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

PHYLLIS BALL, by her General Guardian, PHYLLIS BURBA, et al., Plaintiff(s), v. JOHN KASICH, Governor of Ohio, in his official capacity, et al., Defendant(s).	Case No. 2:16-cv-282 CHIEF JUDGE EDMUND A. SARGUS, JR. Magistrate Judge Elizabeth P. Deavers

BRIEF OF VOR, INC. IN SUPPORT OF MOTION FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE INTERVENOR-GUARDIANS' CROSS-CLAIMS

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VOR, Inc. ("VOR") respectfully submits this memorandum in opposition to the Defendants' motions to dismiss the cross-claims of the Intervenor-Guardians in this matter.

STATEMENT OF INTEREST

VOR is a nationwide, nonprofit advocacy organization dedicated to ensuring that individuals with intellectual disabilities receive the care and support they require in an environment appropriate to their needs. (Dwyer Decl. in Support of Amicus Participation, ¶ 2). A corollary objective is to advance family participation in the choice of treatment options, with the decisions of the disabled person and his or her family recognized as primary. *Id.* VOR has previously appeared before courts as *amicus curiae* in cases, like the instant one, that have a direct and significant impact upon the rights, care, and treatment of the developmentally disabled. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (on behalf of 141 *amici*). VOR was also permitted to file an *amicus* brief in connection with the Guardians' motion for intervention in this matter, as well as in connection with the motion for class certification. *See Ball v. Kasich*, Case No. 2:16-cv-282, 2017 WL 3172778 (S.D. Ohio July 24, 2017) (granting VOR's motion to participate as *amicus curiae* in connection with intervention motion); *Ball v. Kasich*, 307 F. Supp. 3d 701 (S.D. Ohio 2018) (granting VOR's motion to participate as *amicus curiae* in connection with class certification motion).

VOR'S REQUEST[1] TO FILE AN *AMICUS* BRIEF

The United States Court of Appeals for the Sixth Circuit characterizes leave to appear as amici curiae as a matter of privilege committed to the sound discretion of the Court. *United States v. Michigan*, 940 F.2d 143, 164 (S.D. Ohio 1991) (internal citation omitted); *United States*

[1] VOR sought the consent of the Defendants to file this brief. Counsel for OACBDD denied such consent. Counsel for the State Defendants indicated that they would not consent, but also would not object. Counsel for Governor Kasich did not respond.

v. City of Columbus, Ohio, 2000 WL 1745293 at *1 (S.D. Ohio Nov. 20, 2000). The courts within the Circuit recognize "[g]rant of leave to appeal as amici is appropriate where such parties have an important interest and a valuable perspective on the issues presented . . . ." *City of Columbus, Ohio*, 2000 WL 1745293 at *1 (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (internal quotation marks omitted). Amici may provide limited adversary support on issues through briefs and/or oral argument. *See Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). "Factors relevant to the determination of amicus status include whether or not the proffered information is timely, useful, or otherwise necessary to the administration of justice." *City of Columbus, Ohio*, 2000 WL 1745293 at *1 (citing *Michigan*, 940 F.2d at 146).

Here, VOR respectfully submits that it should be permitted to file the following concise statement relating to the legal right to ICF care and to be informed about ICF care. With the evolving realignments among the participants in this matter, the multiplicity of claims, party-specific defenses (such as standing and/or immunity), and the overgeneralizations and imprecision attendant to considering thousands of unique individuals as a homogeneous class, there is a significant danger of missing the forest for the trees. VOR thus wishes to present an overview of the Medicaid framework as well as the statutory and administrative provisions demonstrating that the developmentally disabled have a legal right to be informed of, and receive, ICF care. Maintaining the practical and actual availability of ICF care (as one of many options available) is core to VOR's mission. (Dwyer Dec., ¶ 3). Accordingly, VOR wishes to submit this brief relating specifically to the issue of the legal entitlement to ICF care and the right of individuals and their families to be notified regarding ICF care.

ARGUMENT

I. THE SOCIAL SECURITY ACT PROVIDES A LEGALLY ENFORCEABLE RIGHT TO CARE IN AN ICF

For all of the ink spilled on whether federal law recognizes an "obverse *Olmstead*" claim under the ADA, there can be no real dispute that ICF care is, in fact, an entitlement under federal law. The County Board defendants explicitly (and correctly) acknowledge as such. *See* OACBDD Br., p. 6 at n. 7 (explaining that "the ICF benefit is optional in the sense that a state can choose whether or not to include the benefit in its Medicaid Plan. Once the ICF benefit is included in the Medicaid Plan, ***the benefit becomes an entitlement***") (emphasis added). The State Defendants also implicitly acknowledge this, arguing that the Intervenor-Guardians have failed to allege facts giving rise to an independent claim that they are not receiving services (not that such a claim would be insufficient as a matter of law). *See* State Def. Br. at 19-20 ("Here, Guardians do not allege that anyone in Ohio has been denied the ability to apply for ICF services.").

The Plaintiffs, for their part, request dismissal of all of the Intervenor-Guardians' cross claims on the grounds that failure to provide ICF care does not give rise to a "discrimination claim" under the ADA or Rehabilitation Act. (Pl. Br. at 2-6). Plaintiffs are studiously silent, however, with regard to the Social Security Act, with good reason: the Social Security Act provides a legally enforceable right to ICF care, and ***presumes the availability of ICF care*** when providing for the community-based "waiver" entitlement.

A. The Statutory Framework

"Medicaid, enacted in 1965 as Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., is a cooperative federal-state program that was established to enable the states to provide medical services to those who cannot afford such services." C*hambers v. Ohio Dep't of Human*

Servs., 145 F.3d 793, 797–98 (6th Cir. 1998). "For states that participate in the program, such as Ohio, the federal government provides partial funding and establishes mandatory and optional categories of eligibility and services covered." *Id.* While participation in the program is optional, once a state decides to pursue a Medicaid plan, federal law requires that the plan "shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 U.S.C.A. § 1396a(a)(1). Further, federal law requires that "all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C.A. § 1396a(a)(8).

Under federal law, individuals with developmental disabilities have the right to choose which of the available services and supports are right for them. *See e.g.* 42 U.S.C. § 15001(c)(3) (noting that "individuals with developmental disabilities and their families are the primary decisionmakers regarding the services and supports such individuals and their families receive, including regarding choosing where the individuals live."). Specifically, the Social Security Act requires that developmentally disabled individuals be provided with "medical assistance" which, in turn, is expressly defined to include, if necessary, "services in an intermediate care facility for the mentally retarded." 42 U.S.C. § 1396a(a)(10) & 42 U.S.C. § 1396d(a)(15). For the longest time, the availability of ICF care as a Medicaid entitlement was far beyond dispute. As the Third Circuit explained in analyzing these exact provisions, "the statutory language is clear and unambiguous. Indeed, we can hardly imagine anyone disputing that a state must provide the assistance necessary to obtain ICF/MR services, and that it must do so with 'reasonable promptness.'" *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 189 (3d Cir. 2004); *see also Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) (holding that plaintiffs had legally enforceable right to

ICF services under Social Security Act); *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017, 1028 (D. Haw. 1999) (noting that claims for ICF–DD care "are entitlements once a State offers them."); *Benjamin H. v. Ohl*, No. CIV.A. 3:99-0338, 1999 WL 34783552, at *14 (S.D.W. Va. July 15, 1999) (referring to ICF care as a "Medicaid entitlement[]").

Indeed, as this Court previously recognized, the "waiver" program under which the Plaintiffs bring their claims here both etymologically and logically acknowledges the existence of the antecedent ICF entitlement: once "individuals are determined to be eligible for ICF services, they can then seek to 'waive' from an ICF placement into a 'community' placement; hence the phrase, 'waiver services.' Waiver recipients are, by definition waiving from ***their ICF entitlement***." *Ball*, 307 F. Supp. 3d at 706 n.1 (emphasis added). Any question in this regard is also dispelled by the federal government's implementing regulations under the Home and Community-Based Waiver Services program, which provide that CMS will deny or revoke approval of a state's waiver program unless the state gives assurance that "absent the waiver, beneficiaries in the waiver would receive the appropriate type of Medicaid-funded institutional care (hospital, NF, ***or ICF/IID***) that they require." 42 C.F.R. § 441.302(g) (emphasis added); *cf.* Centers for Medicare & Medicaid Services, *Intermediate Care Facilities for Individuals With Developmental Disability*, *available at* https://www.medicaid.gov/medicaid/ltss/institutional/icfid/index.html (last visited Nov. 29, 2018) (noting that "States may not limit access to ICF/ID service, or make it subject to waiting lists, as they may for Home and Community Based Services (HCBS)"). Accordingly, the Intervenor-Guardians have a right to ICF care under the Social Security Act which is enforceable under federal law.

B. *Olmstead* Did Not Change This Result

As noted by VOR in the past, neither the ADA, nor the Supreme Court's decision in *Olmstead* changed this result. Indeed, the Supreme Court's decision in Olmstead expressly rejected the theory that ICF care was somehow inappropriate or impermissible, instead recognizing the need for an array of care options:

> Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities.

Olmstead, 527 U.S. at 597. The *Olmstead* Court also emphasized that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. . . . ***Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it.***" 527 U.S. at 601-602 (emphasis added). The ADA implementing regulations are likewise, making clear that "[n]othing 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 C.F.R. § 35.130(e)(1). Congress has also made clear that the drive for greater integration need not – indeed, should not – be seen as a federal goal of closing ICFs. *See* House Report, Pub. L. 103-230, Developmental Disabilities Assistance and Bill of Rights Amendments of 1994, H.R. Rep. 103-378 (Nov. 18, 1993) ("Furthermore, the Committee would caution that goals expressed in this Act to promote the greatest possible integration and independence for some individuals with developmental disabilities not be read as a Federal policy supporting the closure of residential institutions. It would be contrary to Federal intent to use the language or resources of this Act to support such actions, whether in the judicial or legislative system.").

Thus, not only did *Olmstead* not alter the status of ICF care as a legally enforceable entitlement under Medicaid, it expressly confirmed it as such.

II. "INTEGRATION" UNDER THE ADA

Because the Social Security Act expressly establishes the right to ICF care, whether the Intervenor-Guardians also have the same right under the ADA or the Rehabilitation Act is largely a duplicative, academic question. The ADA provides that developmentally disabled individuals are entitled to receive care in "the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(b)(1)(B). In light of the very serious medical challenges faced by many in the developmentally disabled community, it may often be the case that the most "integrated" setting appropriate is, in fact, an ICF. As set forth in greater detail in the stories of the many Guardian-Intervenors, ICF care can provide individuals with a variety of supports and services that will foster more growth and independence than a "group home" offered under the community-services waiver. In other words, "integration" should mean something more than having a bed in a group home.

Group homes are no panacea. A report issued earlier this year by the Office of Inspector General of the Department of Health and Human Services found significant shortcomings after analyzing group homes in four states, finding that "health and safety policies and procedures were not being followed," which "left group home beneficiaries at risk of serious harm." U.S. Dep't of Health & Human Servs, et al., *Joint Report: Ensuring Beneficiary Health and Safety in Group Homes Through State Implementation of Comprehensive Compliance Oversight*, available at *https://oig.hhs.gov/reports-and-publications/featured-topics/group-homes/group-homes-joint-report.pdf* (last visited Nov. 29, 2018). The OIG likewise found that "[t]hese are not isolated incidents but a systematic problem," noting that "49 States had media reports of health and safety

problems in group homes." *Id.* This is not to say, of course, that all group homes are problematic, or that all ICFs are not. It is to say, however, that each situation is unique and what is the most integrated care appropriate under the circumstances should be left to the individuals and their guardians – there simply is no flawless one-size-fits-all approach.

III. THE SOCIAL SECURITY ACT PROVIDES A LEGALLY ENFORCEABALE RIGHT TO BE INFORMED OF THE AVAILABILITY OF ICF CARE

Also without merit is the State Defendants' bizarre argument that, while they are required to give developmentally disabled individuals and their guardians information about *alternatives* to ICF care, they are not required to give any information regarding ICF care itself. (State Def. Br. at 14-15). Under the implementing regulations for the Home and Community-Based Services Waiver program, Ohio is required to provide assurance to the federal government that when an individual is "determined to be likely to require the level of care provided in a[n] . . . ICF/IID" the individual or his/her guardian will be:

(1) Informed of any feasible alternatives available under the waiver; and

(2) ***Given the choice*** of either institutional or home and community-based services.

42 C.F.R. § 441.302 (emphasis added). The State Defendants argue that while they are required to give a "choice" between ICF care and waiver services, they are not actually required to inform disabled individuals and their families about ICFs. In other words, the State Defendants argue that while they have a legally enforceable obligation to permit the developmentally disabled and their guardians to make a "choice" they are free to misrepresent the options as either community care or nothing. The State Defendants argue:

> The State must assure . . . that people needing an ICF-level of care will be 'informed of feasible alternatives.' 42 U.S.C. § 1396n(c)(2). Breaking down the text, the provision modifies 'feasible alternatives' in three ways:

> - First, the alternatives being discussed are the alternatives 'available under the waiver;"
> - Second, those alternatives available under the waiver are 'at the choice of' individuals;
> - Third, those alternatives are alternatives 'to'—that is, instead of—'services in an intermediate care facility.'
>
> Taken together, these modifiers reinforce that the State must assure . . . that people will receive information about their available *waiver alternatives* . . . Nothing in the free-choice provision's language reflects . . . that a State has an obverse duty to provide information about ICFs.

(State Def. Br. at 15-16) (emphasis in original).

This hyper technical and elaborately dissembling argument is just wrong. Pursuant to 42 C.F.R. § 435.905(a), the state has a legal obligation to provide information, in plain language, concerning: "(1) The eligibility requirements;" "(2) ***Available Medicaid services***;" and "(3) The rights and responsibilities of applicants and recipients." *Id.* (emphasis added); *see also* 42 C.F.R. § 435.917 (eligibility notice required to include, among other things, "[b]asic information on the level of benefits and services available based on the individual's eligibility").

The Sixth Circuit considered and rejected a similar argument by Michigan in *Boatman v. Hammons*, 164 F.3d 286, 289 (6th Cir. 1998). In *Boatman*, a class of Medicaid recipients alleged that Michigan was violating federal law by failing to provide information about transportation services available to beneficiaries. *Boatman*, 164 F.3d at 289. Michigan alleged that it satisfied this requirement by through an asterisked statement which told beneficiaries to "[c]ontact your local DSS (Department of Social Services) office about other transportation to a Medicaid covered service." *Id.* at 290. The Sixth Circuit reversed the district court's holding that this statement was sufficient, explaining that

> Providing information that directs readers to inquire about transportation services is not the same as explicitly acknowledging in writing the requirement that recipients have the right to state-

> ensured transportation to and from medical service providers. The terms of the regulation at 42 C.F.R. § 435.905 require defendants to identify available Medicaid services in written form. The defendants have not done so and are therefore in violation of the regulation.

Id. In sum, the argument that the State has no obligation to inform Medicaid recipients of the standard (i.e., non-waiver) services available under federal law[2] is simply false.

But the State Defendants' arguments in this regard are more than just wrong; they are deeply insulting, coming from the very agencies charged with protecting the welfare of the developmentally disabled. Any meaningful "choice" between community and institutional care would require, at a minimum, awareness (and thus disclosure) of the options among which one was "choosing." That VOR, the Intervenor-Guardians, the Plaintiffs, or anyone else would actually have to ask the Court to confirm this self-evident fact (or that State Defendants would resort to such linguistic gymnastics to avoid it) is deeply troubling. Whatever else happens in this case, the right of the developmentally disabled and their families to be made aware of all the potential services and alternatives available to them should be clearly and vigorously affirmed.

CONCLUSION

For the reasons stated above, in ruling on the present Motions, VOR respectfully requests that the Court make clear that the Intervenor-Guardians (and other qualified individuals) have a right to ICF care and the right to be informed of the availability of ICF care.

Dated: Morristown, New Jersey
December 7, 2018

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By: *Diane D. Reynolds*
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[2] The County Board defendants explicitly acknowledge that there is an obligation to provide notice of ICF services under Ohio state law. (OACBDD Br. at 17). While true, these statutes do not change the fact that there is likewise a distinct and legally enforceable right to such notice under the Social Security Act as acknowledged by the Sixth Circuit in *Boatman.*

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