, App. A, p. 450 (1991). (emphases supplied)

“ . . . under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.” Id. at 587.³

7. Olmstead is clear that it is the individual person with a disability, not a substituted decision maker, who alone has the power under Title II to reject community placement for which retardation professionals have found the individual person qualified and capable of handling and benefitting from. The Court says so again and again:

“Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets the essential eligibility requirements for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting. See 28 CFR § 35.130(d)(1998)(public entity shall administer services and programs in “the most integrated setting appropriate to the needs of qualified individuals with disabilities”); cf. School Bd. of Nassau City v. Arline, 480 U.S. 273, 288, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) (“[C]ourts normally should defer to the reasonable medical judgments of public health officials.”). Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. See 28 CFR § 35.130(e)(1)(1998) (“Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept.”); 28 CFR pt. 35, App. A, p. 450 (1998) (“[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation.”). In this case, however, there is no genuine dispute concerning the status of L.C. and E.W. as individuals “qualified” for non-institutional care: The State’s own professionals determined that community-based treatment would be appropriate for L.C. and E.W., and neither woman opposed such treatment.” Id. at 2188.

8. In its preliminary Memorandum Opinion and Order, this Court in its 8th Conclusion of Law itself recites and seems to abide by this Olmstead holding, to wit:

“ . . . The Altoona Center residents have demonstrated their success [capability] in

³There is no issue of reasonable accommodation in this case.

integrating with society when considering the three Olmstead factors of the residents' consent to and their medical ability to integrate very adeptly and the state's fiscal . . . capability." (Emphasis supplied).

9. Nonetheless, in apparent contradiction of this conclusion and of Olmstead, the Court has held, preliminarily, that it is not the resident whose objection to community placement for which he or she has been professionally found to be qualified, able to handle, and capable of benefitting from, that is to be heeded, but rather consent from a decision-maker, not the person, but substituted for the person, a legal guardian, which is necessary before the person can be placed in the community, and has preliminarily Ordered Commonwealth defendants to accord veto-power over community living to legal guardians.

10. A preliminary holding had issued in Richard S. v. California Dept. of Developmental Services, 2000 U.S. Dist. LEXIS 22750, from the federal District Court for the Central District of California just like that issued here, which accorded to "family members, conservators and other legal representatives" veto-power over community placement. But the California Protection and Advocacy Agency, several institutionalized people with disabilities who had been found by professional judgment to be qualified for community living, capable of handling and benefitting therefrom, who did not object to community placement, and several disability organizations intervened and, upon further hearing, that District Court held on final judgment that California Defendants' policy of refusing to place institutional residents in the community if a family member, guardian or legal representative objects is unlawful.

See also Richard C. v. Houstoun, 196 F.R.D. 288, 291-92 (W.D. PA)(1999)(Standish, DJ.) affirmed without published opinion, 229 F.3d 1139 (3rd Cir. 2000) (Rendell, Rosenn CJJ; O'Neill, DJ.) (holding that family-member applicants for intervention who, despite professional

judgment for community living, sought family-member veto of community living and opportunity for community-placed persons to return to Western Center did not under Olmstead have any basis for intervention); Bonnie S. v. Altman, 683 F.Supp. 100 (D.N.J. 1988) (Sarokin, D.J.) (holding that guardians can not constitutionally have veto power over institutionalized adult persons' challenge to his or her institutional confinement); Heichelbach v. Evans, 798 F.Supp. 708, 714 (M.D. GA 1992)(Owens, C.J.)(holding that institutionalized person's liberty interest in being free of unnecessary institutional confinement renders Georgia State's policy of discharging institutionalized person only upon consent of person's guardian violative of the Due Process Clause); People First of Tennessee v. The Arlington Developmental Center, W.D.Tenn, No. 92-2213, Slip Opinion and Order Granting Class Certification, Sept. 26, 1995 at pp. 11-13, affirmed 145 F.3d 1332; 1998 U.S.App. LEXIS 9537 at p.6 (6TH Cir. 1998), cert. denied, 525 U.S. 1001 (1998). See also Pennhurst State School and Hospital v. Halderman et al, 707 F.2d 702, 707-09, 711 (3rd Cir. 1983)(holding, before ADA (1990) and before Olmstead (1999), that (1) Constitution and laws establish a presumption against institutional placement and in favor of community living; that (2) even for a minor child, parent can not constitutionally have veto power: when parent intrudes adversely upon constitutional rights of minor child, the parental rights must give way; and that (3) a neutral fact finder's determination that even a minor child no longer needs institutionalization would sustain even a minor child's substantial liberty interest in not being unnecessarily institutionalized, as well as a significant countervailing interest in the state government).

11. The right of people with disabilities to be free of unnecessary institutionalization established by Title II of the Americans with Disabilities Act and declared in Olmstead,

whenever a State's professionals find that the person is qualified for community living, can handle and benefit therefrom and does not object, was prefigured by an unbroken series of earlier Supreme Court decisions establishing on Constitutional grounds the substantiality of the liberty interest of a person with disability to be free of unnecessary institutionalization and establishing also that a professional judgment by a State-employed professional that a person does not need an institution but can benefit from community living which provides the necessary community services, gives binding expression to that liberty interest. The analysis, and the holdings, of these cases make clear that veto-power by parents or guardians violates Constitutional liberties and the Due Process Clause:

a. In Youngberg v. Romeo, 457 U.S. 307, 319, 321-22, 324 (1982)(by Powell J.), the Court held that the constitutional liberty interests of an institutionalized person with disability require the State to "provide minimally adequate or reasonable training to the person to ensure safety and freedom from undue restraint." "In determining what is 'reasonable'," the Court wrote, "we emphasize that courts must show deference to the judgment exercised by a qualified professional. . . . [D]ecisions made by the appropriate professional are entitled to a presumption of correctness."

b. In Parham v. S.R., 442 U.S. 588, 606-07 (1979) (by Burger, Ch.J.), the Supreme Court's plenary analysis of the Constitutional requisites of institutional commitment of minor children (let alone of adult children, as to whom the family relationship has already been ruptured by institutionalization), the Supreme Court wrote:

"We conclude that the risk of conflict inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a neutral fact-finder to determine whether the statutory requirements

for admission are satisfied. . . . That inquiry must carefully probe the child's background using all available sources, including, but not limited to: parents, schools, and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decision maker have the authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure."

c. In Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 442 U.S. 640, 648 (1979)(by Burger, Ch.J.), Parham's companion case from Pennsylvania, the Court recognized the provisions of Pennsylvania' state statute as to minor children—provisions parallel to those set forth at ¶ 3 above—and held that they satisfy the requirements of the Due Process Clause, as follows:

“The Mental Health and Mental Retardation Act of 1966 regulates the voluntary admission for inpatient hospital habilitation of the mentally retarded. The admission process has been expanded significantly by regulations promulgated in 1973 by Pennsylvania's Secretary of Public Welfare. 3 Pa.Bull. 1840 (1973). Unlike the procedure for the mentally ill, a hospital is not permitted to admit a mentally retarded child based solely on the application of a parent or guardian.

“ All children must be referred by a physician and each referral must be accompanied by a medical or psychological evaluation. In addition, the director of the institution must make an independent examination of each child, and if he disagrees with the recommendation of the referring physician as to whether hospital care is ‘required,’ the child must be discharged. Mentally retarded children or anyone acting on their behalf may petition for a writ of habeas corpus to challenge the sufficiency or legality of the ‘proceedings leading to commitment.’ Pa.Stat.Ann., Tit. 50, § 4426 (Purdon's 1969).

“Any child older than 13 who is admitted to a hospital must have his rights explained to him and must be informed that a status report on his condition will be provided periodically. The older child is also permitted to object, either orally or in writing to his hospitalization.

“. . . We are satisfied that these [professional judgment] procedures comport with the due process requirements set out earlier. No child is admitted without at least one and often more psychiatric examinations by an independent team of mental

health professionals whose sole concern under the statute is whether the child needs and can benefit from institutional care. The treatment team not only interviews the child and parents but also compiles a full background history from all available sources. If the treatment team concludes that institutional care is not in the child's best interest it must refuse the child's admission. Finally, every child's condition is reviewed at least every 30 days. This program meets the criteria of our holding in Parham.” (Emphases supplied)

12. The Third Circuit Court of Appeals has twice authoritatively applied the Supreme Court decision in Olmstead, *supra*, in Frederick L. v. Department of Public Welfare of Pennsylvania, 422 F.3d 151 (2005) (Rosenn, Sloviter, McKee, CJJ) and Frederick L. v. Department of Public Welfare of Pennsylvania, 364 F.3d 487 (2004) (Sloviter, Roth, Chertoff, CJJ). In its 2004 Frederick L decision, the Circuit Court held that under Olmstead “unnecessary institutionalization . . . violates the ADA when the following conditions are met:

‘[1] the State’s treatment professionals have determined that community placement is appropriate, [2] the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and [3] the placement can be reasonably accommodated, taking into account [a] the resources available to the State and [b] the needs of others with mental disabilities.’ 364 F.3d at 492, citing Olmstead, 527 U.S. at 587. (emphasis supplied).

In its 2005 Frederick L decision, the Court held that “DPW is obligated by both federal and state law to integrate eligible patients into local community-based settings.” The Court noted also the “Pennsylvania’ Mental Health and Mental Retardation Act of 1966 identifies the county as the responsible entity for providing community-based . . . services.” 422 F.3d at 157.

13. In both decisions, the Third Circuit Court of Appeals , following Olmstead, noted that “the integration imperative is qualified by the ‘fundamental alteration’ defense, under which integration may be excused if it would result in a fundamental alteration of the state’s . . . system”’. Interpreting the defense, the Court of Appeals wrote:

“A state may defend against integration claims by providing a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moves at a reasonable pace not controlled by the State’s endeavors to keep its institutions full populated.” 422 F.3d at 57, quoting Olmstead at 605-06.

and held:

“We interpret the Supreme Court’s opinion to mean that a comprehensive, working plan is a necessary component of a successful ‘fundamental alteration’ defense in these proceedings. DPW may not avail itself of the ‘fundamental alteration’ defense to relieve its obligation to deinstitutionalize eligible patients without establishing a plan that adequately demonstrates a reasonable specific and measurable commitment to deinstitutionalization for which DPW may be held accountable.” (emphasis supplied).

14. The Third Circuit held that DPW’s system-wide submission, offered as a ‘comprehensive, working plan’, did not fulfill those requirements, that therefore DPW could not invoke the ‘fundamental alteration’ defense and that DPW must instead provide the necessary community services to each eligible person, and place each theretofore unnecessarily institutionalized into the community, i.e., in Frederick L., residents institutionalized at Norristown State Hospital who had been found eligible for community living. 422 F.3d at 157-160.

15. “Acknowleg[ing] that the judiciary is ill-suited to second guess DPW’s expertise in devising a regimen of community placement,” the Court did, however, because it found that the “compelling concerns of discrimination and Patients’ rights are in tension with state agency planning”, offer “judicial guidance . . . providing DPW some specifics that are critically important to a comprehensive, effectively working [system-wide] Olmstead plan,” namely:

“[W]e believe that a viable [system-wide] integration plan at a bare minimum should specify the time-frame or target date for [each and every eligible] patient[’s] discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the

collaboration required between local authorities and the housing, transportation, care and education agencies to effectuate integration into the community.” 422 F.3d at 160. (emphasis supplied)

16. On information and belief, Commonwealth defendants have not in the preliminary proceeding here asserted any fundamental alteration defense to their duty under the ADA’s integration imperative to provide community placement and the community services and supports necessary to community living to each of the Altoona Center residents who are unnecessarily institutionalized and eligible for community living. Moreover, Commonwealth defendants could not assert such a defense here because they still do not have a system-wide, comprehensive, effectively working plan to provide community living to all unnecessarily institutionalized Pennsylvanians who are eligible therefor and to whom DPW is required by law to provide community living which meets the requirements of Olmstead and Frederick L.

17. Philadelphia County and, on information and belief, the other county authorities who are responsible for providing the necessary community services to Altoona Center residents who have been and continue to be unnecessarily institutionalized have carefully, thoroughly and professionally designed and prepared the necessary community services and many were, at the time this Court’s Preliminary Orders issued to DPW, ready to begin the extensive, careful, thorough and professional process of community visitation and transition necessary to effective, safe and professional transfer to community living.

18. The Court erred in its preliminary findings here that:

- (a) The disability characteristics and configurations which preliminary evidence assigned to Altoona Center residents may preclude community living. In fact, these characteristics are neither unique nor rare but common among unnecessarily

institutionalized people and among successful community residents. They do not preclude community placement and, in fact, it is people most severely disabled who have proved to make the greatest gains in community living.

- (b) Community living may present a heightened risk of death or injury to people with disability. In fact, the studies presented to the Court at preliminary hearing have been criticized, superseded and discredited.
- (c) Community participation—integration—sufficiently pervades at Altoona Center and Ebensburg Center. But in fact integration and community participation there pales in contrast to the very much greater interaction and productive community participation that ensues from community living and the community services and supports necessary thereto.

19. Parents of people with significant retardation in the generations of the original plaintiffs here were typically, pervasively, and emphatically advised, beginning from the birth of their child and continuing, that it was necessary and appropriate to institutionalize their child. E.g., N. K. Kelly & F. J. Menalascino, M.D. “Physicians’ Awareness and Attitudes Toward the Retarded”, Mental Retardation, vol. 13, no. 6, pp. 10-30 (1975); L. Wilker, “Chronic Stresses of Families of Mentally Retarded Children”, Family Relations, vol. 30, no. 2, pp. 281-88 (Apr., 1981). For most parents, institutionalizing their child involved significant trauma, even guilt, making it likely such parents would conclude that what they had done was necessary, even good, for their child and that they had, and continue to have, no alternatives. Parents of the generations of original plaintiffs in fact mostly did have no alternatives. Until 1971, in Pennsylvania, their children with retardation were systematically excluded from public schools, and thus were

deprived of the support system generally available, relied upon and utilized in raising non-disabled children. Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp 279 (E.D.PA 1971) and 334 F.Supp. 1257 (1972)(three judge court) (Masterson, Broderick, DJJ, Adams, CJ.). It is no accident that most people institutionalized by their parents in those years were institutionalized in their early teen years when, like most teenagers, their teenagers with disability actively, even eagerly, reached out to take control of their worlds—but parents of teenagers with disability did not have the relief let alone the support and assistance which public schooling provided to non-disabled teenagers and their parents. See M. Klaber, “The Retarded and Institutions for the Retarded-A Preliminary Research Report” in S.B. Sarason & I.J. Doris (eds.), Psychological Problems in Mental Deficiency (Fourth Edition 1969).

For these reasons and others, it is not unusual, but in fact pervasive, that so many parents of institutionalized relatives when informed that their relative is qualified for and, with necessary community services and supports, can handle and benefit from community living, should object to community living, as did original plaintiffs here before the Court. Time and time again during the last three decades the experience, documented in the literature, has been that among parents with institutionalized relatives, 90% initially oppose transfer to community and strongly prefer continued institutionalization. Later, after their relative had lived in the community, 90% strongly prefer community living for their relative. S. Larson & C. Lakin “Parent Attitudes About Residential Placement Before and After Deinstitutionalization: A Research Synthesis,” Journal of the Association for Persons with Severe Handicaps, vol. 16, pp 25-38 (1991); A. Latib, J. Conroy, C.Hess, “Family Attitudes Toward Deinstitutionalization,” in N. Ellis & N. Bray (Eds.)

International Review of Research in Mental Retardation, vol. 12, pp. 67-93 (1984); J.W. Conroy & V. J. Bradley, "The Pennhurst Longitudinal Study: A Report of 5 Years Research and Analysis" (1985); S. Spreat, J. Tellis, J. Conroy, C. Feinstein & J. Columbatto, "Attitude of Families Toward Deinstitutionalization: A National Survey." "Mental Retardation," vol. 5, pp.267-74 (1987); Conroy J. & Seiders, J. Final Results of the 1995 Family Survey, Report No. 11 of the 5 Year Coffelt Quality Tracking Project (August, 1996); J. Conroy, Seven Years Later: A Satisfaction Survey of the Families of the Former Residents of Hissom Memorial Center, Oklahoma (1999).

20. Applicants for Intervention of Right and, in the alternative, Permissive Intervention are as follows:

(a) **Joy Baquet**, 36; **Kim Hoffman**, 25; **Mathew Leonard**, 38; **Joseph Long**, 22; **Luis Maldonado**, 35; **Tracey Marshelvk**, 36 and **Ciar Sullivan**, 25, are persons with significant disabilities who live at home or in community-based residential services, in Allegheny, Chester, Montgomery, Philadelphia and Erie Counties. Each is a qualified person with a disability within the meaning of the ADA and Section 504 and an individual with retardation within the meaning of the 1966 MH/MR Act. Each is qualified for community living, services and supports and, with the necessary community services and supports, can handle and benefit from community living. Each applies for intervention and if intervention is granted, would sue, as follows:

- (i) **Joy Becquet** applies for intervention and sues by her next friend Susan Davis, a teacher of Ms. Becquet when she was in high school in the Pittsburgh School District. Before Ms. Becquet's parents died they asked Susan Davis to watch out for her, as her next friend and Susan Davis has undertaken to do so.

- (ii) **Kim Hoffman** who lives in Montgomery County, was institutionalized as a child in Defendants' Woodhaven Center, but was adopted out of Woodhaven Center by her adoptive mother, Claire Hoffman, sues here by her next friend Claire Hoffman.
- (iii) **Matthew Leonard**, was diagnosed with severe retardation, formerly unnecessarily institutionalized in a private Pennsylvania institution, Devereaux, and formerly scheduled for commitment into Pennhurst, now lives in a house which he owns in Chester County; he participates in the self-determination project known as the Autism Living and Working Project; he sues by his next friends, Virginia and Joe Leonard, a former Chair of the Pennsylvania Developmental Disabilities Council.
- (iv) **Joseph Long**, lives with his great grandmother, Rebecca Long, in Philadelphia, he is substantially without the community services necessary to avoid unnecessary institutionalization, and sues by his next friend, Marianne Roche who is further identified and described in sub-paragraph (b) below.
- (v) **Luis Maldonado**, lives in Philadelphia with his parents, Carmen Martinez Maldonado and Francisco Maldonald, who are both very ill and, respectively, aged 77 and 68, who are no longer able to care for him; he and his parents are entirely without community services and at immediate and continuing risk of unnecessary institutionalization; he sues by his next friend, Marianne Roche.
- (vi) **Tracey Marsheluk**, lives with her mother in Philadelphia; she has been waiting for community services for fifteen years but has not gotten any and is at

immediate and continuing risk of unnecessary institutionalization; she sues by her next friend, Marianne Roche.

- (vii) **Ciar Sullivan**, lives in Erie with his family; he is receiving modest community services and is at constant and continuing risk of unnecessary institutionalization; he sues by his next friend, Sean Sullivan.

The liberty and statutory interests of each of these persons may be impaired by the subject of this action; the policies of Defendants here complained of and the Court's Preliminary Orders according to legal guardians veto-power over community placement and the power to admit persons to State Centers, if made final and extended beyond the Altoona and Ebensburg Centers, threatens each of them with immediate and irreparable injury. Each of these people are at risk of unnecessary institutionalization and because of Defendants' policies here complained of and the Court's Order are and in the future will continue suffering irreparable harm.

(b) **Adam Ennis**, 32, and **Philip McGann**, 51, are persons with significant disabilities who have been and are unnecessarily institutionalized, in, respectively, Defendants' Selinsgrove Center and the Altoona Center. They are each qualified persons with a disability within the meaning of Title II of the ADA and Section 504 and individuals with retardation within the meaning of Pennsylvania's 1966 MH/MR Act. Each is qualified for community living, services and supports and, with the required community services and supports, can handle and benefit from community living. Each would not object to community placement, but to the contrary affirmatively want to live in the community so that they may experience the benefits of integration, equal citizenship and a productive, participating life in the community. The

Constitutional liberty and federal and state statutory interests of each is and will continue to be irreparably injured by their continued institutionalization under Defendants' policy and practices complained of here and the Court's Preliminary Order. The interests of each may be and are impeded by the subject-matter of the underlying action here.

(i) Mr. Adam Ennis applies for intervention and sues by his next friend, Marianne Roche, the former Administrator of Mental Retardation Services for Montgomery County, a qualified mental retardation professional, a sister of a person with significant disabilities, an officer of PA TASH, and a Pennsylvania citizen

(ii) Mr. Philip McGann, 51, is a resident of Altoona Center, who does not object to but, rather, affirmatively wants community living, in Allegheny County where he was born and near to his family. Mr. McGann has been found by the professional judgment of Defendants' own retardation professionals to be qualified for community living and capable of handling and benefitting therefrom. He and his family have participated in the design of community services and supports for him. But as a consequence of Defendants's policy and practices here complained of and the Courts' Preliminary Orders, his community placement has been halted. He therefore continues to be unnecessarily institutionalized at Altoona Center, impeding, and defeating, his Constitutional liberty interests and his federal statutory rights. Mr. McGann has suffered immediate and irreparable harm therefrom which harm is continuing. He applies for intervention here and sues by his next friends, Mr. and Mrs. Paul McGann.

(c) The **American Association on Mental Retardation** is the oldest professional organization in the United States concerned with retardation, its direct predecessors having been originally founded in the 19th Century. Its Pennsylvania Chapter, AAMR PA, is a non-profit

professional membership organization organized and existing under the laws of Pennsylvania. Its more than 400 members are retardation professionals who practice their profession in County Retardation Offices, in the Pennsylvania Department of Public Welfare and its instrumentalities, including as professionals working in Defendants' State institutions, and in community services and supports provider agencies throughout the Commonwealth, in nearly all of Pennsylvania's counties. Very many of its members are Qualified Mental Retardation Professionals who, as professional team members in counties and at State institutions, are charged to formulate Individual Service Plans, Plans of Care, Person-Centered Plans, and Discharge Plans for individual persons with retardation and other developmental disabilities including autism, cerebral palsy, epilepsy and dual diagnoses. The AAMR PA applies for intervention and would sue on its own behalf, but also on behalf of its members, asserting their members' professional and occupational interests and on behalf of its members' clients, individuals with disabilities to assert their own and their clients' liberty and federal and state statutory interests.

AAMR PA— like PA TASH, below—sues on behalf of its members and on behalf of their professional members' clients in accordance with Pennsylvania Psychiatric Association v. Green Spring Health Services, Inc., 280 F.3d 278, 288-289 (3rd Cir. 2004) (Scirica, Ch.J.), cert. denied, 531 U.S. 881 (2002), the most recent decision in a long line of decisions confirming professionals' third-party standing—and the standing of professional organizations for their professional members—to assert the rights of their professional members' clients with whom they have close, abiding, informed and non-conflicting professional relationships. See also West Virginia University Hospitals, Inc. v. Casey, 885 F.2d 11, 20 (3rd Cir. 1989), (Rosenn, Becker & Stapleton), cert denied 496 U.S. 936.

The liberty interests and hence the standing of AAMR PA member professionals—like professionals in PA TASH below—are exactly akin to the liberty interests of school teachers recognized in Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923):

“While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt liberty denotes not merely freedom from bodily restraint but also the right of the individual to . . . engage in any of the common occupations of life, to acquire useful knowledge . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

“Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare [A teacher’s] right thus to teach [is] we think within the liberty of the amendment.” (Emphasis supplied).

Meyer v. Nebraska, 262 U.S. at 401-02, speaks further, even more fundamentally, to the Constitutional liberties at issue here. Writing for the Court, Justice McReynolds took as his counterpoint Plato’s Commonwealth:

“For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: ‘that the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and . . . will deposit them with certain nurses . . . but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.’” (emphasis supplied).

But for the Court, Justice McReynolds declared:

“Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a State without doing violence to both the letter and spirit of the Constitution.”

(d) **PA TASH**, the Pennsylvania Chapter of TASH, a national non-profit membership

organization, whose Pennsylvania chapter is organized and exists under the laws of Pennsylvania, was founded in 1975 as the American Association for the Education of the Severely and Profoundly Handicapped (AESEPH), originally with a membership only of university-based educators experts in effectively teaching children with disabilities. It was summoned into existence by the United States Deputy Commissioner of Education—after the decisions in PARC v. Commonwealth of Pennsylvania, 343 F.Supp. 279 (E.D. PA 1971) and its progeny found that all children with disabilities, if taught well, can and do learn and required that the States provide to each and every disabled child a free appropriate public education— in order to assist the United States to teach public schools across the country and the professionals in them how effectively to educate each of these children. See E. Sontag & N.G. Haring, “The Professionalization of Teaching and Learning for Children with Severe Disabilities: The Creation of TASH”, *Journal of the Association for Persons with Severe Handicaps*, vol. 21, n.1, pp. 39-45 (1996).

Subsequently, TASH membership has come to include in addition to university-based education professionals, school based education and related professional, families, friends and advocates of people with significant disabilities, and people with disabilities themselves. It is the largest multi-constituency disability organization in the United States; its membership has been as high as 8,000 persons. TASH’s Pennsylvania Chapter has more than 300 members; included among them are people with disabilities, families, friends and advocates of people with disabilities, university based professional educators, school teachers and related school professionals, and professionals who work for adults in the community service systems.

In the 35 years since the PARC decision, the number of institutionalized people with

retardation and other developmental disabilities has diminished from nearly 300,000 in 1968 to under 30,000. In 1970, some 15,000 children of school age were each year sent to institutions, usually for life-long isolation and segregation there. By 1978, the effective date of the Education for All Handicapped Children Act of 1975, fewer than 1,500 were so confined, chiefly because the schools were now required by law to be open and to effectively teach children with disabilities. Since the number of children committed to institutions has diminished further toward zero, parents and families of these more recent generations of children have seen their children thrive in school, know they can with the necessary community services live productively as participating citizens in their communities, and will not abide their institutionalization. Older generations of parents did not have these experiences.

PA TASH sues for itself, to avoid economic injury by having to divert resources from other undertakings to refighting the long-past settled issues of guardianship and self-determination reopened by Defendant's policy here and this Court's Preliminary Orders. PA TASH sues also for each of its members asserting the constitutional and legal interests of (a) its members with significant disabilities now or formerly unnecessarily institutionalized or at risk of future unnecessary institutionalization; (b) its member parents, siblings and other family whose liberties and rights of association in the community with their relative with significant disabilities may be impaired; (c) its professional members whose liberty and property interests in the successful pursuit of their professional skills and judgments are impaired by the unnecessary, and defeating, institutionalization of people with disabilities who, because of their capabilities and their education, are capable of productive community living. The interests of this last set of PA TASH's professional members many of whom work in County offices, DPW

itself, and in community services provider agencies are akin to those liberty interests recognized by the United States Supreme Court in Meyer v. Nebraska, *supra*. A such, they assert the interests also of their client people with disabilities.

(e) **Pennsylvania Protection & Advocacy, Inc.** (PP&A), is a non-profit corporation organized and existing under the laws of the Commonwealth of Pennsylvania. PP&A is the entity authorized under federal law as the Protection and Advocacy Agency for Pennsylvanians with developmental disabilities pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 15041, 15043.

PP&A has the statutory authority to “pursue legal, administrative, and other appropriate remedies and approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements . . .” 42 U.S.C. § 15043(a)(2)(A)(i).

PP&A seeks to intervene in this action to protect and advocate for the rights and interests of persons with mental retardation living at Altoona Center and persons with mental retardation at Ebensburg Center. Each of these persons has a “developmental disability” as that term is defined by federal law. 42 U.S.C. § 15002(8). In addition, each of these persons has a physical and/or mental impairment that substantially limits one or more of his/her major life activities and thus qualifies as a person with a “disability” entitled to the protections of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

PP&A has an important interest that may be affected or impaired by the disposition of this case. One of PP&A’s most important priorities, established by its Board of Directors, has

been and continues to assure the provision of appropriate community-based services to persons with mental retardation unnecessarily segregated in institutions. Accordingly, PP&A has spent its time, money, and resources—including full-time staff based at Altoona Center and Ebensburg Center to provide assistance and support to residents—to advocate for the provision of services to individuals with mental retardation in the most integrated setting appropriate to their needs and, concomitantly, the development of community-based alternatives to congregate, state-operated, mental retardation institutions.

PP&A's interests are not adequately represented by the Plaintiffs in this action. Indeed, Plaintiffs' interest in remaining institutionalized regardless of any professional judgment to the contrary is in direct conflict with PP&A's interests and the interests of other residents of Altoona Center and Ebensburg Center who have the right to services in the most integrated setting appropriate to their needs.

(f) **The ARC of Pennsylvania** is a non-profit membership organization created nearly sixty years ago in the aftermath of World War II and existing under the laws of Pennsylvania. The ARC of Pennsylvania has previously been called the Association for Retarded Citizens of Pennsylvania, and, before that the Association for Retarded Children of Pennsylvania. It has been a party plaintiff accorded full standing to assert the rights of its members and its own rights in federal litigation concerning the State institution known as the Pennhurst State School and Hospital (1977), and, since then, the Western Center, and Embreeville Center as well in the landmark right-to-education case, PARC v. Commonwealth of Pennsylvania, supra (1971). The ARC of Pennsylvania's purposes are to protect the federal and state statutory rights and the Constitutional rights of people with retardation and to support and advance people with

retardation to full and productive participation in community living and to full and equal citizenship. The members of The ARC of Pennsylvania are people with retardation, their relatives and friends; some members of The ARC of Pennsylvania are so by virtue of family memberships which includes as members the person(s) with disabilities in the family, their parent or parents, and their siblings. The ARC of Pennsylvania sues on behalf of its members, as well as on its own behalf. In virtually all of the 67 counties of Pennsylvania, including the 24 counties from which the Altoona Center residents come, the ARC of Pennsylvania has individual members who are people with disabilities. It has member people with disabilities who are residents, most unnecessarily institutionalized, in most of Defendants' State institutions. It has chapters in nearly all of Pennsylvania's counties, including in all of the nearly 15 counties from which Altoona Center residents come, and including in Philadelphia, Blair, Cambria, and Allegheny Counties, respectively, the four counties with the greatest numbers of Altoona Center residents. The ARC of Pennsylvania is suffering and will suffer organizational economic harm by virtue of having to divert its resources to again address issues of unlawful veto-power of community placement and guardian-admission of people to institutions, issues which had long since been resolved. The interests of The ARC of Pennsylvania and of its members have been impeded and will be further impeded, and members and organization have and will continue to suffer irreparable harm, because of defendants' veto-power and guardian admission policy here and the Preliminary Orders.

(g) **Autism National Committee, Pennsylvania Chapter**, is a non-profit membership organization, existing under the laws of Pennsylvania, which sues on behalf of itself and its members. The members of Autism National Committee and its Pennsylvania Chapter, include

people with autism, some currently resident in communities, some in institutions, whose liberty and statutory interests may be, are and will be irreparably harmed by Defendants' actions here. The purposes of Autism National Committee, Pennsylvania Chapter are to secure equal citizenship, community living and inclusion for all of Pennsylvania's people with autism. Autism is regarded as a developmental disability related to retardation, although many people with autism have full cognitive abilities. In Pennsylvania, people with autism have in great numbers been unnecessarily institutionalized in Defendants' institutions and remain so. The interests of Autism National Committee, Pennsylvania Chapter and its members may be and are impeded by the subject-matter of this case, Defendants' policy and practices here and the Court's preliminary Order according legal guardians veto-power over community placement and power to admit persons to a state institution.

(h) **The National Coalition on Self-Determination** is a non-profit corporation existing under the laws of Virginia, made up of people with disabilities and parents and family members who have joined together to advance the principles of self-determination and the values of the community imperative that: In the domain of human rights: All people have fundamental moral and constitutional rights. These rights must not be abrogated merely because a person has a mental or physical disability. Among these fundamental rights is the right to community living. In the the domain of Educational Programming and Human Services: All people, as human beings, are inherently valuable. All people can grow and develop. All people are entitled to conditions which foster their development. Such conditions are optimally provided in community settings. And that therefore: In fulfillment of fundamental human rights and in securing optimum developmental opportunities, all people, regardless of the severity of

disabilities, are entitled to community living. In support of their application the National Coalition asserts the counterpart economic interests asserted by the other organizations here and for its member people with disability the counterpart federal and state statutory interests, all of which have been and may further be impaired by Defendants' actions here.

(i) **Speaking for Ourselves** is an independent, grass roots, self-advocacy organization, created in 1982 and existing under the non-profit laws of Pennsylvania. It is a membership organization all of whose members are people with retardation, many of them people with severe or profound mental retardation; most are former residents of Defendants' State institutions who had been unnecessarily institutionalized. Its more than 800 members live in fifteen Pennsylvania Counties, including Blair County, and some still are residents of Defendants' State Centers. The purpose of Speaking for Ourselves is to support its members to find and express their voice, to teach the public about the needs, wishes, and capabilities of people with retardation, to speak out on issues concerning them, and to develop leadership skills through real life experiences, thereby increasing opportunities for independence. Like each of the other organizations here, Speaking for Ourselves applies for intervention and sues for its individual members as well as for itself. Because of Defendants' policy complained of here and the Preliminary Orders of January 30, 2006, Speaking for Ourselves has suffered economic harm and its members have suffered and will continue to suffer immediate and irreparable harm to their liberty and other interests guaranteed by federal and State statute and the Constitution.

(j) **Vision for Equality, Inc.** is a non-profit organization created and existing under the laws of Pennsylvania whose purposes are to support people with disabilities in achieving high

quality community services and supports necessary to community living and full and equal citizenship, and to support families of people with disabilities so that they, in turn, may support their disabled family-member in community living. Vision for Equality systematically monitors the quality of community services and supports in Philadelphia County and reports its findings to the responsible state and county officials and to the public. It trains people with disabilities, families and providers. It provides advocacy assistance and support to people and families. Vision for Equality adopts here the same allegations of organizational harm and injury set forth by the other organizations, as if set forth here in the same particularity.

WHEREFORE, Applicants respectfully request that the Court:

- (a) grant Applicants intervention of right as Plaintiffs-Intervenors or in the alternative permissive intervention the standards for which Applicants also satisfy;
- (b) direct that the attached Complaint in Intervention be filed;
- (c) set a Rule 16 Conference at the earliest time convenient to your Honor;
- (d) if the Court wishes argument or hearing on this Motion, such be scheduled promptly at sometime during the weeks of March 6, 2006 or March 13, 2006, at the convenience of the Court;
- (e) direct Defendants to produce for inspection and copying, under a Confidentiality Order which Plaintiffs-Intervenors will submit to the Court, the files and records of each person resident at the Altoona Center on September 30, 2005 including those who may have been moved to Ebensburg Center which documents shall include but not be limited to each person's

current and past Individual Service Plans, Plans of Care, Person-Centered Plans of Care, and Discharge Plans on or before April 10, 2006;

(f) set down for final hearing during the month of May, 2006, Plaintiffs-Intervenors causes of action stated in the Complaint in Intervention which accompanies this Motion; and

(g) grant such temporary and preliminary relief to Plaintiffs-Intervenors as may be necessary and appropriate upon the Complaint.

RESPECTFULLY SUBMITTED

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FILED: MARCH 8, 2006

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CERTIFICATE OF SERVICE

I, Thomas K. Gilhool, hereby certify that on March 8, 2006 by depositing in first-class mail and by faxing or e-mailing a copy of the foregoing Motion to Intervene of Right as Plaintiffs was served on the following counsel:

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