VOR
Speaking out for people with intellectual & developmental disabilities

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Patricia A. Berger, Esquire
Senior Counsel/Project Manager
Legislative Budget and Finance Committee
Room 400 Finance Building
P.O. Box 8737
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By email: pberger@palbfc.us
Copy by U.S. Mail

Dear Ms. Berger,

I represent VOR, a national nonprofit organization advocating for high quality care and human rights for persons with intellectual and developmental disabilities (I/DD). I am writing in regard to House Resolution No. 903 (2014), directing the Legislative Budget and Finance Committee to –

> "conduct a comprehensive review and issue a report of the Department of Public Welfare, Office of Developmental Programs' implementation of the 1999 ruling by the Supreme Court of the United States in *Olmstead v. L.C.*, relating to the closure of State centers for people with intellectual disabilities and the provision of home-based and community-based services." (H.R. 2014-903).

H.R. 2014-903 is motivated by an allegation that Pennsylvania does not have an "Olmstead Plan with measurable objectives demonstrating how *Olmstead* will be implemented." Further, H.R. 2014-903 *incorrectly* indicates that the "closure of the five State centers for people with intellectual disabilities and the provision of home-based and community-based services" are the only ways to comply with *Olmstead*.

VOR respectfully submits that the Commonwealth of Pennsylvania already has an *Olmstead* Plan: The Settlement Agreement in *Benjamin v. Department of Public Welfare* approved by District Judge John Jones on September 25, 2014.

Benjamin, a federal class action lawsuit, was filed by Disability Rights Network (DRN) alleging violations of the Americans with Disabilities Act (ADA), as interpreted by *Olmstead v. L.C.*

In defense and leading to Settlement, Pennsylvania spent more than $1 million dollars in attorney fees and costs associated with the *Benjamin* litigation. Pursuing a legislative review of what has already been resolved favorably in court over 5 years at significant taxpayer expense would be contrary to public trust and an absurd use of scarce State resources.

The *Benjamin* Settlement more than accommodates the State's need for an Olmstead Plan. The Office of Developmental Programs announcement, "*Benjamin Settlement Approved: Protecting Freedom of Choice for Individuals in ICFs/ID*," offered this description of the Settlement:

> **SETTLEMENT OVERVIEW**
>
> The settlement requires that the Department's Office of Developmental Programs (ODP) take measures to protect individual choice and facilitate transition to community residence for those who so choose. Some of these measures include:
>
> - Ensuring that each individual residing in a state-operated ICF/ID who has the capacity to make an informed choice and expresses a preference for community living will move to the community;
>
> - Ensuring that everyone who is capable of making a choice about where he or she lives may make a choice at any time;
>
> - Committing to respecting the wishes of individuals, legal guardians, and substitute decision makers who decide to continue residency at a state-operated ICF/ID and honoring their choice of living arrangement;
>
> - Committing to maintain the level of care currently provided to individuals residing in a state-operated ICFs/ID, and assure that the state ICFs/ID continue to meet the criteria needed to protect the health, health, welfare, and safety of individuals, and to provide them with active treatment;
>
> - Transitioning at least…
>
> - 80 individuals to the community by June 30, 2015,
> - 50 individuals to the community between July 2015 and June 2016,
> - 50 individuals to the community between July 2016 and June 2017, and
> - 50 individuals to the community between July 2017 and June 2018
>
> If at any time there are fewer individuals on the planning list than the number of individuals slated to move in the agreement, the Department will work to move only the number of individuals remaining on the list.
>
> - Creating a website that allows providers to view information about individuals who chose to transition to the community and to notify ICF/ID staff of their potential interest in serving an individual; and
>
> - Monitoring community transition to ensure positive outcomes, including prevention of arrests or unnecessary readmissions to ICFs/ID.

["*Benjamin Settlement Approved: Protecting Freedom of Choice for Individuals in ICFs/ID*," Office of Developmental Programs: Announcement 081-14 (10/16/14) (emphasis in original].

In sharp contrast to H.R. 2014-903, the Settlement focuses on individual choice, not closure, as required by *Olmstead*.

VOR participated as *Amicus Curiae* in *Olmstead v. L.C.* and in *Benjamin*, in support of family/guardian intervenors. In both cases, consistent with *Olmstead* and the *Benjamin* Settlement, VOR supported an individual's right to receive care and support according to choice and need. Quoting VOR's brief in support of Lois and Elaine (appellees/plaintiffs), the Supreme Court in *Olmstead* 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 on a case-by-case basis, that setting may be an institution'[Brief for VOR et al. as *Amici Curiae*]." *Olmstead v. L.C.*, 527 U.S. 581, 610 (1999).

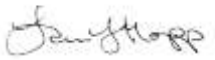
In *Benjamin*, VOR wrote:

> "The individual plaintiffs in the underlying action are five ICF/MR residents who filed suit claiming they were entitled to, but had been deprived of, the right to choose an alternative form of care. Specifically, they claimed a right to relocate to a community based facility. At the outset, it should be recognized that the Amici do not dispute anyone's right to choose an alternative form of care, which the United States Supreme Court recognized in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). Rather, the *Amici* take issue with the District Court's improper decision to certify a class and force a settlement onto the profoundly intellectually disabled that is, itself, at odds with Olmstead. Indeed, the actions by the parties below and the District Court will simply result in a shift of all intellectually disabled from one setting to another, this time eliminating the right to choose by the profoundly intellectually disabled. One type of service, one type of residence, does not suit the welfare of all intellectually disabled. The solution is not to move everyone from one type of facility to another. This is not only in direct contravention of Olmstead, but will cause unspeakable harm to those in need of institutional care. [Brief of *Amici Curiae* VOR and 92 Member *Amici* in Support of Appellant's Argument For Reversal (December 27, 2012; http://vor.net/images/VORAmicusBriefSettlementAppeal.pdf].

As required by *Olmstead* and enforced by the existing *Benjamin* Settlement, State Center residents have ample opportunity to exercise their right to receive care in the most integrated setting appropriate and avoid *unnecessary* institutionalization. We agree that the 13,888 individuals on the waiting list are deserving of similar options but the solution to solving this injustice is not to create another. Instead, individuals with disabilities waiting for services should be afforded the opportunity to receive state center supports (either as residents or "out-patients") and benefit from adequate funding for community-based services.

H.R. 2014-903, which appears only motivated by state center closures, is an unnecessary and unwise application of state resources and contrary to the *Olmstead* decision and the Benjamin Settlement. On behalf of its Pennsylvania members, VOR calls on the Pennsylvania Legislature to withdraw H.R. 2014-903.

Sincerely,



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