

Tragic Consequences Driven by Litigation and Threats of Litigation

*“It would be unreasonable, it would be a **tragic event**, then, were the American 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...**”*

- Justice Anthony Kennedy, concurring opinion on *Olmstead v L.C.* 527 U.S. 581, (1999) (**emphasis added**)

As foreseen by Justice Kennedy, the policy of litigation against Medicaid-licensed residential facilities has been tragic for the fragile individuals with severe and profound intellectual and physical disabilities and complex medical needs at which it has been targeted. Individuals in states that have been forced to close ICF/IID homes or divert individuals from them because of litigation have paid a horrible price, as can be seen in the following examples:

California: Up to 88% greater risk of mortality in community settings (peer reviewed studies, 1996-2005).¹

Georgia: In 2016, The Augusta Chronicle reported that of 503 residents moved as a result of a DOJ settlement agreement, 79 died, a mortality rate far higher than the rate in ICFs/IID.² Thousands of hospitalizations and hundreds of reports of abuse, elopements, and interactions with law enforcement have been reported in Georgia’s Annual Quality Management Reports for 2013 and 2014.³

Illinois: In 2016, The Chicago Tribune’s three-part series, “Suffering in Secret,” reported widespread abuse, neglect, and deaths in Illinois’ Home and Community Based Services settings.⁴

Most alarmingly, the forced transfer away from appropriate settings and supports took place even though the HHS-funded Protection and Advocacy attorneys and the Department of Justice knew community-based supports were wholly inadequate.

Samuel Bagenstos, former **DOJ Civil Rights Division** Principal Deputy Assistant Attorney General stated:

“It should not be surprising that the coalition of deinstitutionalization advocates and fiscal conservatives largely achieved their goal of closing and downsizing institutions and that deinstitutionalization advocates were less successful in achieving their goal of developing community services.”⁵

Vicki Smith, Executive Director of **Disability Rights North Carolina** and Board Member of the National Disability Rights Network (NDRN), a national association of Protection & Advocacy agencies, stated:

“So, let’s just be clear that people with intellectual and developmental disabilities living in community are not safe. And, that’s what we found with the project that Curt (Curt Decker, Executive Director, NDRN) referenced earlier to go out and look at and use the same kind of monitoring strategies and techniques that we use at our DD centers (i.e. ICFs/IID), and we still have some in North Carolina. And so, they’re not safe and it’s much harder to monitor these folks and the facilities (in the community), and many of the facilities are owned and operated by our traditional allies, the Autism Society, the ARC, and then other provider organizations.”⁶

VOR asks Congress for your oversight of these agencies, HHS and DOJ. Please protect our fragile and vulnerable family members from the dangerous policy of forced de-institutionalization that is not based in law, safety or common sense.

¹ Widespread Abuse, Neglect, and Death in Small Settings Serving People with Intellectual Disabilities
<http://www.vor.net/get-help/more-resources/item/abuse-and-neglect-document>

² <http://chronicle.augusta.com/news-metro-health/2016-10-18/girls-death-among-500-one-year-community-care>

³ <http://dbhdd.georgia.gov/documents/georgia-quality-management-system>

⁴ <http://www.chicagotribune.com/news/watchdog/grouphomes>

⁵ The Past and Future of Deinstitutionalization Litigation, 34 Cardozo L. Rev. 1, 21 2012
http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1156&context=law_econ_current

⁶ Panel Discussion, “The Disability Rights Movement: Immediate Challenges,” Staff In-Service, Advocacy Center of Louisiana, August 4, 2015, 47:06 min. mark. https://www.youtube.com/watch?v=daGi_mstQy0