

Families and Friends of Care Facility Residents (FF-CFR)
Arkansas' statewide parent-guardian association, an all-volunteer organization
Advocating for At-Risk Arkansans with life-long developmental disabilities and
working in support of Arkansas' Intermediate Care Facilities (ICFs), our human development centers (HDCs)

March 13, 2018

Sent electronically
judiciary.house.gov

To: Chairman Steve King
Ranking Member Steve Cohen
U.S. House Committee on Judiciary|Subcommitte on Constitution and Civil Justice

Re: March 6, 2018 Hearing - Class Action Law Suits against Intermediate Care Facilities for Individuals with Cognitive and other Developmental Disabilities (ICFs)

Dear Chairman King and Ranking Member Cohen:

Please accept these comments from Arkansas' statewide parent-guardian association, Families & Friends of Care Facility Residents (FF-CFR), regarding the March 6 hearing on class action lawsuits brought by federally funded entities against public and private Intermediate Care Facilities for Individuals with Cognitive and other Developmental Disabilities (ICFs). We appreciate that the Subcommittee provided an opportunity for testimonies from families whose loved ones with profound disabilities and their peers have been harmed by lawsuits.

FF-CFR's interest in commenting is that most FF-CFR members have family members who receive residential treatment services at one of five state-operated ICFs. We are grateful that our great state operates a range of service options, including ICF care, for eligible persons with disabilities.

1. Protection and Advocacy Systems (P&As).

Our families are familiar with the protection and advocacy system (P&As), a federally funded program with insufficient independent and objective oversight operating in every state. The majority of Arkansas ICF residents are non-verbal and function in the profound range of cognition impairing their abilities to self-advocate or self-direct their service needs without assistance of others. HDC residents are our state's citizens who are most at risk of abuse, neglect and exploitation. There is no cure for their life-long cognitive deficits / developmental disabilities. The federally funded Arkansas protection and advocacy system, Disability Rights Arkansas (DRA), refuses to represent our families or support the choice of ICF care for our loved ones with disabilities. DRA has brought three federal lawsuits (two of which were class action cases) against our state's ICFs using named plaintiffs from ICFs without notice to their legal

guardians. DRA representatives have testified before legislative bodies against funding capital improvements at the state's public ICFs. DRA has published inflammatory, incomplete materials denigrating the Booneville ICF and has called for its closure in the media. DRA has used its office to enlist other advocacy groups in its campaign to close the center. Families ask:

Why are protection and advocacy systems permitted to use public funds to carry out ideological goals and objectives through class action lawsuits to eliminate long term care facilities (ICFs) for at-risk persons who are unable to care for themselves?

2. U.S. Department of Justice | Civil Rights Division.

Our families are familiar with Department of Justice | Civil Rights Division (DOJ). DOJ brought two lawsuits in Arkansas in 2010: one against the Conway Human Development Center (CHDC), an ICF program and the other against all of the state's other developmental disabilities centers (HDCs), also ICF programs. During the eight stressful years DOJ spent investigating Conway HDC, the center was at all times in compliance with its federal Medicaid certification regulations. There was no support for the Arkansas DOJ *Olmstead*/ADA lawsuit: not one Conway center family from the over 400 residents joined with DOJ in its claims that their family members' civil rights were violated and not one area medical provider or hospital representative familiar with the center's at-risk residents and their medical needs testified to support DOJ's claims of poor care. After a six-week trial in the fall of 2010, the federal court dismissed the case against Conway HDC in June, 2011. Earlier, in 2010, the court had dismissed the DOJ case against all of the state's other HDCs. The cost to our state in defending Conway HDC against DOJ was \$4.3 million and \$150,580.00 in court costs. Our state cut and sold timber from public lands and used CHDC bequest funds to meet the litigation costs. Constrained by budgets, other states have settled with DOJ rather than spend the millions it would cost to defend. Human services systems are weaker because of the DOJ | Civil Rights Division deinstitutionalization policies and human tragedies have followed. Families ask:

Why is the Department of Justice | Civil Rights Division permitted to use public funds to carry out ideological goals and objectives through litigation or threat of litigation with an aim to eliminate long term care facilities (ICFs) for at-risk persons who are unable to care for themselves?

3. The witness who testified on March 6, 2018 in Support of Class Action Litigation.

The witness who testified on March 6 in support of class action litigation testified that the reason for states' consolidation and closures of ICFs is that there are a "dwindling number of people in institutions." She omitted critical information: (1) States are under tremendous pressure by self-advocates, HHS grantees and others to close admissions/deflect admissions to ICFs. (2) States downsize and close their ICF programs due to litigation or the threat of litigation and also due to the intense lobbying for deinstitutionalization, often by federally funded groups, or by persons /organizations with clear conflicts of interest.

Summary and Request

The comprehensive and devastating reach of the Protection & Advocacy Systems (P&As) and the Department of Justice | Civil Rights Division (DOJ) on at-risk individuals living in ICFs requires a Congressional response. We respectfully request the Judiciary Committee | Constitution and Civil Justice Subcommittee's action in halting the misuse of public funds for agendas of deinstitutionalization by adopting the following policy position:

Protection and Advocacy Systems and U.S. Department of Justice shall not commit federal funds:

- (1) to bring a lawsuit against public or private intermediate care facility (ICF) when the targeted facility is in compliance with the regulations of its funding authority;
- (2) to bring a lawsuit against a public or private ICF when no resident or resident's family has joined in the claims;
- (3) to bring a lawsuit against a public or private ICF when the facility's residents do not have the option to opt out of the lawsuit;
- (4) to enter into *in camera* settlement agreements containing provisions of downsizing and closures of intermediate care facilities without notice to and consideration of facility residents, their families, and legal representatives.

Thank you for the opportunity to submit comments and requests on federal policies which affect our families.

Respectfully submitted,
Families and Friends of Care Facility Residents (FF-CFR)

/s/Carole L. Sherman, Public Affairs Chair
Mother and Co-Guardian of John, age 49, whose brain injuries occurred at birth and who functions as a young toddler

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