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

NANCY MARTIN, et al.
Plaintiffs,

CASE NO: C2-89-362

v.

JUDGE SARGUS

ROBERT TAFT, et al.,

MAGISTRATE JUDGE KING

Defendants.

PLAINTIFFS' MEMORANDUM CONTRA DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

Summary and Table of Contents

Plaintiffs challenge state defendants' denial of integrated residential services to persons with mental retardation and developmental disabilities (MR/DD). Despite "Medicaid Redesign," with focus on federally funded community services, the residential waiting list now totals over 22,000 people. Ohio continues to be one of the higher users of congregate care for people with MRDD in the United States. The enactment of the ADA, adoption of the 'integration mandate' (28 C.F.R. 35.130(d), the decision in Olmstead v. L.C., 527 U.S. 581 (1999), and a considerable body of case law have clarified that institutional segregation of persons with developmental disabilities who are eligible for and may be appropriately served in integrated settings is discrimination which Congress intended to prohibit in passing the ADA.

Ohio remains invested in providing congregate care for persons with mental retardation and developmental disabilities. Ohio's expenditures for services delivered in ICFs/MR are almost double the national average. Ohio's data uses fiscal year 2003 data, which shows 2,429 people with developmental disabilities lived in non-specialized nursing homes. This is significantly higher than any state except California. Two named plaintiffs reside in nursing facilities. Defendants' recent grant application notes that Ohio spends only 21.6% of Medicaid dollars for long-term services and supports, ranking 46th in the nation.

Although many facts are undisputed, e.g. that Ohio Access 2004 is the Olmstead Plan for Ohio, these facts call into question whether Ohio has a plan which is "effective" and a wait list which moves at a "reasonable pace." Dr. Gretchen Engquist, the defendants' long-time consultant, has testified that extraordinary additional expenses will result from the relief requested by the plaintiffs. This conclusion, and the means used to reach it, are subject to question. A significantly different view is offered by James Conroy, Ph.D., based upon twenty-five years of research in Ohio and other states. Dr. Conroy is able to conclude that cost savings are significant when individuals are provided a choice of integrated versus institutional care. These, and other factors, demonstrate a dispute of fact on a material issue.

Defendants offer a selective view of Title II jurisprudence. In order to determine whether or not a state is liable for violating the ADA's integration mandate, or Section 504's provisions regarding discrimination under a program receiving federal financial assistance, the court must answer two questions: First, is the state discriminating? Second if the state is discriminating, has the state made reasonable accommodations to address the discrimination? In addition, plaintiffs can show that defendants have not met their burden of proving the affirmative defense of "fundamental alteration."

Olmstead v. L.C., 527 U.S. 581 holds that Title II of the ADA prohibits undue segregation of people with disabilities. A qualified person may not be unduly segregated in an institution if they can be reasonably accommodated. A plurality of the Court held that a state can demonstrate that it is meeting its duty if it could demonstrate that it had an effective plan in place to address segregation and a waiting list that moves at a reasonable pace.

The Third Circuit in the case of Frederick L. v. Dep't of Pub. Welfare, 422 F.3d 151 (3rd Cir. 2005) states the appropriate standard for assessing such a defense. For a plan to be effective it must contain quantifiable outcomes and a timetable for implementation.

Defendants use of Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005), ARC of Washington State Inc. v. Department of Social & Health Services, 427 F.3d 615 (9th Cir. 2005), and Rodriguez v. City of New York, 197 F.3d 611 (2nd Cir. 1999) is inapposite. Townsend v. Quasim, 328 F.3d 511(9th Cir. 2003) recognizes that some degree of change and additional dollars may be required by the ADA.

The parties agree that the "Ohio Access" is Ohio's Olmstead Plan. It is, therefore, defendants' compliance with this plan, and its 2004 update that the Court should use to measure Ohio's compliance with Olmstead. The reality faced by the plaintiff class is that significant parts of the plan were

I. Introduction

This action, originally filed in 1989, challenged the denial by state defendants of community integrated residential services to persons with mental retardation and other developmental disabilities. At the time of filing, the waiting list for community residential services was approximately 6000 people. Placements in the community were largely accomplished under a state funded "Purchase of Service" / group home program, or a "supported living" program using state and local monies.

Since that time, a number of state defendants, including three governors, three Directors of the Ohio Department of Mental Retardation and Developmental Disabilities (ODMRDD), and numerous Directors of the Ohio Department of Job & Family Services (ODJFS) have held office. The system itself has changed, undergone a "redesign," with the focus today on federally-funded, rather than state-funded, community placements.

What has not occurred is a reduction in the residential waiting list, which in the most recent figures compiled by state defendants now totals 22,000 people.[1] At the same time, Ohio continues to be one of the highest users of congregate care for persons with mental retardation and developmental disabilities in the United States.

During these seventeen years, the Americans with Disabilities Act (ADA) became law, the integration mandate (28 C.F.R. 35.130(d)) was adopted by the U.S. Department of Justice at Congress' direction, the Supreme Court decided *Olmstead v. L.C.*, 527 U.S. 581 (1999), and a considerable body of case law has been created. Under this framework, it is clear that institutional segregation of persons with developmental disabilities who are eligible for and can be appropriately

[1] Throughout this litigation, wait list numbers as compiled by the counties have been untrustworthy. As will be discussed below, the figure offered here is probably an inflated number that includes many individuals who are not currently in need of residential services (and therefore not class members) and some individuals who are already on waivers, as determined by defendants' analysis. Director Ken Ritchey acknowledged in deposition that the wait lists could "certainly be modified to be more accurate." Ritchey deposition p. II-45, l. 3.

served in integrated settings is the type of discrimination that Congress intended to prohibit in passing the ADA.

As will be set out in this Memorandum, defendants are hampered by their historical and ongoing emphasis on congregate care. Although defendants have certainly made strides through the creation of a large number of federally-funded Home and Community Based Services (HCBS) waiver slots in recent years, Ohio's move in this direction has largely been a refunding of the previous state funded supported living and purchase of service programs. Of the 11,634 people enrolled on the Individual Options waiver, more than 50% (or 6,149) are individuals refinanced from supported living (Declaration of Jim Conroy, exhibit A); more than 25% (or approximately 3,000 people) are a transfer from the Residential Facilities Waiver (Defendants motion for summary judgment p.11). The RFW was itself a refinancing of a then state funded Purchase of Service program, which in 1990 had 4,453 licensed beds (Williams deposition, exhibit 3).

The Transitions Waiver, administered by Defendant Williams, was approved by CMS January 1, 2002 and served 2,161 recipients in 2005. (Defendants' Motion for Summary Judgment, Document 757, page 19 of 52). The defendants fail to inform the Court that these recipients were previously served by another HCBS waiver, the Ohio Home Care Waiver. (Oliver deposition, joint exhibit 2, p 8: ("A number of former Home Care consumers are now served on other, more appropriate waivers. Last year, 2,338 people moved to the new Transitions Waiver for people with an ICF/MR level of care, and 41 people moved to existing waiver programs, like Individual Options.") In fact, until this year, an eligibility requirement for the Transitions Waiver was having received services under the Ohio Home Care Waiver.

Another example is the Level One Waiver, which requires an ICF/MR institutional level of care, and is limited to recipients who want to live at home or have a network of family, friends, neighbors and professionals who can provide needed services safely and effectively." (Document

757, pp. 18-19). These recipients cannot have service needs over $5000 a year. This waiver does allow the cost of day habilitation and supported employment services, which do not count towards the cap and which do no more than replace Ohio's Community Alternative Funding System or CAFS, which was taken off plan by defendants on July 1, 2005. Even defendants' own expert assumed that the for individuals seeking ICF/MR residential level of service the Level 1 waiver would probably not be the correct placement for them. (Engquist 2006 pp 95, l. 22.)

While defendants tout the growth in HCBS expenditures (which predominantly serves individuals previously funded by state or locally funded programs), they fail to show the huge growth in Ohio's expenditures for the ICF/MR program - which serves a slowly diminishing number of individuals.

Defendants now seek summary judgment on all of plaintiffs' claims in this action. These include claims under Title II of the ADA, section 504 of the Rehabilitation Act, as well as plaintiffs' Constitutional claims under the due process clause based on state statutory provisions and the decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982), and the cause of action under the equal protection clause of the Fourteenth Amendment. Defendants' motion should be denied, and this case should proceed to trial.

II. Background

A. The Named Plaintiffs

Nancy Martin

Nancy Martin is a fifty-seven year old woman who has disabilities which include cerebral palsy, mental retardation, and depression. She uses an electric wheelchair due to her cerebral palsy

and spastic quadriplegia. Ms. Martin has limited ability to speak, and communicates through use of a word book, gestures, verbalizations, pointing and nodding.[2]

Ms. Martin has lived in institutional settings for over thirty-five years. She was committed involuntarily to Mount Vernon Developmental Center after her father died and her mother was unable to care for her. She remained at Mount Vernon Developmental Center for many years. At the time Ms. Martin lived at Mount Vernon Developmental Center, the facility housed more than 300 persons with mental retardation and developmental disabilities. Mount Vernon Developmental Center is operated by defendant Kenneth Ritchey and funded by defendant Riley through Medicaid.

In 1991, Ms. Martin was removed from Mount Vernon Developmental Center and placed in the Echoing Lake Facility in Lorain Ohio, an eight-bed institution licensed by defendant Kenneth Ritchey. After surgery in May of 1993 to place a PEG Tube in her stomach to address problems she had swallowing, Echoing Lake insisted she be moved.

Ms. Martin was then moved to Echoing Ridge Residential Center, a fifty-bed ICF/MR in Stark County, which is segregated from non-disabled persons. This decision was based solely on her disability. She was weaned off the feeding tube, began to eat by mouth again, and was permitted to return to an Echoing Lake facility.

Ms. Martin applied for an Individual Options waiver in 1995, and was placed on a long waiting list because of the non-availability of waiver slots. More recently, Ms. Martin has resided in two nursing facilities in Lorain County, Autumn Aegis, and presently Lorain Manor Nursing Center." (Deposition of Nancy Martin, May 23, 2006, p. 1, line 16).

Despite eleven years on the Individual Options waiting list, Ms. Martin has not been offered an Individual Options waiver slot.

[2] Facts regarding the plaintiffs are from the Court's second opinion unless otherwise stated. These facts have remained largely undisputed throughout the litigation.

When recently asked whether she still wants to live in the community today, Ms. Martin answered "yes." (Deposition of Nancy Martin, p. 6, lines 13-18). Although she answered affirmatively to whether she lived living in Lorain Manor, she indicated that she did not consider this a community, and would like to live in the community. " (Deposition of Nancy Martin, p. 11, lines 19-25). Ms. Martin stated she did not make decisions on what activities she would do " (Deposition of Nancy Martin, p. 13, line 25, p. 14, line 1).

Claude Martin

Claude Martin is a fifty-eight year old man with disabilities of cerebral palsy with spastic quadriplegia, and mild mental retardation with severe adaptive behavior deficits. He is not ambulatory, and uses a power wheelchair. He also uses a manual wheelchair and a Hoyer Lift for transfers. Mr. Martin grooms and feeds himself independently, and is able to bathe himself but needs assistance in getting in and out of the bathtub. He also needs assistance in transferring in and out of the wheelchair.

Mr Martin was placed in the Echoing Valley Residential Home in Dayton, Ohio in 1982. Echoing Valley Residential Home is a thirty-six bed ICF/MR which is segregated from non-disabled persons. Defendant Ritchey licenses the facility, and defendant Riley provides Medicaid funds for Mr. Martin's stay at the facility.

Mr. Martin applied for community-based services through the Individual Options Waiver in January of 1993, and he was placed on a waiting list. He began receiving community-based services through the Individual Options Waiver in 1996.

Mr. Martin was quite specific regarding his prior living situation in Echoing Valley Residential Center. He stated there were 35 people who lived with him (Deposition of Claude Martin, May 22, 2006, p. 8, lines 19-21), he didn't get to make decisions if he wanted to go out and

go shopping (Deposition of Claude Martin, p. 9, lines 12-14), and that he didn't get to make other kinds of decisions regarding his living situation (Deposition of Claude Martin, p. 9, lines 15-18).

In summary, Mr. Martin explained he now got to decide what he ate, if and when he would leave his home, and go on trips in the community to see ballgames. (Deposition of Claude Martin, p.14, lines 6-25, p. 15, line 1).

Kathy R.

Kathy R. is a fifty-six year old woman with disabilities of mental retardation and chronic schizophrenia. She was involuntarily committed to Gallipolis Developmental Center in 1967, and remained there until 1974. She returned to Gallipolis Developmental Center in 1984 due to her mental retardation and behavioral disabilities. While living at Gallipolis Developmental Center, it housed about 280 persons with mental retardation and developmental disabilities

In January of 1994, Kathy R. was moved to Peterson Enterprises Ridge, a 10 bed ICF/MR in Hamilton County. Kathy R. was placed on a waiting list for community-based services in October of 1994.

Kathy R. now lives in Mountaincrest Nursing Home. She moved to Mountaincrest in March of 2006 because she stopped ambulating at her former group home, which had multiple levels of stairs she was unable to climb. (Deposition of Tammy Murray, June 7, 2006, p. 16, lines 23-24, p.17, lines 1-7). Although Kathy R. once stated she was happy at the nursing home, she has stated an interest in exploring group home options, and prefers to live with females. (Deposition of Tammy Murray, p. 20, lines 3-8).

Kathy R. is unable to participate in any activities at Mountaincrest, because the facility does not offer transportation or any onsite day programming. (Deposition of Tammy Murray, June 7, p. 21, lines 3-8). She misses activities and outings, and misses the money she earned at the workshop. (Deposition of Tammy Murray, p. 23, lines 3-8, p.34, lines 8-14).

She is also unable to do activities she performed at the group home she moved from. Specifically, she liked to bowl, to go to concerts, and to go out to eat and shop. (Deposition of Tammy Murray, p. 26, lines 13-15).

Warren B.

Warren B. is a thirty-nine year old man with disabilities including a closed head injury, mental retardation, seizure disorder, and behavioral impediments. He also has a psychiatric diagnosis of intermittent explosive disorder.

Mr. B. is developmentally disabled as the result of a closed head injury which resulted from being struck by an automobile when he was eight years old. His negative behaviors include biting, spitting, pinching, and tripping others. His mother is his guardian. Warren B. applied for the Individual Options waiver in January of 1993,

Warren B. participated in the Traumatic Brain Injury (TBI) Outlier program from August of 1997 to February of 1998, and showed progress in several areas. Upon discharge from the TBI Outlier program, Mr. B. was placed in Belmont Habilitation Center, an eighty-five bed ICF/MR which was licensed by defendant Ritchey and funded by defendant Riley through Medicaid.

While at Belmont Habilitation Center, Warren B.'s behavioral episodes increased, his ability to care for himself lessened, and he refused to eat or take medication. The Belmont County Board of MR/DD instituted proceedings to have Mr. B. involuntarily committed to Cambridge Developmental Center, a 100-bed ICF/MR operated by defendant Ritchey and funded by defendant Riley through Medicaid.

Warren B. received an Individual Options waiver slot in 2003, and was discharged from Cambridge Developmental Center in June of that year. Deposition of Lyla Kepler, November 17, 2003, p. 46, lines 12-13).

When Warren B.'s mother and guardian was recently asked for her understanding of the [IO] waiver, she responded that the waiver was his option to choose a place that he wanted to live and to get into the community, and to have the services provided for his care. (Deposition of Lyla Kepler, Vol. II, June 8, 2006, p. 114, lines 1-4). When asked the main difference between his placement at Cambridge Developmental Center and where he is now in the community, she responded that he receives more of a one on one care, it's more home-like, it's his home, and he has his own room. (Deposition of Lyla Kepler, Vol. II, June 8, 2006, p. 119, lines 13-19).

Each plaintiff is a person with a disability; qualified for residential services / ICF/MR level of care; are currently or have been institutionalized; and would choose or wish to choose an integrated setting in which to receive services. In each case they have been denied services for lengthy periods.

B. The Ohio System

Ohio has been and remains heavily invested in providing congregate care for persons with mental retardation and developmental disabilities. Ohio remains one of the largest users of congregate care in the United States. Defendants' own expert witness, in her 2003 study of ICF/MR reimbursement rates (Engquist deposition Volume 4, exhibit 3), discusses this fact, quoting a leading source, Prouty, Smith, and Lakin (hereinafter Lakin):

> "Overall, Ohio's total expenditures for services delivered in ICFs-MR were 8.7 percent of the state's Medicaid expenditures in 2001. This was almost double the national average of 4.8 percent."

Using the same resource for the most current year available, fiscal year 2004, shows that Ohio has now more than doubled the national average. This annual publication uses data provided by the states and shows that for fiscal year 2004 Ohio spent $83.90 in annual expenditure per state resident for ICF-MR, as compared to a national average of $40.62. Table 3.4, page 96, Residential Services

for Persons with Developmental Disabilities: Status and Trends Through 2004, July 2005, Edited Robert Prouty, Gary Smith, and Charlie Lakin. http://rtc.umn.edu/docs/risp2004.pdf.

Class members (and plaintiffs Nancy Martin and Kathy R.) also reside in nursing facilities in Ohio. Lakin's report shows a state by state comparison of the numbers of people with developmental disabilities in these non-specialized nursing facilities. Ohio's data uses fiscal year 2003 numbers, which indicated that 2,429 people with developmental disabilities lived in non-specialized nursing homes. This is significantly higher than any state except California. The data also show that Ohio again is more than double the national average of people in nursing facilities as a percentage of all people receiving ICF-MR services, waiver services and nursing facility services Ohio (Table 3.13, page 114.) Disturbingly, Defendant's own expert testified that in 2005 there were 1,116 people with developmental disabilities admitted to Ohio's nursing homes. (Engquist deposition, p.71, l. 2.) In 2006, named plaintiff Kathy R. became another Ohioan with DD admitted to a nursing facility - an admission required because she was no longer ambulatory and her previous placement in a 10 bed ICF/MR had stairs. (Murray deposition, pp 18, 19, ll. 19-24, 1-8.)

The defendants' June 15, 2006, grant application ("Transforming Ohio's System of Long Term Supports")(Exhibit 2, attached hereto) says, at page 1, "[w]hile facing many of the same challenges as other states, Ohio is quite different due to a longstanding, heavy reliance on facility-based care for people with disabilities;" and "Ohio's system is out of balance. Ohio spends only 21.6% of its Medicaid dollars for long-term services and supports for in-home services, ranking 46th in the nation (Burwell, Medstat, 2005)." Finally, the document states "Ohio must fundamentally change its approach to the provision of, and funding for, long-term services and supports." (Exhibit 2, pp. 1-2.)

Ohio's Real Choice grant (Exhibit 2), after discussing lack of balance between community based services and institutional services, and the powerful role of provider interests, notes "there is

growing recognition that 'business as usual' is simply not sustainable." (p. 5); "Because facility based service expenditures are so much higher than home care, even a small percentage increase to nursing facilities ends up costing the state considerably more dollars than a larger increase on the community-based services side of the ledger." (p. 12). "Other challenges to Ohio's system include:

- Funding increases for facility-based service providers that are guaranteed by statute.
- Pervasive over-bedding in the nursing facilities services sector.
- A rank of 46th in state spending on facility based versus community based services.
- Ohio is one of the few states that does not have a state funded, in-home services program.
- Ohio does not cover personal care as an optional service under Medicaid.
- Ohio's Home care waiver for individuals under age 60 with disabilities has a waiting list of 1600 consumers.
- County boardsd of MRDD currently report over 20,000 individuals with mental retardation and developmental disabilities awaiting enrollment on a waiver.
- Ohio's PASSPORT Medicaid waiver for elders has a waiting list of 1400 eligible individuals."

In summary, although the number of community waiver "slots" has increased, residential placements in the community continue to be scarce except for persons in crisis or emergency situations, who then go to the top of the waiting list, while spending for institutional placements continues to increase dramatically.

III. Argument

A. Standard of Review for Summary Judgment

This case is before the court on the defendants' motion for summary judgment under Rule 56, Fed. R. Civ. P. Rule 56(c) reads, in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

> any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554, 557 (6th Cir. 2003), the Sixth Circuit stated that summary judgment is appropriate:

...where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).... While a court must draw all inferences in a light most favorable to the non-moving party, it may grant summary judgment if the record, taken as a whole, could not lead to a rational trier of fact to find for that party. *Matsuishita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)."

As observed by this Court in *Martin v. Taft*, 222 F. Supp. 940, 979-980 (2002), "[s]ummary judgment will not lie if the dispute about a material fact is genuine; 'that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248....Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 US. 317, 322. ....When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. n34 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000).

It is true, as well, that summary judgment is disfavored in civil rights cases. Civil rights actions are subject to special scrutiny on motions for summary judgment. *Davis v. Connecticut General Life Insurance*, 743 F. Supp. 535, 537 (D. Tenn. 1990).

Finally, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. *Id.* Under this standard, the motion must fail.

B. The Testimony of Defendants' "Expert" Witness is Improper and Should Not Be Admitted

As noted in federal rule 56(e), testamentary evidence offered in support or opposition of a motion for summary judgment must be "facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therin." For a witness to give opinion testimony, Rule 56 requires compliance with Federal Rules of Evidence 702. See *United States v. Ohio Edison Co.*, 2003 U.S. Dist. LEXIS 2919 (S.D. Ohio 2003). As stated by the Court in the case of *Cowan v. Treetop Enterprises*:

> Moreover, under Federal Rule of Evidence 104(a), the Court must make a threshold determination as to whether the expert's opinion should be admitted. Likewise, Federal Rule of Civil Procedure 56(e) only permits consideration of evidence admissible under the Federal Rules of Evidence.
>
> The United States Court of Appeals for the Sixth Circuit has observed that "close judicial analysis of such technical and specialized matter is necessary not only because of the likelihood of juror misunderstanding, but also because expert witnesses are not necessarily always unbiased scientists. They are paid by one side for their testimony." *Turpin v. Merrell Dow Pharm., Inc.*, 959 F.2d 1349, 1352 (6th Cir. 1992). "If an opinion is fundamentally unsupported, then it offers no expert assistance to the jury. Furthermore, its lack of reliable support may render it more prejudicial than probative, making it inadmissible . . . ." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) (citations omitted); *Robinson v. Union Carbide Corp.*, 805 F. Supp. 514, 523 (E.D. Tenn. 1991).

Cowan, 120 F. Supp. 2d 672, 684 (U.S. Dist. , 1999)

Based on this standard, the testimony of Gretchen Engquist should not be considered by the Court.

1. Legal conclusion are not permitted

While the federal rules allow expert testimony on an ultimate issue, Federal Rule of Evidence 704, the federal courts have long held that opinion testimony on a legal issue should not be allowed. *Woods v. Lecureux*, 110 F.3d 1215 (6th Cir.). Even while the rules allow testimony on an ultimate

issue, the courts have ruled that opinion testimony on a legal issue comports with Rules 701, 702, and 704, in that it is not helpful to the jury, nor Rule 403, in that it is prejudicial.[3] *Id.*

An often cited case in this regard is *Torres v. County of Oakland,* 758 F.2d 147 (6th Cir. 1985). The *Torres* court summarized the difficulty caused by such testimony:

> The problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury. This "invade[s] the province of the court to determine the applicable law and to instruct the jury as to that law." *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir.) *cert. denied* 464 U.S. 895 (1983). *See also Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir.) *cert. denied* 434 U.S. 861 (1977) ("It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge."); 3 J. Weinstein & M. Berger, supra, at para. 704[02], page 704-11. Although trial judges are accorded a relatively wide degree of discretion in admitting or excluding testimony which arguably contains a legal conclusion, *see Stoler v. Penn Central Transportation Co.*, 583 F.2d 896, 899 (6th Cir. 1978), that discretion is not unlimited. This discretion is appropriate because it is often difficult to determine whether a legal conclusion is implicated in the testimony. *See, e.g., Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) ("The task of separating impermissible questions which call for overbroad or legal responses from permissible questions is not a facile one."); *Wade v. Haynes*, 663 F.2d 778, 783-84 (8th Cir. 1981) *aff'd sub nom. Smith v. Wade*, 461 U.S. 30 (1983).

Torres, 758 F.2d at 150.

Torres also sets out the standard that has been used by the Circuit since that time: opinion testimony should be excluded if the terms used by the witness have a "separate, distinct and specialized meaning in the law different from that present in the vernacular." *Id.* at 151.

The court then turned to the specific question before them, and determined that the testimony in question must be excluded. It noted that the term used by the witness was "almost verbatim" from the statute in question (Title VII), and that the legal use of the term ("discrimination") was specialized and more precise than the meaning generally given to it. *Id.*

Various cases have applied *Torres* with little difficulty. As noted in *Woods v. Lecureux*, 110 F.3d 1215 (6th Cir.), there has been some disagreement in cases involving deliberate indifference

[3] *Torres* was based on an analysis of lay opinion testimony, and thus implicates Rule 701. The Court's analysis applies with equal force to expert testimony under Rule 702, however, as the court was analyzing Rules 704 and 403.

claims. Thus, in *Heflin v. Stewart County*, 958 F.2d 709 (6th Cir.) *cert. denied* 506 U.S. 998 (1992), the Court upheld testimony by a witness that prison officials were "deliberately indifferent" because the witness used that term in a way "an ordinary layman would describe such conduct." *Id.* at 715. In *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994) *cert. denied* 513 U.S. 1111 (1995), however, the Court ruled that the term "deliberate indifference" was properly a legal term. Thus, opinion testimony on that matter was improper and the appellate court reversed a jury verdict for the plaintiff.

More analogous to this case, however, is the application of *Torres* by this Court in *United States v. Ohio Edison Co.*, 2003 U.S. Dist. LEXIS 2919 (S.D. Ohio 2003). There, the Court excluded expert opinion testimony by a consultant whose testimony would include only legal matters, not factual ones. The Court ruled that interpretation of (EPA) regulations was the function of the judge, and that allowing testimony on legal matters, even by one who had worked contemporaneously with the government agency at the time in question, would invade the province of the Court.

Torres and *Ohio Edison* mandate that the conclusions offered by defendant's witness Engquist must be disallowed. Dr. Engquist's disclosures and her testimony in deposition, as well as the affidavit filed with the current motion, demonstrate that her conclusions are exclusively legal terms, derived from the Act in question. Specifically, her disclosure in 2006 offers the conclusion that "To consider placing all individuals with MR/DD in community, non-congregate settings would require Ohio to incur significant costs and change the nature and structure of current MR/DD programs, and would constitute a fundamental alteration of the existing system." She again uses the term in her 2006 deposition, and also concedes that she is using the legal definition of the term from the ADA, stating that the terms she is using are as defined by the ADA (page 101-102, ll. 24-5 "Q. When you use fundamental alteration, you use that term as it is meant in the ADA 504 regulations? A. Given that I'm not a lawyer. Q. And in the Olmstead decision? A. Right. And I'm not a

lawyer. I'm a psychologist.") She testifies that the state's Olmstead plan is "an effective plan," again using a specific legal term this time from the *Olmstead* decision itself. *Id.* at p. 49 ll. 20-22 ("Q. So when you say effective plan, that term is out of the Olmstead decision? A. Yes. But the way people have interpreted it is actionable. You're moving, and you can see where you are moving to.") No where in her disclosures or deposition testimony is an alternative generic or lay definition of these terms offered. Under *Torres*, therefore, her testimony should be excluded.

2 Dr. Engquist is merely an agent of the defendants and their lawyers

As noted above, trial courts are given broad discretion in their gatekeeping function with expert witnesses because, in part, because "[t]hey are paid by one side for their testimony." *Turpin v. Merrell Dow Pharm., Inc.*, 959 F.2d 1349, 1352 (6th Cir. 1992). In addition to offering only legal conclusions that should not bind the trier of fact, it is apparent on the record in this case that Dr. Enquist has, in the course of several years, become merely an agent of the defendants and their Washington counsel, and is merely a conduit for hearsay facts and defendants' legal arguments.

First, Dr. Engquist has testified that she is no longer a principal at EPP consulting, instead working on retainer on an as needed basis. (Engquist deposition, p 8. ll. 13-19.) Other than her testimony in this case, she now works only on one matter, and that is the ICF/MR conversion pilot project. *Id.* p. 15, ll 3-5. Her testimony is provided under a verbal agreement between EPP principal Yvonne Powell and the Washington law firm of Covington and Burling, which has been retained by the attorney general to provide assistance to defendants in this case.. *Id.* ll 14 - 22. Exhibit 3 (retainer agreement between Ohio Attorney General and Covington and Burling.)

As established in her deposition, she has done multiple deliverables for Ohio. She has designed new reimbursement methodology for ICFs/MR and the reimbursement rate for the IO and Level One waiver (DDP). She has been an active consultant to ODMR/DD and defendant Ritchey.

Moreover, her testimony shows that much of her work is simply a reiteration of information given to her by the defendants. E.g Enquist deposition (pp IV- 5 ll. 1-6 "Did you analyze this data yourself or was it someone in your department that did this? A. JFS did this." p. 80 ll. 1-5 "Is there a document that reflects this other than your disclosure? A. This was the summary document almost verbatim. I put it in a different format than I received from JFS.")

3. Dr. Engquist's methodology does not comport with Rule 702

Opinion testimony is the exception. Lay witnesses may give opinion testimony only in limited circumstances. Evidence Rule 702 otherwise allows opinion testimony to be given where the "scientific, technical, or specialized knowledge" of an expert "will assist the trier of fact to understand the evidence or to determine a fact in issue." In this case, defendants have not laid a proper foundation to allow Dr. Engquist to offer the opinions she does.

Again, it is necessary to examine the nature of the opinions that are offered. They are, seen most favorably to defendants, policy conclusions shaped around legal definitions. This are not matters outside of the knowledge of a non-expert; rather, they are a conglomeration and reiteration of the factual matters and legal arguments offered by the defendants in the case.

The testimony is not "the product of reliable principles and methods" that the witness has applied "reliably to the facts of the case." A review of her work for the defendants and other states shows that her training and expertise are largely in the area of measurement of costs and applying that information to develop rate setting formulas, a highly different specialty. The opinions offered here are not statistical analysis, as she testified that the calculations she offered were "just math." (Engquist deposition, pp. IV-82 ll. 1-5 "Q. It is not a statistical analysis in any way? It's just math? A. It's just math. It's just summing the claims up and looking at the unduplicated number of recipients to the claims.") She did not conduct surveys of individuals, or analyze the characteristics of the class or any part of it, nor did she compare this data with other states. E.g. *Id.* at p 92, ll. 12-20 (regarding

a comparison of other states "A. Anecdotally. I look at the tables. Ohio is sort of in the middle relative to the average. I didn't count the number of states that they are above or below.")

As noted above, her deposition shows that she provided an opinion based on information that she did not prepare herself, instead relying on data prepared specially for this litigation by defendants staff and attorneys. E.g Enquist deposition (pp IV- 5 ll. 1-6 "Did you analyze this data yourself or was it someone in your department that did this? A. JFS did this." p. 80 ll. 1-5 "Is there a document that reflects this other than your disclosure? A. This was the summary document almost verbatim. I put it in a different format than I received from JFS.")

Finally, with regard to the cost figures offered to support her conclusions, there is no analytical basis offered for the examples she uses. For these cost factors to be valid, every member of the class (or a valid statistical sample) would need to have the characteristics listed by the witness. She offers no averaging or other statistical methodology to justify her choices.[4] In deposition she acknowledges that some of the Medicaid costs she attributes to waiver services also accrue to institutions, a factor not included in her analysis, Engquist IV-99 - 100, ll 20 - 4 and that day program, which allows the person to leave the home and reduces staff dependent would not be provided to any member of the class "because some of the individuals may not be able to go to the program, which is the case as you know many times." *Id.* p. 86 ll. 4-6.

In fact, the basis for these calculations are wholly subjective and constructed solely for this litigation. This is not the type of reliable methodology envisioned by the rule, and it should not be permitted in this case.

[4] In fact, even a cursory examination of the available data shows that significant numbers of individuals on the wait list do not have serious chronic medical conditions. See Conroy declaration, exhibit D.

C. Defendants Are Not Entitled to Summary Judgment On Plaintiffs' ADA or Section 504 Causes of Action[5]

As noted above, summary judgment can only lie when there is no material dispute of fact or, absent such a dispute, the defendants would be entitled to judgment as a matter of law. In this case, there remains a serious dispute of fact regarding the impact of awarding relief to the plaintiff class. Additionally, there are questions of fact regarding whether defendants have met their burden to show that they have a comprehensive, effectively working "Olmstead" plan, including a wait list for integrated services that moves at a reasonable pace. Also, defendants have misstated the legal test this court should apply, and while offering some facts regarding their "progress" have failed to provide significant information to the court about how that "progress" has affected the class of individuals in this case. Finally, there is a legal / factual issue related to whether the defendants have violated Title II as described by Justice Kennedy in his *Olmstead* concurrence by actual discrimination against the Plaintiff class. Plaintiffs will deal with each issue separately.

1. There is a serious dispute of fact regarding the effect of relief in this case.

Most of the facts in this case are 'undisputed'. For example, there is no dispute that the "Ohio Access" and its update in 2004 are the "Olmstead" plan for Ohio. (Oliver deposition, Joint Exhibit 1, 2.) As will be discussed below, there is no dispute about the growth in waiver slots in Ohio, although there is abundant information (beyond that provided by defendants) about how those slots were used viz a viz the plaintiff class. These facts call into question whether the state has a plan that is "effective" and a wait list that moves at a "reasonable pace."

The most significant factual dispute between the parties remains on the impact of relief for the class, whether there would be additional costs associated with that relief, and if so what would be

[5] Defendants essentially concede the common analysis under these two laws, and plaintiffs and the plaintiff class will analyze them together as well.

those additional costs.[6] On this issue, the evidence offered by the two expert witnesses paint vastly different pictures.

Defendants offer the testimony of Gretchen Enquist, Ph.D., their long time consultant, that the relief requested by the plaintiff class will result in extraordinary additional expenditures. See Enquist affidavit, attachment 1. This conclusion and the means she uses to reach it are certainly subject to question, as demonstrated in her 2006 deposition at pp IV-82. Significantly, the algorithm / formula she uses is not based on research, but rather on her subjective view of the factors at play in this case. Nonetheless, this is the evidence offered by defendants for the purposes of summary judgment.

A significantly different view is offered in the research and testimony of James Conroy, Ph.D. regarding both costs and quality of life for those like class members who are served in community settings. See Declaration of James Conroy, Ph.D., ¶ 29, 2006 deposition of 2006 at pp. , and Exhibit 3 to that deposition, 2006 disclosure. After some 25 years of research in Ohio and many other states, Dr. Conroy is able to conclude that costs savings are significant when individuals are provided a choice of integrated versus institutional care.

Additionally, and ironically, Dr. Engquist acknowledges the high cost of institutional care in her 2003 report to defendants on ICF/MR costs in Ohio from 2003 (2006 deposition Exhibit 3). In fact, defendants own documents demonstrate the significant cost savings associated with serving those with an institutional (ICF/MR) level of care through waiver services rather than placement in an institution. Not only is this true as a matter of waiver methodology,[7] but defendants witness Linda Lewis-Day has testified that the cost savings have become more significant as the state has

[6] The legal question of whether additional costs equate with a fundamental alteration is discussed below.
[7] Home and Community Based Waivers must, by statute, be cost neutral as compared to ICF/MR costs in order to be approved by CMS. *See* 42 U.S.C. § 1396n. Testimony by Linda Lewis-Day as cited above provides a dramatic example of the cost savings to the defendants achieved through the IO waiver, with an average cost savings to the state of over $30,000 per year in Medicaid costs per resident.

gained more experience with management of the waivers. (Linda Lewis-Day deposition, pp. II- 119-120.)

Other examples could be offered, and some are mentioned below, but these are enough to demonstrate that there is a dispute of fact on a material issue. A trial is necessary to allow the trier of fact to hear testimony, weigh evidence, and resolve this dispute.

2. Defendants are Not Entitled to Judgment as a Matter of Law

Defendants offer the Court a highly selective view of the state of Title II jurisprudence, one obviously intended to suggest that plaintiffs can prove no set of facts that would entitle them to relief. Yet under the evolving standards, particularly as set forth by the Third Circuit, Plaintiffs can show that the defendants have, in fact, not met their burden of proving the affirmative defense of "fundamental alteration."

a. The status of the fundamental alteration defense

Title II of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. Secs. 12131, et al., prohibits discrimination on the basis of disability by a public entity. Sec. 12131 specifies:

> Subject to the provisions of this Title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

28 C.F.R. Sec. 35.130(d), a regulation known as the "Integration Mandate", states: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities".

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 794 provides that "[n]o otherwise qualified individual with a disability in the United States,..., shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. Sec. 794(a).

Congress ordered that the Attorney General's Title II regulations "shall be consistent with" regulations in part 41 of Title 28 of the Code of Federal Regulations implementing Section 504 of the Rehabilitation Act, 42 U.S.C. Section 12134(b), which provides:

> A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

28 C.F.R. Sec. 41.53.

In order to determine whether or not a state is liable for violating the ADA's integration mandate, or Section 504's provisions regarding exclusions from participation in, denial of the benefits of, or being subjected to discrimination under a program or activity receiving Federal financial assistance, the court must answer two questions: First, is the state discriminating? In other words, are qualified individuals with disabilities being denied community residential services? Second, if the state is discriminating, has the state made reasonable accommodations to address the discrimination?

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court noted the two-step nature of the determination of liability:

> [T]he Attorney General, in the integration and reasonable modifications regulations...made two key determinations. The first concerned the scope of the ADA's discrimination proscription, the second concerned the obligation of the states to counter discrimination. As to the first, the Attorney General concluded that unjustified placement or retention of persons in institutions...constitutes a form of discrimination based on disability, prohibited by Title II....Regarding the States' obligation, to avoid unjustified isolation of individuals with disabilities, the Attorney General provided that States could resist modifications that "would fundamentally alter the nature of the service, program, or activity.

Olmstead at 596-597.

In the action before this court, with regard to the ADA's discrimination proscription, the plaintiffs are qualified individuals with disabilities whose requests for integrated community-based residential services have been denied by defendants. *Olmstead* makes it clear that undue discrimination of qualified individuals has been defined by Title II of the ADA and the integration

mandate (28 C.F.R. Sec. 35.130(d)) as discrimination per se. "We affirm the Court of Appeals' decision in substantial part. Unjustified isolation, we hold, is properly regarded as discrimination based on disability." *Olmstead* at 597.

This leads to the second step of liability determination, whether defendants have made reasonable accommodation to address the discrimination. A plurality of the Court then went on to suggest means by which a state could demonstrate that it complied with the requirements of Title II. The *Olmstead* plurality's example of a means of demonstrating reasonable accommodation is:

> If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.

Olmstead at 605-606.

Very few cases had been decided at the time this court last reviewed the case law on this issue. It is worth noting, however, that the more penurious view of *Olmstead* taken by some early decisions, particularly *Williams v. Wasserman*, has not become the prevailing view. Rather, the circuit courts have required that states take meaningful steps to address the problem of unduly segregated people with disabilities, and a considerable body of case law has developed regarding what constitutes a reasonable accommodation and what specifics that a comprehensive, effectively working plan should contain. In its second appearance at the Third Circuit Court of Appeals, the Court in *Frederick L. v. Dep't of Pub. Welfare*, 422 F.3d 151 (3rd Cir. 2005) stated:

> The lengthy procedural history of this case reveals that we would be promoting confusion rather than clarity if we were to remand without providing DPW some specifics that are critically important to a comprehensive, effectively working plan. To alleviate the concerns articulated in Olmstead, we believe that a viable integration plan at a bare minimum should specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.

Frederick L., 422 F.3d at 160.

"Ohio Access," Governor Taft's Strategic Plan to Improve Long-Term Services and Supports for People with Disabilities, February 2004, An Update to the original February 2001 Report" is Ohio's Olmstead Plan. (Deposition of Tracy J. Williams, page 10, lines 20-24, page 11, lines 1-2, June 8, 2006). Yet the record in this case demonstrates that the defendants have in many respects failed to implement the very terms of this plan.

Defendants cite *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005) for the proposition that summary judgment has been granted on the ground that the relief sought was not required by the ADA or the *Olmstead* decision. *Sanchez* involved allegations that since California paid lower wages to HCBS service providers than it paid to employees in state institutions, California was violating 42 U.S.C.A. Sec. 1396a(a)(30). Unlike *Martin*, summary judgment in *Sanchez* was based on whether or not 42 U.S.C.A. Sec. 1396a(a)(30) creates a private right of action, a question of law which the *Sanchez* Court decided in the negative.

Although *Sanchez* did go on to grant summary judgment to state defendants on the plaintiffs' ADA Title II and Sec. 504 of the Rehabilitation Act claims, this determination was based on the Ninth Circuit's analysis of the record before the district court, which found that the plaintiffs had failed to establish any material factual dispute with respect to three key issues:

First, the court held that "even if unjustified institutionalization is occurring, [Sanchez and the Providers] have failed to show that an increase in wages and benefits for community-based direct care workers would remedy the alleged violation." Second, the court held that the relief proposed...is not a "reasonable modification" of California's current policies and practices because the $1.4 billion of extra expenditure they request would represent a forty percent increase in the State's budget for developmentally disabled services. Third, the court held that California already has in place an acceptable plan for deinstitutionalization, the disruption of which would involve a

fundamental alteration of the State's current policies and practices in contravention of the Supreme Court's instructions in *Olmstead.*

Sanchez, 416 F.3d at 1063.

Similarly, defendants' reliance upon *ARC of Washington State Inc. v. Department of Social & Health Services*, 427 F.3d 615 (9th Cir. 2005), as an example of summary judgment in an ADA Title II case is misplaced. Here the issue was whether Washington's HCBS program could be capped. The Ninth Circuit based its decision on the record below, in which the State demonstrated that it has a comprehensive, effectively working plan, and that its commitment to deinstitutionalization is genuine, comprehensive, and reasonable. *ARC* at 621.

Defendants first claim that the relief sought is not a reasonable modification (Defendants' motion for summary judgment, Document 757, page 35 of 52), and then observe that neither the ADA nor *Olmstead* creates an absolute right to services in the community. Whether or not this assertion is correct, their basis for this is *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2nd Cir. 1999), a case which addressed whether the State's failure to include safety-monitoring services and other personal care services in its Medicaid plan violated the Medicaid Act, the Rehabilitation Act, or the ADA. What *Rodriguez* in fact decided regarding the ADA was that:

> the ADA requires only that a particular service provided to some not be denied to disabled people....Thus, New York cannot have unlawfully discriminated against appellees by denying a benefit that it provides to no one.... Instead, it holds only that "States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide."

Rodriguez at 618, quoting *Olmstead* at 602.

Defendants cite *Townsend v. Quasim*, 328 F.3d 511(9th Cir. 2003), for the proposition that the ADA does not mandate the provision of new benefits (Defendants' motion for summary judgment, Document 757, page 36 of 52). What *Townsend* stated is considerably different:

> The district court's reliance on *Rodriguez* in support of its determination that Mr. Townsend is requesting new benefits not currently provided by the state's Medicaid

> program is misplaced. As Rodriguez makes clear, where the issue is the location of services, not whether services will be provided, Olmstead controls.

Townsend at 517. (Emphasis in original).

Townsend goes further, noting that "[i]f services were determined to constitute distinct programs based solely on the location in which they were provided, *Olmstead* and the integration regulation would be effectively gutted." *Id.*

Sanchez is also again cited by defendants for a statement that *Olmstead* does not require "the immediate, state-wide deinstitutionalization of all eligible developmentally disabled persons[.]" (Defendants' motion for summary judgment, Document 757, page 36 of 52, citing *Sanchez* at 1067-68). The precedent to this statement by the Ninth Circuit was a statement that when there is evidence that a State has in place an effective comprehensive deinstitutionalization scheme, "the courts will not tinker with that scheme." *Sanchez* at 1067. The situation in California was considerably different than the situation in Ohio.

b. Ohio's Olmstead plan does not comply with Title II / 504.

The most recent decision in *Frederick L.* provides the greatest guidance for the Court at this stage of the proceedings. It requires that the state, in order to prove a fundamental alteration defense, must show that its Olmstead plan is "effective," and goes on to define that term by requiring that the state's plan have objective and quantifiable goals and a timetable. Ohio's plan fails to meet this test in every regard.

Defendants' argument has a finely polished public relations gloss to it, skimming the surface of recent activity to argue that the growth in waiver slots and the closure of two DCs should demonstrate their compliance with the ADA and Section 504. Like a view of a city from above, however, this view fails to get into the details of the streets, where the real life of the city exists. That view shows that Ohio's plan has largely gone unimplemented, and that even the parts that have been implemented have had no more than a marginal effect on those in institutions.

i) Ohio's plan has failed

The parties agree that the "Ohio Access" is Ohio's Olmstead plan. It is, therefore, the defendants' compliance with this plan and its 2004 update that the Court should use to measure Ohio's compliance with *Olmstead*'s requirements.[8] (The table at page 2 of appendix A provides a good list of the steps that defendants had stated they would take to implement the plan.) This plan includes creation of the Level One and Level Three waivers; expansion of the IO waiver; redesign of the RFW waiver, redesign of the CAFS program; and development of the Community Model Waiver (CAM) and ICF/MR conversion waiver. All this activity would be completed by state FY 2007, beginning July 1, 2006.

The reality, however, is that significant parts of the plan were never implemented. The CAM waiver, for 200 individuals, was applied for and then withdrawn. (Lewis-Day deposition, p. 143.) The RFW was not redesigned but instead was ended by the state, with the slots being rolled onto the IO waiver. *Id.* at p. 139 l. 9, 120, l. 17 (see discussion of "refinancing", below). CAFS, rather than being redesigned, was taken off plan by the state, and has been replaced by waiver "day habilitation" services. *Id.* pp. 159, 160. Some two years after the target date (FY 05), the Independence Plus waiver for 200 slots has not advanced beyond a concept paper. *Id.*, p 147. The ICF/MR conversion waiver was eliminated by the Ohio General Assembly, which substituted a 200 person pilot.[9] And the Level III waiver, designed to meet the needs of individuals with higher needs, has been

[8] Several witnesses testified that the plan is in the process of being updated, but that no draft was currently available. Plaintiffs reserve the right to supplement this memorandum should a new update be published.

[9] Defendants, oddly, seek to absolve the state of responsibility for this failure because it was done by the legislature. Title II and Section 504 bind the state government and, as noted by the Third Circuit in the case of *Helen L. v. DeDario*, 46 F.3d 325, 338-39 (3d Circuit 1995), "[t]he ADA applies to the General Assembly of Pennsylvania, and not just to DPW. DPW can not rely upon a funding mechanism of the General Assembly to justify administering its attendant care program in a manner that discriminates and then argue that it can not comply with the ADA without fundamentally altering its program. . . . [S]ince the Commonwealth has chosen to provide services to Idell S. under the ADA, it must do so in a manner which comports with the requirements of that statute."

abandoned, leaving the IO waiver as the only vehicle for individuals who wish to choose services outside of an ICF/MR institution. *Id.* p. 132.

Moreover, the IO waiver is now closed to new enrollment. Lewis Day deposition p. 138, as is the Level One waiver. *Id.* p 162. Ritchey, p. 46. Defendants have decreased the number of people who can be served on the Level One waiver, from a projected 6100 to 5,134. The defendants had sought to limit this waiver to 4100, but amended that figure based on a survey of county officials. (Linda Lewis Day 2006 deposition, page 159, line 7) Most significantly, every witness testified that waiver growth has ended, and that there is no plan to seek additional state dollars to further expand waiver services. E.g. Williams, p. 44; Lewis Day, p. 162.

There are many and complex reasons that defendants can offer for the many failures of Ohio Access 2004, including federal compliance issues, legislative resistance, and litigation between providers and the counties. None of these reasons, however, can change the simple fact that the state has largely failed to meet the goals that it set for itself in its Olmstead plan.

ii) Ohio's plan does not materially affect those in institutions or at risk of institutionalization

It is beyond dispute that the bulk of the new waiver growth touted by defendants is simply a refinance or "redesign" of state and local funded community services. Since 1996, Ohio has allocated waivers through a statutory priority scheme, and has also tracked those allocations in a Waiver Tracking System. As detailed below, this data tracks the use of federal waiver programs to refinance existing community placements.

Level One -- The Level One waiver has been used in the past to refinance the family resources program (Ritchey 2003 deposition p 57, l. 18) and is currently being used to refinance Adult Services (Linda Lewis Day 2006 deposition, p. 159, l. 16.) Of the 3,312 individuals listed as enrolled on the Level 1 waiver earlier this year, 2,023 were enrolled under the priority category of

refinancing Adult Services. No person was enrolled through the category of deinstitutionalization (Conroy declaration and exhibit B).

Individual Options -- As noted above, the IO waiver is the primary waiver serving people with MR/DD. Defendants have made significant changes to the waiver, addressing concerns that have the federal government has had with Ohio's MRDD waivers (Engquist 2006 deposition, p. 46-47 (p 46 line 21, through 47, line 3). However, close examination of defendants' assertion of significant growth in this waiver reveals that at least 75% of current recipients of this waiver are merely refinanced from previous programs. There is no evidence that this refinancing, which has drawn down significant federal dollars, has allowed people languishing on the waiting list to access services.

Using data from the Waiver Tracking System as of June, 2006, there were 11,634 individuals enrolled on the Individuals Options waiver. Defendants acknowledge that in 2004 approximately 3,000 people transferred from the RFW waiver (see below) to the IO waiver. (motion for summary judgment, page 11). In addition to this refinancing, there are 6,149 individuals who were refinanced from the supported living program (Conroy declaration, Exhibit A). Only 147 of current IO enrollees are individuals that were deinstitutionalized, and only 163 were enrolled from the regular waiting list. *Id.*. The growth in numbers served by the IO waivers is almost exclusively due to county efforts to utilize existing state subsidies and their own local money. (Linda Lewis Day 2003 p 21 lines 12-21, and p 24 lines 1-7.; Exhibit 6, October 2003 Priority Status Totals by County).

Residential Facilities Waiver (RFW) - The residential facilities waiver was, as defendants noted in their motion, "a mechanism to shift the funding of ODMR/DD's group home program from pure state and local dollars to a Medicaid funded program." Motion for Summary Judgment page 12. The RFW waiver has been eliminated, and individuals that were served in this program are now moved to the IO program. These changes in funding streams have not resulted in any growth

in community based programs. The program this waiver replaced was called the Purchase of Service program. In 1990 the Purchase of Service program had 4,453 licensed beds (Williams deposition, exhibit 3).

The numbers are clear: less than 200 individuals have been transferred from institutions under the defendants' Medicaid redesign program. The growth in slots offered by defendants as justification for summary judgment in their favor has not resulted in any significant change in who receives services in the community, only how that is paid for. The defendants mistake growth in Medicaid funded programs with real progress in ending undue segregation as required for an effective Olmstead plan.

iii) Ohio's plan does not have measurable outcomes or timetables

The requirement of *Frederick L.* is plain: an effective Olmstead plan must have measurable outcomes, and timetables to meet them. Ohio's plan, now played out, has neither. Nor is this merely a function of chronology, as the testimony cited to above shows that the waivers are closed; there are no plans to seek additional waiver slots; and there are no plans to seek additional monies that would allow expansion. On this record, the defendants cannot be found to have complied with the requirements of ADA / 504, and summary judgment must be denied.

c. Plaintiffs' Requested Relief is Reasonable

Plaintiffs have asked that all individuals "in need of placement" be provided a choice of integrated or institutional services. The state's waiting list has served as a proxy for this group throughout the litigation. As noted above, however, all parties have agreed that the county maintained wait lists could be more accurate.[10]

[10] For example, in an analysis prepared for this litigation and identified by Dr. Engquist, the defendants have identified that 1,142 individuals who are identified on the wait list but are already receiving waiver services.

There is agreement, however, between both plaintiffs' expert and the defendants, as testified to by Dr. Engquist, that there are 22,178 individuals on the current wait list. This includes 2,668 people on the waiting list who are currently in ICFs/MR (ICF MR Public and ICF MR Private) (page IV-5 of Engquist declaration) and 688 people in nursing facilities. (SNF and ICF), or a total of 3,356 individuals who are currently individualized and have sought integrated services. On this record, this would be the absolute minimum number of people the state would need to serve. It does not, however, address others who have been excluded from the wait list, or those who will be at risk of institutionalization over the next year to five years.

There are, of course, many other measures that could be used by the parties to suggest a target number for the Court to use, should that become necessary. For the purposes of this motion, however, it is noteworthy that the defendants' own witness has testified that an expansion of up to 10,000 community / waiver slots over a six year period (essentially the growth of the last six years) is a reasonable pace. Engquist deposition, pp. 102, ll. 10-20 (as corrected by errata sheet)("Q. At one point you mentioned that Ohio has served 9,000 to 10,000 additional people in six years? A. Yes. Q. Is that a reasonable pace? A. I believe so, yes. That specifically refers to your entire class that you refer to in the third amended complaint. You suggested there were 9,000 plus the people who will be seeking or are seeking from the waiting list. But that was a figure that you used and it seems to be a pretty reasonable pace from 2000 to 2006."). This fact alone suggests that summary judgment for the defendants is inappropriate.

d. Ohio discriminates against those in institutions

While much case law has developed around the reasonable accommodation standard in *Olmstead* and the plurality opinion, which suggests standards by which a state may meet the

requirements of Title II,[11] little has been said about the concurrence of Justice Kennedy in that case, and the question of actual discrimination. Although Justice Kennedy was skeptical that undue segregation or isolation alone could amount to a violation of Title II, his opinion offers a different view of the protections of that law, one based on actual discrimination against the person with a disability. Stated differently, he wrote that:

> To establish discrimination in the context of this case, and absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received differential treatment. Regulations are an important tool in identifying the kinds of contexts, policies, and practices that raise concerns under the ADA. The congressional findings in 42 U.S.C. § 12101 also serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned. Indeed, those findings have clear bearing on the issues raised in this case, and support the conclusion that unnecessary institutionalization may be the evidence or the result of the discrimination the ADA prohibits.

Olmstead, 527 U.S. at 613 (Kennedy, J. concurring).

Defendants fail to address this aspect of the law in their memo, and offer no facts to demonstrate that plaintiffs and the plaintiff class are not treated differently than those who do not have a disability. This is sufficient to deny them judgment as a matter of law.

Moreover, the record contains significant evidence that class members who have been institutionalized are, in fact, treated differently than others. Plaintiffs Nancy Martin and Claude Martin are emphatic in noting that they are not and were not, respectively, given choices of food, living companions, activities, and other day to day matters where people without disabilities take choice for granted. (See Deposition of Claude Martin, May 22, 2006, p. 8, lines 19-21, p. 9, lines 11-14, p. 9, lines 15-18, p. 14, lines 6-25, p. 15, line 1. Deposition of Nancy Martin, May 23, 2006, p. 9, lines 10-11, p. 11, lines 21-25, p. 12, lines 1-6, p.. 13, lines 20-25, p. 14, line 1, p. 14, lines 11-17, line 25, p.15, lines 10-19, p. 15, lines 21-24). Lyla Kepler, parent and guardian of plaintiff Warren B.,

[11] As noted by defendants, the bulk of the appellate and trial court decisions have chosen to use the plurality as the lynch pin of their discussion. *See* Defendants Memorandum, p. (Doc. 757)

offers similar examples in her deposition (Deposition of Lyla Kepler, June 8, 2006, p. 114, lines 1-4, p. 119, lines 13-19). Kathy R's guardian representative, Tammy Murray, discusses the difficulties faced by Kathy in seeking activities or companionship because she is institutionalized due to her disability. (Deposition of Tammy Murray, June 7, 2006, p. 16, lines 23-24, p. 17, lines 1-7, p. 20, lines 3-8, p. 21, lines 3-12, p. 23, lines 4-11, p. 26, lines 13-15, .34, lines 8-24) The record is replete with facts that will demonstrate that those individuals who are institutionalized are isolated and denied equal access to services because they are in an institutional placement.

Beyond failing to acknowledge this issue, the defendants go so far as to characterize the state's developmental centers (and by implication other ICFs/MR) as "home-like." This characterization is offered even as the defendants are on notice that the federal Medicaid agency, the Center for Medicaid and Medicare Services (which somehow has obtained the acronym CMS) has notified them that under no circumstances would it allow a home and community based waiver to be utilized in a wing of an ICF/MR. Williams deposition, Exhibit 10. This letter is highly instructive of the viewpoint of the federal agency most heavily involved with funding residential services to the class. In particular, the letter provides a strong sense of the difference between an institutional placement and one that is more homelike, congregate care versus more integrated, homelike care. Individuals who have meals prepared in a central kitchen, receive medical care on grounds, in some cases work where they live, and live with as many as 30 other people per ward, all with disabilities, cannot be considered to be in a "home-like" or integrated environment.

Plaintiffs have demonstrated both material facts at issue, and that defendants have incorrectly analyzed the law and the record in this case. Accordingly, summary judgment on the plaintiff class' ADA / 504 claims should not be granted.

D. Defendants are Not Entitled to Summary Judgment on Plaintiffs ' Constitutional Claims

Defendants seek judgment on the plaintiffs' constitutional claims. They offer no factual evidence, but rather argue the law in a fashion that largely mirrors a motion to dismiss or for judgment on the pleadings. The Court has previously addressed many of these issues in its written opinions in this case.

1. Plaintiffs Claim Under Procedural Due Process

This cause of action, and the underlying constitutional framework, was addressed by the Court in *Martin I*, 840 F.Supp. 1175 (S.D. Ohio 1993), rejecting the arguments now raised by defendants. The Court ruled, at p. 1206, that: "plaintiffs have stated a claim for denial of procedural due process with respect to the protected interest created by § 5123.182, namely, their interest in the creation of a plan for provision of residential services for those who are eligible and on a waiting list." Additionally, the Court found a cause of action under §5123.62, finding that that section also created property rights.

Defendants here simply reiterate their arguments that no protected interest is created by these statutes, an argument previously rejected by this Court, and the motion should be denied.

2. Plaintiffs' Claim Under *Youngberg*

The Court in *Martin I* provided a thorough analysis of this question, and concluded that the law supported a claim for those involuntarily committed. *Id.* at 1207. ["Some portions of plaintiffs' claim are well within the scope of Youngberg. See Complaint, P 299 (failure to provide support services threatens plaintiffs' health and safety), and P 303(c) (failure to provide training threatens plaintiffs' safety)."] Additionally, plaintiffs contend that many individuals are held "against their will," including those held there by guardians without a commitment hearing. See deposition of Ron Koslowski, Executive Director of APSI, the state's public guardian for people with MR/DD, at 24, ll. 11-12 (stating that APSI has 728 wards confined to Developmental Centers). Many if not all of

these individuals could be served in integrated settings if they were available. He testified that APSI sometimes is forced to use DCs for their wards because they are the only placement available. *Id.* at 39, ll. 15-24; p. 41, ll. 14-18 ("Oftentimes, people get placed in a developmental center because it is the only choice, I mean the only option that's available for a person to go to because there isn't anything else available.")

Finally, plaintiffs' continue to preserve for any appeal the Court's limitation of *Youngberg* to conditions in institutions, rather than recognizing the authority of *Thomas S. v. Flaharty*, 902 F.2d 250 (4th Cir. 1990). *Thomas S.* recognized that state officials must comply with the presumptively valid judgment of their treating professionals when that judgment recommends community placement for a resident, and that the requirement of minimally adequate treatment compliments the general constitutional requirement that treatment should not be provided in a setting that unduly confines the individual.

3. Plaintiffs' Equal Protection Claims

Plaintiffs acknowledge that the heightened scrutiny for people with disabilities suggested by the findings of the ADA, and relied upon by this Court in *Martin I*, would likely receive little deference by the Supreme Court under *City of Boerne*. Defendants misstate the holding in *Clebourne*, however, and fail to acknowledge the similarity of Congress' finding regarding stereotypes of people with disabilities and the language of *Clebourne* regarding whether discrimination based on stereotypes of people with disabilities can ever be rational.

Defendants, at page 44 of their memorandum, also misstate the nature of plaintiffs' claims. This Court has previously ruled that plaintiffs need not show only disparate treatment between the class and people without disabilities, but can prove a violation of law by showing disparate treatment because of severity or type of disability. *Martin I* at 1208, recognizing that plaintiffs seek protection of the Equal Protection clause not because "they have been discriminated against because they are

mentally retarded persons. Rather, they assert that they have suffered discrimination on the basis of their other disabilities or because of the severity of their mental retardation."

As with their ADA / 504 claims, plaintiffs also offer facts that show that they have suffered actual discrimination because they are people with disabilities, and those arguments are incorporated by this reference.

Defendants have failed to demonstrate that they are entitled to judgment as a matter of law on plaintiffs' constitutional claims, and the motion should be denied.

IV. Conclusion

For the reasons stated above, the defendants' motion for summary judgment should be denied.

Respectfully Submitted,
Ohio Legal Rights Service

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Memorandum Contra Defendants' Motion for Summary Judgment and supporting exhibits was filed electronically with this certification on the 11th day of August, 2006. Counsel may access this document through the court's electronic filing system.

/s/*Michael Kirkman*
Michael Kirkman