No. 10-1908

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANKLIN BENJAMIN, by and through his next friend, **ANDRÉE YOCK**; **RICHARD GROGG** and **FRANK EDGETT**, by and through their next friend **JOYCE MCCARTHY**; **SYLVIA BALDWIN**, by and through her next friend, **SHIRL MEYERS**; **ANTHONY BEARD**, by and through his next friend **NICOLE TURMAN**, on behalf of themselves and all others similarly situated,

Appellees,

v.

DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA and **ESTELLE B. RICHMAN**, in her official capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania.

Non-Participating Parties,

CRAIG SPRINGSTEAD, by and through his father and guardian, **BERTIN SPRINGSTEAD**; **MARIA MEO**, by and through her mother and guardian **GRACE MEO**; **DANIEL BASTEK**, by and through his father and guardian, **JOHN BASTEK**; **MICHAEL STORM**, by and through his guardian, **POLLY SPARE**; **BETH ANN LAMBO**, by and through her father and guardian, **JOSEPH LAMBO**; **RICHARD CLARKE**, by and through his father and guardian, **LEONARD CLARKE**; **RICHARD KOHLER**, by and through his sister and guardian, **SARA FULLER**; **MARIA KASHATUS** by and through her father and guardian, **THOMAS KASHATUS**; and **WILSON SHEPPARD**, by and through his brother and next friend, **ALFRED SHEPPARD**,

Appellants.

On Appeal from the Order dated March 10, 2010, by the United States District Court for the Middle District of Pennsylvania, Civil Action No. 09-01182

BRIEF *AMICUS CURIAE* OF VOICES OF THE RETARDED, INC. IN SUPPORT OF APPELLANTS' ARGUMENT FOR REVERSAL
(Filed by Consent Pursuant to Fed. R. App. P.29(a))

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 10-1908

Franklin Benjamin, et al.

v.

Department of Public Welfare, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Voices of the Retarded, Inc. makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

None

(Signature of Counsel or Party)

Dated: August 16, 2010

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I. Interest of *Amicus Curiae*[1]

Voices of the Retarded, Inc. ("VOR") is a nationwide, nonprofit advocacy organization dedicated to ensuring that individuals with mental retardation receive the care and support they need in settings appropriate to fulfill those needs. 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. VOR has previously appeared before courts as *amicus curiae* in cases, like this one, that have a direct and significant impact upon the rights, care and treatment of the mentally retarded. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (on behalf of 141 *amici*); *Heller v. Doe*, 509 U.S. 312 (1993); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (on behalf of 93 *amici*); *Ricci v. Patrick*, 544 F.3d 8 (1st Cir. 2008), *cert. denied,* 129 S. Ct. 1907 (2009); *Martin v. Taft*, 222 F.Supp.2d 940 (S.D.Ohio 2002); and *Cramer v. Chiles*, 33 F.Supp.2d 1342, 1351 (S.D. Fla. 1999).

The Disability Rights Network of Pennsylvania ("DRN") brought this action on behalf of five residents of Pennsylvania Intermediate Care Facilities for the Mentally Retarded ("ICFs/MR") against the Department of Public Welfare for the Commonwealth of Pennsylvania ("DPW") and Estelle Richman, as Secretary of

[1] This *amicus* brief is filed with the consent of all participating parties.

the DPW. (A-53-81) The case was brought as a class action seeking to relocate residents of Pennsylvania ICFs/MR to community settings. (A-53-81) The District Court granted class certification, defining the class as all persons who: (1) currently or in the future will reside in one of Pennsylvania's state-operated ICFs/MR; (2) could reside in the community with appropriate services and supports; and (3) do not or would not oppose community placement. (A-111-112; A-27) Following class certification, seven residents of ICFs/MR ("Interveners-Appellants" or "Springstead Interveners") filed a motion to intervene. That motion was denied; the Order is the subject of this appeal. (A-5-26)

VOR has an interest in this matter because it will directly affect the right of approximately 1,200 residents of ICFs/MR in Pennsylvania to choose their own care and receive the care necessary to meet their individual needs. VOR supports the Interveners'-Appellants' request to intervene in this matter because, absent such intervention, the rights of those individuals who do not wish to leave ICFs/MR and be placed in community settings will not be protected. The mass relocation of individuals from ICFs/MR to community settings has a devastating affect on the health, well-being and mortality of those individuals. *See Infra* II.B.3. For the reasons stated below, this Court should reverse the decision denying intervention and grant the Appellants' motion to intervene.

II. Argument

The Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581 (1999), established the right of mentally disabled residents to choose the best care option in light of each individual's own needs. The vague and general declaratory and injunctive relief sought by DRN, pursuant to Federal Rule of Civil Procedure 23 (b)(2), threatens to take away that right. The practical consequences of the relief being sought contradict the rights established and protected by the Supreme Court in *Olmstead.*

A. All Individuals Residing In State ICFs/MR Have A Legal Right To Choose Their Own Care

In *Olmstead*, the Supreme Court addressed the rights of mentally disabled individuals to choose their own care based on their individual needs. The Supreme Court held that the anti-discrimination provision of Title II of the Americans with Disabilities Act (ADA) of 1990, 104 Stat. 337, 42 U.S.C. §12132 requires states to place individuals in community settings, rather than institutions, only when: (1) professionals have determined that such placement is appropriate; (2) the individual does not oppose relocation; **and** (3) the State can accommodate such relocation, taking into account the resources available to the State and the needs of others with mental disabilities. *Olmstead*, 527 U.S. 581. To clarify the scope of its holding, the Supreme Court emphasized that "nothing in the ADA or in 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.

Under *Olmstead*, Interveners-Appellants have a protected interest in choosing where they receive the care appropriate for their individual needs. 527 U.S. at 602. This right has been recognized by federal and state courts across the country and most recently in Tennessee, where the District Court for the Middle District ruled in favor of individuals' and their legal guardians' right to choose their care. Specifically, the District Court held that individuals and their guardians had the right to choose care provided by an ICF/MR even when professionals determined the individuals could be provided care in a more integrated setting. The Court specifically stated that there is no federal requirement to impose community-based care on individuals. *See People First of Tennessee v. Clover Bottom Developmental Center,* Civil Action No. 3:95-1227 (M.D. Tenn., Nashville Div., Memorandum filed May 28, 2010).

The Supreme Court, in its *Olmstead* ruling, not only recognized each disabled person's right to choose their own care, but the need for a range of services which respond to the varied and drastically different needs of the broad

and diverse disability community. The Supreme Court explicitly recognized "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. In fact, citing VOR's *Amici Curiae* brief, a plurality of Justices noted: "As already observed [by the majority], the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. . . 'Each disabled person is entitled to treatment in the most integrated setting possible for that person – recognizing that, on a case-by-case basis, that setting may be in an institution.'" 527 U.S. at 604-605.

The very rights recognized and protected by *Olmstead* are in danger of being violated here, as both Plaintiffs-Appellees and Defendants proceed to railroad all residents of ICFs/MR out of those institutions and into community facilities. Justice Kennedy recognized the danger of such efforts, noting in his concurring opinion that, "[i]t would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision." 527 U.S. at 610.

In the present matter, the District Court recognized *Olmstead* as establishing and protecting an individual's right to choose their own care, stating that "[b]oth the ADA and our Supreme Court in *Olmstead* unequivocally hold that no disabled individual must accept accommodation which he or she opposes." (A-17) The District Court also acknowledged that "states need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities." (A-14) However, the District Court concluded that any concern regarding being "forced to live in community-based settings" was unfounded and based on speculation, as any individual who does not wish to relocate is excluded from the class. (A-17) The concerns of the Interveners-Appellants and VOR, however, are neither unfounded nor speculative. The District Court failed to realize that the interests of those excluded from the class would be detrimentally affected by the non-diverse decisions of those in the "class" and thus, those interests need to be protected.

B. The Relief Being Sought Violates An Individual's Right To Choose Their Own Care

Choice of residential care options is VOR's guiding principle and a right that VOR adamantly strives to protect. In this class action, Plaintiffs, in pursuit of their own deserved individual redress, seek relief that would result in the relocation of ***all*** ICFs/MR residents to community facilities. Both the relief sought by Plaintiffs and the plan proposed by Defendants to achieve that relief ("the Plan") will violate

an individual's right to choose their own care.[2] VOR's (and Interveners') concern is based on over 25 years of experience speaking out for people with mental retardation and VOR's knowledge of similar litigation filed in Pennsylvania and other states across the country. Many of these cases and the decades-long litigation movement by DRN to relocate all residents of state ICFs/MR to community centers have resulted in the closing of state institutions. The mass movement of disabled individuals, based on incomplete information, to community centers has had a devastating effect on the health, well-being and mortality of many affected individuals.

1. Provisions Of The Plan Proposed By Defendants And The Relief Sought By Plaintiffs-Appellees Will Have The Real Consequence Of Violating An Individual's Right to Choose Their Own Care

On its face, the relief sought by Plaintiffs-Appellees and Defendants may appear to be in compliance with *Olmstead*, but when examined deliberately, the "relief" they both seek endangers an individual's right to choose their own care

[2] Plaintiffs-Appellees outlined the relief they are seeking in their Brief In Support of Motion for Summary Judgment and the Proposed Order attached as Exhibit 1. (A-290-301) Defendants outlined their proposal to achieve that relief in Defendants' Motion for Summary Judgment and "The Plan – Supporting People Who Currently Reside in State Centers Who Want to Move to the Community," which was attached as Exhibit 6 to that Brief. (A-304-308)

and where he or she will receive that care. (A-290-301; 304-308) The practical consequences of imposing such "relief" violate the rights protected by *Olmstead.*

As Interveners-Appellants stated in their brief at pages 28-31, the relief sought would result in the closure of ICFs/MR facilities in Pennsylvania, leaving residents, such as the Interveners-Appellants, who oppose relocation to community centers, with no choice but to relocate to community settings. Although the Defendant's so-called "Plan" is lacking in sufficient details, it does promise the relocation of "at least" 50 people, even while acknowledging they don't know who will want to move, and noting that this number could be adjusted upward as financial conditions change. (A-304-308; 318-319). *See Also*, Brief in Support of Def. Motion to Dismiss at page 2 ("given sufficient funding to create community placements, defendants would discharge [all class members] to community placements."). (A-151.3) Like the Plaintiffs, Defendants pay lip service to "choice" but are primarily driven by quotas for relocation as funding allows. The certain outcome will be closed ICFs/MR. While Defendants acknowledge that serving current ICFs/MR residents in community programs will be expensive, they also acknowledge that as residents are transferred certain overhead expenses will not decrease as residents move out. (A-304-308; 317) Thus, as people are discharged, the center will become more expensive, on a per person basis, to

operate. This, coupled with the budgetary woes facing Pennsylvania, puts the future viability of Pennsylvania ICFs/MR in serious jeopardy as residents are relocated and admissions prevented. (A-304-308; 316). Both Plaintiffs-Appellees and Defendants recognize that potential consequence. (A-304-308; 315) Given the past practices of DRNs in Pennsylvania and across the country, this appears to be the underlying intent of this litigation. If ICFs/MR in Pennsylvania are closed, an individual's right to choose ICFs/MR care will effectively be taken away.

In addition to creating the very real and plausible risk of closing ICFs/MR, the provisions for implementing the Plan proposed by Defendants cause great concern. For example, while the Plan requires ICF/MR residents' social workers (state employees who are employed by the Defendants) and ICF/MR "Facility Advocates" to proactively assess "opposition to discharge", there are no criteria for assessing "opposition to discharge" and the "facility advocates" are not identified, nor is the source of these "advocates" described. (A-304-308) In all likelihood, the people assessing a resident's "choice" will be employed by the very people seeking to relocate all residents to community facilities. This possible manipulation of the system, as well as other concerns, are detailed in the *Amicus Curiae* brief of Diane Solano, filed by and through her brother and guardian.

Also troubling is the presumptuous emphasis on educating families about community options. Plaintiffs-Appellants continually opine that if the individuals and their families were educated about community alternatives, they would all choose to relocate to such settings. The fact is, in VOR's experience, many ICFs/MR families have visited community homes, taken part in "provider fairs," or even had providers speak at family association meetings. For the most part, these are informed and compassionate families who are educated about their options. The Plaintiffs- Appellees and Defendants belittle and ignore the fact that some individuals choose ICFs/MR as an informed decision and sometimes after failed community placements.

VOR is also greatly concerned about the many individual residents who, without the benefit of a legal guardian or advocate, are not able to make a choice or communicate that choice. One must ponder: What will happen to them? Many, if not most, current residents of ICFs/MR do not have legal guardians. (A-238) Who in this lawsuit, other than the potential Interveners-Appellants, will protect their right to choose ICFs/MR as their treatment option?

2. DRN's Nationwide Movement to Close ICFs/MR Violates An Individual's Right To Choose Their Own Care

VOR's concerns are based on the Pennsylvania DRN's markedly obvious intent in bringing the present lawsuit. This intent is evidenced by DRN's claims in the amended complaint that ICFs/MR "are not the most integrated settings appropriate to the needs of any individual resident" (A-98), and, as will be explained, the remarkably similar pattern of events in the present case as compared to lawsuits brought by other state DRNs across the country. These cases illustrate a growing movement by state governments and DRNs to close state institutions, such as Pennsylvania ICFs/MR, and relocate all residents to community settings.

The DRN is this State's federally-designated and funded Protection and Advocacy System (P&A). P&As, located in each state, are one of the four federally-funded programs authorized by the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §15001 et seq. (2000) ("DD Act"). P&As are charged "to protect the legal and human rights of individuals with developmental disabilities" (§15041) by pursuing "legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals" (§15043). While the DD Act's policy endorses residential choice and family decision-making, (42 U.S.C. 15001(c)(3)), some

federally funded programs, including some P&As, work to eliminate one of those choices: ICFs/MR.

State P&As have implemented the strategy to close all ICFs/MR through a scheme of class action lawsuits filed across the county. Like the present action, all such class action lawsuits are brought pursuant to Federal Rule of Civil Procedure 23(b)(2), which does not require notice at the time of filing and does not permit class members to opt out of the lawsuit. Furthermore, since 1996, the lawsuits have sought "community integration" as the primary relief and DRNs have achieved that relief through settlements with the States, not by Court determined Memoranda and Orders. The 28 class action lawsuits of this type filed by P&As in various states resulted in the closure of at least 15 ICFs/MR in 9 states, including two in Pennsylvania: Embreeville and Western Center.

For example, in 1994, the California P&A (now called Disability Rights California) filed a lawsuit in state court, *Coffelt v. Department of Developmental Services*, Civil Action No. 91-6401 (Cal. Super. Ct. Jan. 1994), seeking to relocate residents of California ICFs/MR to community centers. Approximately 10 named plaintiffs negotiated a settlement agreement with the state on behalf of more than 2,000 people. The majority of affected families did not participate in the lawsuit or settlement negotiations, despite the fact that a survey of ICFs/MR families found

that 98% of the respondents opposed P&A representation of their family members. Implementation of the settlement caused more than 2,000 residents to be transferred from state ICFs/MR. As a result, two institutions were closed, leaving residents with no choice but to relocate to community settings.

Similarly, in Florida, another P&A lawsuit was filed, *Brown v. Bush*, Civil Action No. 98-cv-673 (S.D. Fla. March 1998), expressly calling for the closure of state ICFs/MR. Families unsuccessfully sought intervention. Ultimately, the case was settled and per the settlement agreement, two ICFs/MR in Florida were closed, again eliminating certain residents' choice in care.

The New Jersey P&A recently filed a case, *New Jersey Disability Rights Network v. Davy*, Civil Action No. 3:05-cv-04723 (D.N.J. Sept. 2005), seeking to relocate all residents of state ICFs/MR to community facilities. The New Jersey P&A represented to the court that 2,400 people were inappropriately institutionalized in New Jersey ICFs/MR, yet a survey of families in all but one New Jersey Developmental Center revealed that 96% of all respondents were satisfied with their current placements.

The Illinois P&A filed a lawsuit similar to the present case in 2005, *Ligas v. Maram*, Civil Action No. 1:05-cv-04331 (N.D. Ill. July 2005). The case was brought on behalf of 6,000 people who reside in ICFs/MR. Nine residents sought

intervention, objecting to the Plaintiffs' claims that all residents experience unnecessary regression, deterioration, isolation and segregation, and prefer to live in a home that is integrated in the community rather than an institution. The potential interveners also objected to P&A representation of their family members. Much like the present action, because the original Complaint claimed "choice," the District Court denied intervention. The appellate court upheld denial of intervention, but questioned a class that was dependent on knowing class members' "state of mind." *Ligas v. Maram*, 478 F.3d 771 (7th Cir. 2007). In 2008, the parties proposed a settlement agreement which called for the reduction of ICFs/MR beds over a period of time, among other requirements. A group of objectors, led by the original "interveners," submitted 2,500 written objections to the Court. As a result, the Court rejected the proposed settlement agreement and decertified the class, and ultimately granted intervention to the group of objectors. *Ligas v. Maram*, Civil Action No. 1:05-cv-04331 (N.D. Ill. July 7, 2009). Settlement negotiations, which now include interveners, are still on-going in the case.

Ligas foreshadows exactly what could happen in the present case if intervention is not allowed. The parties and the Court could spend significant time and money litigating the case, only to discover during the settlement process, that

there are hundreds of objectors, causing the Court to reject any proposed settlement agreement and warranting decertification of the class. Class actions typically have a low rate of participation, sometimes as low as 1%. While a low rate of participation in a class action may not be problematic in a typical case involving claims for monetary damages, in a case such as the present case, a low rate of participation is not only detrimental, but highly likely. As *Ligas* demonstrates, a case involving analysis of the level of care needed by thousands of mentally disabled individuals, as well as their choice of care, is certain to lead to individual questions of fact and prevent valid class certification.

The lawsuits filed by DRNs follow the same pattern and have the same ultimate goal of closing state institutions and relocating residents to community centers. DRN is repeating the same legal strategy here; they ask the court to: (1) certify the case as a class action lawsuit by all residents of PA's ICFs/MR; (2) require that all center residents be evaluated by state professionals to determine if, with proper services and supports, a community placement would be appropriate; and (3) order DPW to provide a community placement to all state center residents who do not object. The parties agree to class certification and negotiate a settlement before many of the potential class members and affected individuals ever become aware of the lawsuit.

Based on the consequences of similar cases brought across the country by DRNs, as well as the current class definition, VOR strongly believes that the intent of the case is to close ICFs/MR and force individuals into community settings, even when such programs often do not provide the appropriate level of care for the individuals.

3. DRN's Nationwide Movement Creates A Substantial Risk of Abuse and Neglect And Serious Health Concerns For The Mentally Disabled

The mass movement of disabled individuals from ICFs/MR to community facilities should not be taken lightly. It has a devastating affect on the health, well-being and mortality of many affected individuals. Many of the individuals who are relocated require a greater level of care and support than that provided in community settings, such as group or family homes. In over half the states, there is detailed evidence of systemic concerns regarding the quality of care in community-based settings for persons with developmental disabilities. A summary of over 100 newspaper articles and reports detailing the very real increased risks and dangers from relocating individuals from ICFs/MR to community homes, can be found on VOR's website: http://www.vor.net/images/AbuseandNeglect.pdf. This summary details systemic abuse, neglect and death in community systems of care, affecting thousands of vulnerable people across the country.

Inappropriately relocating individuals to community settings results in tragedies ranging from physical, emotional, and financial abuse to neglect and even death. While many of these outcomes are a result of the movement described by some as a "community for all" vision for people with developmental disabilities, in fact the outcomes often reflect an inadequate consideration of the ramifications of separating vulnerable people from the specialized care they receive in ICFs/MR, while simultaneously doing away with a critical safety net (the result of closing institutions).

The lessons learned from more than 25 states should demonstrate the range of needs of the disabled, which require a wide variety of diverse care options. The safety and health risks, as well as the increase in mortality rates, for individuals who are moved from ICFs/MR to community facilities have been well-documented in numerous studies and reports.

For example, in California, over 2,000 people were transferred from California institutions for the mentally disabled between 1993 and 1995, due to the previously cited California P&A lawsuit, *Coffelt v. Department of Developmental Services*, Civil Action No. 91-6401 (Cal. Super. Ct. Jan. 1994). One year after the mass-transfer, a 1996 peer-reviewed study found that the risk of mortality was 72% higher for those who were transferred from public ICFs/MR, as compared to those

who stayed. David Strauss, Theodore Kastner, *Comparative Mortality of People with Mental Retardation in Institutions and the Community*, American Journal on Mental Retardation, 101:26-40 (1996). The 1996 peer-reviewed study was followed by 10 other studies, all of which found the state operated institution to be superior in health and safety.

The next peer-review study concerning the same 2,000 individuals was conducted in 1998. It found that the risk of mortality was 67% higher for those individuals who had been transferred. D. Strauss, R. Shavelle, A. Baumeister, R. Anderson, *Mortality in Persons with Developmental Disabilities after Transfer into Community Care,* American Journal on Mental Retardation, 102:569-581 (1998). In 1999, 4 years after the transfer, the risk of mortality was 88% higher in the community than in institutions. R. Shavelle, D. Strauss, *Mortality of Persons with Developmental Disabilities after Transfer into Community Care: A 1996 Update*, American Journal on Mental Retardation, 104:143-147 (1999). A decade later, in 2005, the risk of mortality is still 47% higher in the community than in institutions. Robert Shavelle, David Strauss, Steven Day, *Deinstitutionalization in California: Mortality of Persons with Developmental Disabilities after Transfer into Community Care, 1997-1999*, Journal of Data Science, 3:371-380 (2005).

As noted, the increased mortality rates and risks to health, safety and well-being are not limited to California, but have been documented in over half the states engaged in moving patients. In 2001 in Pennsylvania, then Auditor General Robert P. Casey, Jr. released a two year audit examining Pennsylvania's oversight of Personal Care Homes, or community facilities. The audit found serious deficiencies in the state's oversight and proposed over 30 recommendations to better protect residents' health and safety. Among other things, the audit found that DPW renewed licenses without verifying that serious violations were corrected, licensed new care homes without ensuring that administrators and staff were qualified, failed to impose fines and penalties as required by law, and investigated almost half of the complaints it received late. In the two year time period covered by the audit, capacity in care homes increased by 34%, with nearly 50,000 residents living in 1,800 personal care homes. There were just 34 employees monitoring those homes and residents. Overall, the audit found that DPW was too slow and ineffective in ensuring the safety of mentally retarded individuals living in those community facilities.

As previously mentioned, two Pennsylvania ICFs/MR were closed due to DRN lawsuits, including Western Center. The Commonwealth closed Western Center in 1998 and moved its remaining 380 residents to group homes. Parents

and families of residents made unanswered pleas and then filed last minute court appeals to block the closing, alleging injuries to residents who had already been transferred. Essentially ignored by the court, two years later, approximately 23 of those individuals had died in accidents in group homes.

III. Conclusion

While some ICFs/MR residents may be capable of living successfully in community programs, such settings are not suited to all people. The Supreme Court in *Olmstead* requires protection of an individual's right to choose the care appropriate to his or her specific needs. Moreover, the *Olmstead* decision reflects the Court's observation that a variety of care options are required to meet the varying needs of the disabled. VOR and the Appellants-Interveners do not seek to take away an individual's right to choose community placement; rather they seek to protect the rights of other residents of institutions to choose to remain in ICFs/MR. Without Appellants' intervention, the rights of those individuals will be ignored.

For the reasons stated above, this Court should reverse the District Court's order denying intervention.

Respectfully submitted,

/s/ Lesli C. Esposito

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CERTIFICATE OF SERVICE

I, Lesli C. Esposito, hereby certify that on August 16, 2010, Brief *Amicus Curiae* of Voices of the Retarded, Inc., in Support of Appellants' Argument for Reversal was served electronically via ECF or First Class Mail on the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the Microsoft Word word processing program, the foregoing Brief contains 4,315 words.

Dated: August 16, 2010

/s/ Lesli C. Esposito
Lesli C. Esposito, Esquire

CERTIFICATE OF TEXT

I, Lesli C. Esposito, hereby certify that the text of the electronically filed Brief and the text of the hard copies of the Brief are identical.

Dated: August 16, 2010

/s/ Lesli C. Esposito.
Lesli C. Esposito, Esquire

CERTIFICATE OF A VIRUS CHECK

I, Lesli C. Esposito, hereby certify that a virus check has been performed on the PDF file containing the Brief. The virus check was completed using McAfee VirusScan Enterprise–Antispyware Enterprise 8.7i.

Dated: August 16, 2010

/s/ Lesli C. Esposito
Lesli C. Esposito Esquire

CERTIFICATE OF ADMISSION TO BAR

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: August 16, 2010

/s/ Lesli C. Esposito
Lesli C. Esposito