

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

LINDA ALEXANDER, by her guardians and :  
next friends FRANCES ALEXANDER :  
and MARY ALEXANDER, et al, :

Plaintiffs, :

vs. :

EDWARD G. RENDELL, as Governor of the :  
Commonwealth of Pennsylvania; THE :  
DEPARTMENT OF PUBLIC WELFARE :  
OF THE COMMONWEALTH OF :  
PENNSYLVANIA, et al, :

**CIVIL ACTION NO. 05-419J**

Defendants :

JOY BECQUET, by her next friend, :  
SUSAN DAVIS; and :

KIM HOFFMAN, by her next friend, :  
CLAIRE HOFFMAN; and :

MATTHEW LEONARD, by his next friends, :  
VIRGINIA and JOE LEONARD; and :

**JUDGE GIBSON**

JOSEPH LONG, LUIS MALDONADO, and :  
TRACEY MARSHELUK, by their next friend, :  
MARIANNE ROCHE; :

CIAR SULLIVAN, by his next friend, :  
SEAN SULLIVAN; :  
each of the foregoing persons are community :  
residents at risk; :

ADAM ENNIS, a Selinsgrove Center Resident, :  
by his friend, MARIANNE ROCHE; and :

PHILIP McGANN, an Altoona Center Resident	:
by his next friends, MR. & MRS. PAUL	:
McGANN;	:
	:
each of the foregoing persons are institution	:
residents, unnecessarily institutionalized	:
	:
AMERICAN ASSOCIATION ON MENTAL	:
RETARDATION, PENNSYLVANIA	:
CHAPTER;	:
	:
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.;	:
	:
Plaintiffs - Intervenors	:

**COMPLAINT IN INTERVENTION**

\_\_\_\_\_ 1. This is a civil rights action arising under 42 U.S.C. § 1983, seeking declaratory and injunctive relief to enforce Title II of the Americans With Disabilities Act, 42 U.S.C. § 12132 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 594 and their statutorily prescribed integration regulations, as well as the Due Process, Equal Protection, and Equal citizenship Clauses of the fourteenth Amendment of the United States Constitution.

2. Plaintiffs-Intervenors have been suffering and will continue to suffer immediate and irreparable harm from the policies and actions complained of here; money damages are inadequate, and injunctive relief is therefore appropriate.

### **Jurisdiction and Venue**

\_\_\_\_\_ 3. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1343 and 1331. In accordance with 28 U.S.C. § 2201, Plaintiffs-Intervenors seek also a declaratory judgment. Venue lies in this District under 28 U.S.C. § 1391.

### **Parties**

4. Plaintiffs-Intervenors are:

(a) **Joy Baquet**, 36; **Kim Hoffman**, 25; **Mathew Leonard**, 38; **Joseph Long**, 22; **Luis Maldonado**, 35; and **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 Martinex Maldonado and Francisco Maldonado, 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 the 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.

(i) Mr. 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 sibling of a person with significant disabilities, an officer of PA TASH, and a Pennsylvania citizen. Mr. Ennis is an unnecessarily institutionalized resident in Defendants' Selinsgrove Center.

(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' 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 19<sup>th</sup> 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> Cir. 1989), (Rosenn, Becker & Stapleton), cert denied 496 U.S. 936.

(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*. As 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.

5. Defendants, as also previously named in the underlying action here, are: the Department of Public Welfare of the Commonwealth of Pennsylvania, and, in their official capacities, Estelle B. Richman, Secretary of Public Welfare of the Commonwealth and Kevin T. Casey, Deputy Secretary of Public Welfare for Retardation.

### **The Facts**

6. It has here become Defendants' policy and practice not to place unnecessarily institutionalized persons into community living or to provide to them the community services and supports necessary to community living, if the person's legal guardian, parent, or a family member objects.

7. This policy and practice arose when, as this Court has found (Finding No. 15, pp.4-5, January 30, 2005 Opinion and Preliminary Orders): "Despite any previously contrary written and verbal indications to the families and guardians of Altoona Center residents, the Defendants have indicated on the record before the Court their willingness to have all remaining residents of Altoona Center transferred to another State institution, the Ebensburg Center, if they wish move (*sic*) to the Ebensburg Center."

8. Most, if not every one, of the past and current residents of Altoona Center and future residents of Ebensburg Center are unnecessarily institutionalized, i.e., each has been the subject of professional judgment by their county-assigned professionals and by their institutional professionals that each is qualified for community services and supports, if the community services and supports which each needs for community living are provided and, with those services and supports, each can handle and benefit from community living. Upon full hearing, Plaintiffs-Intervenors will present these facts into evidence.

9. Each of the persons who have the disability characteristics and configurations set forth by the Court in its January 30, 2006 Preliminary Finding No. 3, page 3— i.e.: profound or severe retardation, middle age or elderly, unable to walk by themselves, unable to speak at all, tube-feeding, dependent upon others for care—are matched in their disability characteristics and configurations by many, many more persons, on the order of factors of five to twenty times more, who are successfully living in the community and have been, in great numbers, since at least 1970. Extensive, long-time and well-documented experience shows that people so disabled do qualify for community services and can handle and benefit from community living. The characteristics of Altoona residents recited by the Court are neither unique nor unusual, but are common and widely shared among institutional residents including those who, under judicial orders, have moved to community living from the Pennhurst Center, the Western Center, the Embreeville Center all of whose residents were placed in the community and provided with the necessary community services and supports before the institutions were closed. Well-documented experience shows that it is the most severely disabled people who gain the most from community living. The same disability characteristics are also common, and present, in

large numbers of people who have never been institutionalized but who had been living at home and now in large numbers are living out-of-their-original homes in communities and receiving the full range of necessary community services and supports. Upon full hearing, Plaintiffs-Intervenors will present these facts into evidence.

10. The community activities which the Court found to be engaged in from Altoona Center and Ebenburg Center (Finding No. 4, 10, pp 3, 4) pale by comparison to the community activities and the interaction with non-disabled persons which Attorney General Thornburg set as the standard for integration in the Commentary to his ADA regulations, 28 C.F.R. pt. 35, App.A, at p. 450 (1991), which occur regularly in the lives of similarly disabled people who are living in the community and receiving community services and supports. See also Olmstead, 527 U.S. at 600-01. Upon full hearing Plaintiffs-Intervenors will adduce proof of these facts.

11. The continued benefit of the caring and competence of Altoona Center staff which the Court properly celebrates in Findings No. 5, 6, and 9 can be secured not just by Altoona employee transfer to Ebensburg, but also by Altoona employee transfer to community which has successfully occurred in Defendants' Pennhurst, Western and Embreeville Center closings. Such staff have found their community work even more personally and professionally rewarding than their previous work in institutions and, after experience with it, strongly prefer it. There is successful experience also in transferring institution staff to community services while maintaining their State institution salary, benefit and pension levels. E.g., in Connecticut, in the closing of the Mansfield State Center. Plaintiffs-Intervenors will adduce proof of these facts upon full hearing.

12. The Court found clearly that "there is no evidence of record that suggests any former

resident of the Altoona Center who has been transferred to privately-owned community care facilities has died as a result of transfer from the Altoona Center or a lack of care at their new residence.” Finding No. 21, page 6. The Court’s additional finding that “Empirical evidence before the Court suggests that placement of mentally retarded individuals in privately-owned community care facilities increased their risk of possible death as compared to remaining in state-owned facilities” is based upon studies, presented here at preliminary hearing without significant cross-examination, which have been criticized, contradicted, and discredited by a large number of subsequent studies including, but not limited to: K.C. Lakin “Observations on the California Mortality Studies,” Mental Retardation, vol. 36 no. 5, pp. 395-400; K. F. O’Brien & E. S. Zaharia, “Recent Mortality Patterns in California,” Mental Retardation. Id. at pp. 372-79; J. Conroy & M. Adler, “Mortality Among Pennhurst Class Members, 1978 to 1989”, Id. at 395-400. Proof of these facts, as well as comparative analyses of injuries, abuse and neglect in institutions compared to community living, will be adduced by Plaintiffs-Intervenors upon final hearing.

13. For the generation of parents such as original Plaintiffs here whose children with disabilities were born in the 1960s, 1950s, 1940s, even 1930s, the complete unavailability to them of supporting community services for them and their child, the exclusion of their children from the public schools, the near universal and persistent advice of obstetricians and pediatricians at birth and throughout that their only option was to institutionalize their children, that doing so will be “best” for the child, the parents and the rest of the family e.g. see N.K. Kelly & F.J. Menalascino, “Physicians Awareness and Attitudes Toward the Retarded,” Mental Retardation, vol. 13, no. 6, pp. 10-30 (1975)), as well as the pain and trauma for parents, child

and the rest of the family that ensues upon a decision to institutionalize does often cause such parents and family to reject later professional judgments that their now adult child can handle and benefit from community living and to object to community placement. E.g., L. Winkler, “Chronic Stresses of Families of Mentally Retarded Children,” Family Relations, vol. 30, no. 2, pp. 281-88 (1981); M. Klaber, “The Retarded and Institutions for the Retarded - A Preliminary Report” in S.B. Saraon & I.J. Doris (Eds.) Psychological Problems in Mental Deficiency (Fourth Edition, 1969). Extensive experience in Pennsylvania and throughout the country shows that when community placement of an adult child and the closing of an institution are proposed, 90% of parents or family members oppose community placement and strongly prefer continued institutionalization. But, as has been universally the case, when parents and family members are included in designing and planning the necessary community services and supports and, given no veto-power in legal guardian, parent or family member, the adult child theretofore institutionalized is, as the Constitution and laws require, placed in the community despite parental or family objection, then, with the actual experience of community living by the person, 90% of parents and family members do themselves embrace it, strongly support it, and strongly prefer community living. E.g., S. Larson & K. 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 J.W. Conroy & V.J. Bradley, The Pennhurst Longitudinal Study: A Report of 5 Years of Research and Analysis (1985) and similar Reports to Oklahoma (The Hissom Center Outcomes Series (1999)) and to California (The Coffelt Quality Tracking Project (1996)).

14. Extensive studies in Pennsylvania and throughout the country of the effects of

community living with the necessary community services and supports upon formerly institutionalized people with retardation show that they gain greatly in life skills, adaptive behavior, interaction, life chances and performance, as well as in life-satisfaction from community living, and the studies show it is people who are the most severely and profoundly disabled who gain the most. Ibid.; and compare Olmstead 357 at 600-01. Upon final hearing, Plaintiffs-Intervenors will present these facts into evidence.

### **First Cause of Action**

15. Paragraphs 1-18, foregoing, are realleged and incorporated here, as if fully set forth.

16. The Americans with Disabilities Act and Section 504 of the Rehabilitation Act prohibit Defendants from the unnecessary institutionalization of people with disabilities.

17. The Acts affirmatively require that Defendants actually provide community placement and the community services and supports necessary to community living to each person who is unnecessarily institutionalized. In the authoritative words of Olmstead and Frederick L.:

“Under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when [1] the State’s treatment professionals have determined that community placement is appropriate, [and] [2] the transfer from institutional care to a less restrictive setting is not opposed by the affected individual.” Olmstead, 527 U.S. at 587; Frederick L., 364 F.2d at 492.

18. The prohibition and requirements of the ADA and Section 504 have been and are being violated here.

19. The Due Process, Equal Citizenship and Equal Protection Clauses of the Fourteenth Amendment and the decisions of the United States Supreme Court in Youngberg v. Romeo, 457

U.S. 307, 319-22(1982) in Parham v. S.R., 442 U.S. 588, 606-07 (1979), and in Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 442 U.S. 640, 648 (1979) require the same and have been and are being violated here.

WHEREFORE, Plaintiffs-Intervenors respectfully request that this Court grant declaratory judgment to Plaintiffs-Intervenors and enjoin Defendants from failing to provide community living and the community services and supports necessary thereto to each person who has been, is now and in the future may be unnecessarily institutionalized at Altoona or Ebensburg Centers.

### **Second Cause of Action**

20. Paragraphs 1-18, foregoing are realleged and incorporated here, as if fully set forth.

21. In Richard S. v. Department of Developmental Services, 2000 U.S. Dist. LEXIS 22750, the federal District Court for the Central District of California, had issued a Preliminary Injunction halting community placements and temporarily sustaining defendants grant of veto-power over community placement to parents, conservators, and other legal representatives. But after intervention by unnecessarily institutionalized individuals and disability organizations, the Court upon final consideration forbade California State defendants from according veto-power to them. Invoking Olmstead and Youngberg, supra and relying upon the Due Process Clause as well as State law (which, compared to Pennsylvania State law, was equivocal on the power of guardians), the Court held:

“[California’s] Lanterman Act . . . reaffirms a fundamental principal which the courts have also repeatedly reaffirmed . . .: Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other

individuals by the United States Constitution and laws and the Constitution and laws of the State of California.

“By giving parents, conservators, and other legal representatives veto authority to overrule [Developmental Center] residents’ preferences and/or best interests, the State Defendants’ policy allows such residents’ rights to be, in effect, waived by third parties. No matter how well-meaning these third parties may be, such an automatic veto is not appropriate.

“Summary judgment is appropriate on Intervenor’s § 1983 due process claim enjoining any such veto policy. Views of third parties may be taken into consideration in a weighing process to reach an appropriate [professional] decision, but such views cannot be conclusive.” 2000 U.S. Dist. LEXIS 22750.

Accord, Richard C. v. Houstoun, 196 F.R.D. 288, 291-92 (W.D.PA 1999)(Standish, D.J.) (The Western Center Case) affirmed without published opinion, 229 F.3d 1139 (3<sup>rd</sup> Cir. 2000) (Rendell, Rosenn, CJJ, O’Neill, DJ.); Bonnie S. v. Altman, 683 F.Supp. 100, 101-102 (D.N.J. 1988)(Sarokin, J.); Heickelback v. Evans, 798 F.Supp. 708, 714 (M.D.GA 1992)(Owens, Ch.DJ); 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 1998 U.S. App LEXIS 9537 at p. 6; 145 F.3d 1332 (6<sup>th</sup> Cir. 1998), cert. denied, 525 U.S. 1001 (1998); Pennhurst State School and Hospital v. Halderman et al, 707 F.2d 702, 709, 711 (3<sup>rd</sup> Cir. 1983)(holding before ADA (1990) and Olmstead that even for minors parents cannot lawfully be accorded veto-power.)

22. Pennsylvania Decedents, Estates and Fiduciaries Law; ch. 55, Incapacitated Persons; sub-ch. D, Powers, Duties and Liabilities of Guardians, 50 P.S. § 5521, provides expressly:

**(f) Powers and duties not granted to a 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.”

See also Chief Justice Burger's recitation of Pennsylvania Law in Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 442 U.S. 640, 648 (1979).

23. Rule 17(c), Fed. R. Civ. P., requires that the capacity of any guardian is determined by state law and, in particular, the law of the forum state. Developmental Disabilities Advocacy Ctr. v. Melton, 689 F.2d 281, 285 (1<sup>st</sup> Cir. 1982) (Aldrich, Campbell and Breyer, CJJ); Last v. Elwyn, Inc., 935 F.Supp. 594, 596 (E.D.PA 1996)(Padova, D.J.); Wolfe v. Blas, 601 F.Supp. 426, 427 (S.D.W.VA 1996)(Haden, D.J.). See generally Moore's Federal Practice, Ch. 17, § 17.25[1]; Wright & Miller, Federal Practice and Procedure, Vol. 6, ¶ 1571.

24. The ADA, Section 504, the Due Process, Equal Protection and Equal Citizenship Clauses of the Fourteenth Amendment, Pennsylvania Probate Law, Pennsylvania MH/MR Act and Rule 17(c) of the Federal Rules of Civil Procedure have been and continue to be violated here.

WHEREFORE, Plaintiffs-Intervenors respectfully request that this Court, grant declaratory judgment to Plaintiffs-Intervenors, modify and vacate Paragraph C and any related paragraphs of its Preliminary Orders of January 30<sup>th</sup>, enter a permanent injunction enjoining Defendants from according to legal guardians, parents or family members veto-power over community placement for any unnecessarily institutionalized person, and further enter a permanent injunction enjoining Defendants from allowing any guardian to admit to a State Center for Mental Retardation, including by transfer, any person with developmental disability; and

WHEREFORE, Plaintiffs-Intervenors respectfully request that the Court grant such further relief as may be necessary and appropriate.

RESPECTFULLY SUBMITTED

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Filed: March 8, 2006

**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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