Nos. 07-2522 and 07-2523

United States Court of Appeals for the First Circuit

No. 07-2522

ROBERT SIMPSON RICCI, et al.,
Plaintiffs - Appellees
v.
DEVAL L. PATRICK, in his capacity as Governor
of the Commonwealth of Massachusetts, et al.,
Defendants - Appellants

No. 07-2523

MASSACHUSETTS ASSOCIATION FOR RETARDED
CITIZENS, INC., a/k/a Arc/Massachusetts, Inc., et al.,
Plaintiffs - Appellants
v.
DEVAL L. PATRICK, in his capacity as Governor
of the Commonwealth of Massachusetts, et al.,
Defendants - Appellants

ON APPEAL FROM ORDERS OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS IN
NOS. 72-0469-T; 74-2768-T; 75-3910-T; 75-5023-T; 75-5210-T

BRIEF AMICUS CURIAE NATIONAL ASSOCIATION OF STATE DIRECTORS OF DEVELOPMENTAL DISABILITIES SERVICES IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the National Association of State Directors of Developmental Disabilities Services is a non-governmental organization. It has no parent corporation, and no public corporation owns 10% or more of its stock.

INTEREST OF AMICUS CURIAE

The National Association of State Directors of Developmental Disabilities Services (NASDDDS) is the leading organization in the nation for state-sponsored services for persons with intellectual and developmental disabilities (ID/DD). NASDDDS is comprised of the public agencies in all fifty States and the District of Columbia with a statutory mandate to serve persons with ID/DD. NASDDDS members are responsible for providing, financing, and overseeing the delivery of long-term supports for persons with ID/DD in the context of institutional-, home-, and community-based programs.

The mission of NASDDDS is to assist member State agencies to build person-centered systems of services and supports for persons with ID/DD and their families. In pursuit of this goal, NASDDDS provides member State agencies with timely analyses of federal statutory and regulatory policies that affect persons with disabilities; it disseminates cutting edge information on state of the art programs and service delivery practices; it provides technical assistance in organizing,

financing and delivering services to eligible individuals and families; and it offers a forum for the joint development of multi-state and national policy initiatives.

The lower court's order requires Massachusetts to maintain costly and less-effective institutional services at Fernald for a small number of recipients. As such, that decision affects the interests of all NASDDDS members who are charged with the responsible use of State resources to provide high-quality services to the large and diverse population of persons with ID/DD. *See Olmstead v. L.C.,* 527 U.S. 581, 604 (1999).

All parties who have entered an appearance in this appeal have consented to the filing of this brief.

STATEMENT OF THE ISSUES

1. Is the district court's August 14, 2007 order which requires that the Commonwealth maintain the Fernald Developmental Center for as long as current residents elect to stay there, and the court's reliance on the report of the Court Monitor to predict whether future transfers from Fernald will comply with federal and state law, inconsistent with the experience of the vast majority of States that have phased down large, segregated institutions?

2. Does the district court's order impede the Commonwealth's duty to fairly allocate limited resources to persons with disabilities and to provide services

in the most integrated setting?

3. Does the district court's order contravene basic principles of federalism which counsel against undue interference by a federal court with State discretion to fund programs and equitably allocate resources?

SUMMARY OF ARGUMENT

The district court's order that effectively requires the Commonwealth to continue to operate the Fernald Developmental Center for as long as *any* current resident wishes to remain, and its reliance upon the clinical speculations of the United States Attorney (acting as the Court Monitor) about future transfers from Fernald, is contradicted by our years of experience overseeing institutional closures nationwide, as well as by the Monitor's own findings concerning prior transfers from Fernald. We have observed time and again that responsible, carefully-planned institutional closures have benefited virtually *all* persons with ID/DD who are able to live in the larger community and other settings, even those who were initially opposed to such closures. Our observations are informed by many examples of successful institutional closures throughout the country, including Massachusetts. The Monitor himself acknowledges the great success experienced by former residents of Fernald and other facilities who have already transitioned into different services settings. Nothing in the record or in our experience supports the district

court's speculative prediction of future harm to Fernald residents. Regardless of its aims, the district court's decision does not promote the interests of Fernald residents, who, in our experience and the Monitor's own findings, can receive equal or better services elsewhere.

Moreover, the district court's decision runs afoul of *Olmstead*. The district court ultimately has not made a legal decision, but rather has attempted to impose its policy preference for the maintenance of a particular institution as one of the range of services that should be afforded to persons with ID/DD. But the Supreme Court in *Olmstead* has made clear that policy preferences, as well as the fair allocation of services and resources for all persons with disabilities, are decisions expressly reserved for State officials with the responsibility for a large and diverse population of persons with disabilities. Since the district court's order effectively requires the Commonwealth to maintain an expensive and antiquated public institution for less than two hundred persons, regardless of its detrimental impact on the ability of State officials to meet the needs of more than ten thousand other persons with ID/DD in Massachusetts, the injunction is inconsistent with the Supreme Court's decision in *Olmstead*.

ARGUMENT

I. THE DISTRICT COURT'S ORDER, AND ITS RELIANCE UPON THE MONITOR'S SPECULATIVE CONCERNS ABOUT THE ABILITY OF FERNALD RESIDENTS TO TRANSITION INTO ALTERNATIVE SETTINGS IN THE FUTURE, IS CONTRADICTED BY OUR EXPERIENCE, BY EMPIRICAL STUDIES, AND BY THE COURT MONITOR'S OWN FINDINGS.

States have increasingly implemented more effective, community-based services while closing outmoded institutional facilities like Fernald. In the last twenty-five years, States have closed more than 170 public institutions or special units of 16 or more ID/DD persons.[1] All fifty states and the District of Columbia have reduced their reliance on state-operated institutions.[2] Ten states and the District of Columbia now operate without a single public institution for persons with developmental disabilities.[3]

The district court's injunction, and its effective requirement that all current Fernald residents be allowed to choose to remain at that facility indefinitely, runs

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[1] R.W. PROUTY, G. SMITH AND K.C. LAKIN, RESIDENTIAL SERVICES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES: STATUS AND TRENDS THROUGH 2006 (August, 2007) (hereinafter Prouty, *et al.* (2007)) at 19, 20, 21-32 (documenting chronology of all closures of public institutions from 1960 through 2006).

[2] Prouty, *et al.* at 6 (from 1980 to 2006, the population of large state-operated ID/DD residential facilities declined by more than 70%).

[3] Prouty, *et al.* at iii The States are Alaska, the District of Columbia, Hawaii, Indiana, Maine, New Hampshire, New Mexico, Rhode Island, Vermont and West Virginia.

counter to this overwhelming national consensus on how to best deliver services to persons with ID/DD. In opposition, the district court relies in significant part on the findings and clinical speculations of the United States Attorney, who was appointed as the Court Monitor in this case. These speculations, and, therefore, the district court's injunctive order, erroneously predict that Fernald residents will be irreparably harmed if they are required to transition into new environments. The order requiring the Commonwealth to effectively maintain Fernald is unsupported by, and inconsistent with, our experience in the field, careful research, and the Monitor's own report documenting the success of prior transfers from Fernald.

A. *Case studies nationwide demonstrate that residents of ID/DD institutions can successfully be transferred into different service environments.*

In our years of experience across all fifty States and the District of Columbia, we have dealt extensively with a large number of States that have closed all or some of their ID/DD institutions and transferred residents into alternative service settings, including more effective community care. As demonstrated time and again, with proper planning, sensitivity, and funding, residents young and old can successfully and effectively be transitioned into different environments. That result is equally true when residents' families and guardians initially oppose the transfer.

We now know that the most successful transitions require substantial investment in the capacity and quality of the community service system. Good fiscal planning and use of available federal funding for transition activities help reduce the cost of maintaining a "dual system" of institutional and community-based services. Moreover, involving those persons who are most affected by movement from institutions to other settings is important to a successful transition. By creating open dialogue and building trust among all stakeholders, the transition process should allay fears and identify solutions.

With these principles in mind, we have overseen the successful transition nationwide of facility residents into different environments – primarily community-based care – with very positive results. The success of these transitions, often related to facility closure or consolidation, have consistently occurred in a large number of States and an even larger number of institutions. We focus here on our experiences in Vermont, Pennsylvania, and Indiana, where institutional closure posed challenges that are comparable to those in this case, and by extension demonstrate the overwhelming likelihood of an effective transfer process for Fernald residents.

1. Vermont

In 1993, Vermont became the second State to close its only public institution,

the Brandon Training School. Vermont's service system faced challenges similar to those that Massachusetts officials face in this case: Institutional costs were climbing much faster than community service costs, with nearly half the budget of the State's Division of Mental Retardation ("Division") supporting just 13% of the people served by the system.

Once the Governor's office, the legislature, service providers, and advocates agreed that Brandon should be closed, the Division worked cooperatively with these stakeholders to carry out the structural changes that made closure possible.[4] The process began with a plan distributed by the Division's Director. State officials put additional safeguards in place for people leaving Brandon, including a backup system for serving people in crisis, and Protective Service Specialists assigned to all Brandon residents as they left the institution.[5]

The Division of Mental Retardation required not only that the community placement process be highly individualized, but that families and guardians be as involved in the process as possible. Although parents and guardians could not prevent a resident from being transferred from the institution, they were allowed to

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[4] Shoultz and Moseley, *et al.,*Closing Brandon Training School: A Vermont Story (Center on Human Policy, 1999) at 7, 9-21.

[5] *Id.* at 12, 9-11.

visit potential homes and make choices within the community service system.[6]

With safeguards and specialized services in place, transition to the community proceeded successfully. Since the closure of Brandon, Vermont has continued to pursue the goal of increasing community integration by reducing the size of community residential settings, expanding supported employment, and phasing out group homes in favor of more normal settings, such as supervised apartments, companion homes, and adult foster homes, with great success.[7]

2. Pennsylvania

The Commonwealth of Pennsylvania has closed eleven state-operated ID/DD institutions and special units, including three facilities that, like Fernald, were the subject of litigation: Pennhurst Center in 1987, Embreeville Center in 1997, and Western Center in 2000. All these institutions served a large number of older persons, including men and women in their 60s, 70s and 80s who had been institutionalized since childhood. The Commonwealth's Office of Mental Retardation put in place transition teams that oversaw the entire planning process,

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[6] The Minnesota Research and Training Center on Community Living and the Lewin Group, Medicaid Home and Community-Based Services Program in Vermont, Final Report: Site Visit of August 21 through August 25, 2000 (2000) (hereinafter "Lewin Group") at 10, 11, 12, 15, 52

[7] Lewin Group at 10; University of Colorado, The State of the States in Developmental Disabilities (2006): Vermont.

assured the availability of adequate funding to develop community-based services before the facilities were closed, and completed follow-up visits after the moves to monitor services, health care, therapies, behavioral services, as well as to obtain feedback from former residents and their families. These teams worked closely with families throughout the entire process to ensure they were apprised of the changes and the benefits of transitioning to community-based services.[8] Despite opposition from some guardians and families who were initially opposed to any form of change in residential setting, Pennsylvania's closure of these institutions has been heralded as an unqualified success by public officials, legislators, involved professionals, and, most importantly, the residents themselves.[9]

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[8] Nancy Thaler, Review of the Tennessee State Arlington Developmental Center Closure and Community Transition Plan, *United States of America v. State of Tennessee,* Civil Action No. 92-2062 (W.D. Tenn) (2006) at 7.

[9] *See, e.g.,* "Independent Monitoring for Quality: what consumers in Pennsylvania say about their services," and "What families, friends and guardians say about services," Department of Public Welfare, Office of Mental Retardation. *Report of independent monitoring for quality in the Pennsylvania mental retardation system* (2002) at 7, 10; Pennsylvania Department of Public Welfare, Office of Mental Retardation, *Everyday lives: Making it happen* (2001); Kim, Larson & Lakin, Behavioral Outcomes of Deinstitutionalization for People with Intellectual Disabilities: A Review of Studies Conducted Between 1980 and 1999 (Research & Training Center on Community Living, 2001) at 3, 5 (studies of deinstitutionalization in Pennsylvania consistently show growth and development after community placement); J. W. Conroy and V. J. Bradley, *The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* (Philadelphia: Temple University and Boston: Human Services Research Institute, 1985) at 322-23 ("the people deinstitutionalized under the Pennhurst court order *are* better off in *every* way measured … the results are not mixed") (emphasis in

The opposition of parents and guardians to closing Western Center was the most strident resistance to institutional closure that the Commonwealth had ever encountered. The families and guardians of Western Center residents used litigation in efforts to prevent community placement; however, those courts properly recognized that they should neither interfere with the legitimate policy choices of State officials, nor attempt to dictate which specific facilities and programs must be maintained by Pennsylvania's public agency.[10] However, despite their opposition, the families of all but fifty-six out of 380 residents actively participated in the development of individual transition plans. Perhaps most telling was the fact that after the institution was closed, the fifty-six families who did not participate were – to a person – very pleased with their sons' and daughters' community living arrangements, and only one family sought to have a former

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original); Conroy, J. *Selected findings from two decades of research on community versus institutional living*. Rosemont, PA: Center for Outcome Analysis (n.d.)

[10] *See, e.g., Richard C. v. Houston,* 196 F.R.D. 288, 289 (W.D. Pa. 1999), *aff'd.,* 229 F.3d 1139 (3d Cir. 2000) (denying parents' motion to intervene to stop community placement; M. Bucsko, "Western Center Moves Delayed," Pittsburgh Post-Gazette, February 1, 2000, http://www.post-gazette.com/regionstate/20000201western1.asp; J. Ackerman, "Judge won't hear Western Center parents' petitition," Pittsburgh Post-Gazette, March 31, 2000, http://www.post-gazette.com/regionstate/20000331western6.asp; J. Ackerman, "State closing home for mentally retarded amid continued appeals, protests," Pittsburgh Post-Gazette, April 12, 2000, http://www.post-gazette.com/regionstate/20000412western1.asp.

resident return to the institution.[11]

3. Indiana

Indiana closed its last institution, the Fort Worth State Developmental Center ("Fort Worth"), less than one year ago, on April 18, 2007. Like their Massachusetts counterparts, officials in Indiana were concerned about the disproportionate funds that were maintaining old, less effective institutional facilities, and instead sought to promote more effective and less wasteful community-based services. The State had closed other institutions successfully, including New Castle and Northern Indiana State Developmental Centers, where longitudinal studies of institutional residents showed that after a year in the community, residents demonstrated statistically significant and meaningful gains in skills, and professionals and involved families expressed the view that residents were far better off in their new homes.[12] Nevertheless, the State's decision to close the facility in January 2005 was particularly controversial because the 239 Fort Worth residents, like the residents of Fernald in the present case, had complex needs, were considered difficult to serve, and indeed, were regarded as some of the most severely disabled persons in the

[11] Thaler Report at 8.

[12] J. Conroy and J. Seiders, Outcomes of Community Placement at One Year for the People Who Moved from New Castle and Northern Indiana State Developmental Centers, Report Number 6 of the Indiana Community Placement Quality Tracking Project (Center for Outcome Analysis, 2000) at 23.

public service system.

When the institution closed, only eight of the 239 were placed in mental health facilities, while the remaining 231 moved to community settings.[13] Although critics predicted that many of these severely disabled residents would not be successful in the community, the State's careful planning and appropriate funding helped ensure an effective and successful transition into integrated community-based services. Specifically, the State formed a special team to follow former Fort Worth residents into the community for one year after placement and monitor their treatment. The State also enlisted community providers to build "extensive support needs" homes for people with the most significant behavioral challenges. By closing the institution, the State freed up substantial funds that it then reinvested to build community services and to provide much needed services to hundreds of other non-institutionalized persons on waiting lists.[14]

B. *Massachusetts officials have successfully transferred residents from public ID/DD institutions and have successfully closed several large facilities that are part of this litigation.*

Massachusetts officials have already demonstrated their ability and willingness to lay the proper foundation for an effective transition process for all

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[13] Bisbecos, *Closing institutions and opening doors to the community,* 14 COMMUNITY SERVICES REPORTER No. 9 at 6 (2007).

[14] *Id.*

institutionalized persons with ID/DD, including Fernald residents. The Commonwealth's track record of advance preparation is directly comparable to the successful planning demonstrated by our members in Vermont, Pennsylvania, and Indiana.

The Commonwealth demonstrated readiness, strong planning, and sensitivity to residents' and family members' concerns in the closure of the Belchertown and Dever State Schools in 1992 and 2001, respectively. Although the residents of these facilities had equally disabling conditions, ranged in age from young to quite elderly, and had family members or guardians that opposed facility closure, the district court did not enjoin the closure nor interfere with the transition process. Given the successful results of these other facility closures, and the absence of any evidence indicating any new or unique circumstances at Fernald, there is no justification to interfere with the transition process now.

1. Belchertown State School

Before the closure of Belchertown, the superintendent, the five Area Directors of the community service system, and the Regional Director of the Massachusetts Department of Mental Health established a collaborative process to systematically develop community services for Belchertown residents. The plaintiffs maintained strict oversight of Belchertown and, after considerable initial

resistance, eventually joined in the planning and development of community based-placement options for individual residents. As the system grew, so did supervision, oversight, and quality assurance. Affidavit of William Jones at ¶¶ 7, 9-13, Jt. Appx. v. VI, 1828, 1830-32.

As a result, the Commonwealth created a comprehensive array of community services to respond to the identified needs of each individual resident of Belchertown. *Id.* at ¶¶ 14-16, Jt. Appx. v. VI, 1832-33. Residents and families were engaged in the transition process; they were given the opportunity to visit new homes and express preferences about their roommates and staff; and when new residences were constructed, families were asked to participate in their design. In the early phases of community placement, residents were given the option of returning to Belchertown. However, this was rarely necessary. *Id.* at ¶¶ 16, 19, Jt. Appx. v. VI, 1832-34.

Initially, Massachusetts officials focused on developing community services without considering whether to close Belchertown. However, as more successful placements occurred, it became less feasible and more wasteful to operate a large institution when so few residents remained. By this time, the great majority of Belchertown residents had chosen placement in the community. When the decision was made to close the institution, most residents and families chose community

placement – including those who had lived at Belchertown for many decades – and the few who preferred to continue living in an institution were offered a transfer to another state-operated developmental center, just as the Fernald residents have been offered a transfer to another institution. *Id.* at ¶¶ 14, 18, Jt. Appx. v. VI, 1832-33.

2. Dever Developmental Center

An even more sophisticated transition planning process was initiated several years later, when the Commonwealth decided to close the Dever Developmental Center. This policy decision was strongly opposed by family members and guardians, but eventually, through careful planning, engaged participation, and an emerging history of successful placements, the opposition waned. Over several years, hundreds of severely disabled residents were carefully transitioned to other settings, the vast majority of which were in the community. All were offered, and a few requested, placements in other institutions. Affidavit of John E. Riley at ¶¶ 5-23, Jt. Appx. v. VI, 1937, 1939-49. Once again, the district court did not interfere with this policy judgment although it involved members of the plaintiff class.

For the residents of Dever, the Commonwealth was a pioneer in person-centered planning – a systematic individual planning process characterized by searching actively for a person's gifts and capacities in the context of community life and by strengthening the voice of the person and those who know her best to

define desirable changes in her life. By 1995, this process was being used for people leaving Dever.[15] Subsequently, the Department of Mental Retardation developed the concept of building "social units" as part of the transition planning for each resident, in which the consumer and family/guardian had the opportunity to identify staff who would remain with the client through the transition and into the community.[16]

3. Fernald Developmental Center

Significantly, Massachusetts officials have also already successfully transferred residents out of Fernald itself, and that success is documented in the Monitor's own report. In particular:

> The Monitor found that the Department of Mental Retardation was in substantial compliance with the Final Court Order in its method of certifying that residents placed out of Fernald were receiving "equal or better services." Jt. Appx. v. VI, 1691, 1704, 1706.
>
> Services furnished to the residents of community homes were 'consistent with the Court's final order." Jt. Appx. v. VI, 1704.

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[15] C.L. O'Brien and J. O'Brien, The Origins of Person-Centered Planning: A Community of Practice Perspective (Syracuse University, 2000) at 3.

[16] E.G. Enbar et al. A Nationwide Study of Deinstitutionalization and Community Integration (Chicago: Equip for Equality, 2004): Massachusetts.

The community homes visited during the course of the Monitor's review were well maintained and in pleasant neighborhoods. Jt. Appx. v. VI, 1705.

The Monitor's medical experts found that the services that class members required were available in the community and that the persons who moved to the community were receiving equal or better services. Jt. Appx. v. VI, 1704, 1706.

The guardians of Fernald residents who had transferred into different service settings were given surveys to measure their satisfaction with the transition process. On a scale of one to five, with "one" being the highest, 78% of respondents rated their satisfaction with the transition a "1" and an additional 14% rated it a "2." Moreover, "[t]he written commentary [in the surveys] reflected extremely positive attitudes regarding the moves." Jt. Appx. v. VI, 1712-13.

Significantly, the Monitor found no adverse effect of any past transfer from Fernald, either during the transition process or in subsequent treatment in different environments. Jt. Appx. v. VI, 1712-13.

Most importantly, the Monitor concluded that all recent transfers from Fernald were consistent with federal and state law, and clearly satisfied the Disengagement Order's "equal or better" standard. Jt. Appx. v. VI, 1703-13.

These findings are consistent with the Commonwealth's experience at

Belchertown and Dever, as well as its transfers from other institutions. They are in stark contrast with the speculative and unsupported conclusions about *future* transfers from Fernald that formed the basis for the district court's August 14, 2007 injunction.

C. *The lower court's order is based upon unsupportable conclusions and fears, contradicted by the record and expertise, of Fernald residents' ability to successfully change settings.*

Despite the Monitor's findings that all previous placements from Fernald were compliant with federal law and the Disengagement Orders' "equal or better" standard, the Monitor and then the district court predicted that transferring Fernald residents in the future would harm their emotional or physical well-being. Those predictions are incompatible with our experiences across the country, as well as careful research.

To the extent that the lower court accepted the Monitor's assumption that future Fernald residents may pose a special situation because some may be elderly, *see* Jt. Appx. v. VI, 1713-14, that assumption is wrong. Unquestionably, residents of ID/DD institutions in the United States are an aging population. Admissions to public institutions dropped precipitously when children with significant disabilities obtained the right to education in the mid-1970s.[17] In 1977, 35.8% of the residents

[17] Prouty, *et al.* (2007)) at 35, 36.

of public institutions were of school age (0-21 years) and only 22.9% were over forty. By 2006, those percentages had changed so dramatically that only 3.9 of institutional residents were 0-21 years of age, and 72.1% were over forty.[18] The reasons for the shift include not only the right to education but the increase in community services for persons with significant disabilities as well as longer life spans. In States with mature community service systems such as Massachusetts and Pennsylvania, in which few, if any, persons with ID/DD are admitted to public institutions each year, the age range of institutional residents is even more dramatically skewed.[19]

Thus, it is hardly surprising that Fernald residents tend to be older persons who have lived at the institution for many years. The same is true of the residents of most public institutions in the United States today, including those who lived at Belchertown and Dever. However, that has not prevented thousands of older institutional residents from moving to the community and thriving there.

Like their counterparts in other States, Fernald residents who are older and have lived in that facility for most of their lives can successfully transition into different environments. The ISP process in Massachusetts affords Fernald residents the individual attention and care that, in our experience, promotes a successful

[18] *Id.* at 35.

[19] *Id.* at 155, 172.

transition out of institutional care, and that is analogous to those safeguards we observed in the case studies discussed *supra* pp. 7-17. The guiding principles should be careful planning and sensitivity to each individual resident's needs, and not generalizations about the inability of whole groups of residents to adapt to new settings based on their age.

Moreover, carefully controlled studies of community placement have demonstrated that people of advanced years who have lived in a particular institution all their lives can and do benefit from a new environment.[20] Those

[20] J.W. Conroy, Deinstitutionalization of People with Mental Retardation and Developmental Disabilities in the United States (Center for Outcome Analysis, 2005) at 1. Social scientists who have analyzed the outcomes of deinstitutionalization recognize the importance of measuring the satisfaction of both persons with disabilities and their family members, although methodological problems have prevented most researchers from consistently attempting to evaluate the satisfaction of people with disabilities themselves. J.R. Brown & J.G. Bretting, *The Jackson Longitudinal Study: Findings of five years of research.* (Corrales, NM: JRB Associates, 1998) at 10; S. Spreat & J. W. Conroy, Consumer Satisfaction in the Oklahoma Mental Retardation System (Center for Outcome Analysis, 1999) at 5. Nevertheless, studies of consumer satisfaction among people with disabilities who were surveyed directly have shown that older adults living in institutions express a strong as desire to move as younger persons. For example, in a study conducted by Oklahoma State University on all persons who receive services through the Developmental Disabilities Service Division (DDSD) of the State of Oklahoma, Department of Human Services, consumers were asked the question, "If you had one wish, what would it be?" In the Division's survey in 1991, the desire to move was the single greatest wish of the older adults who were still living in institutions. It remained their greatest wish in a second survey in 1997. Minton, *et al., The wishes of people with developmental disabilities by residential placement and age: a panel study,* 13 J. DISABILITY POLICY STUD. 163 (2002).

studies have shown that people over 80 years of age who have moved out of institutions actually thrived in their new homes and "reported a major change from fear of the unknown (often exacerbated by well-meaning institutional staff) to delight with new experiences and new opportunities."[21] In fact, data collected on former residents of Mansfield Training School in Connecticut who moved to the community prior to the institution's closure found that older movers actually gained more in measures of independent functioning than the younger movers.[22]

It is understandable and predictable, based on our experience in Massachusetts and other States,[23] that the guardians and family members of some Fernald residents resist the transfer process. However, as illustrated by our experiences in Vermont, Pennsylvania, Indiana, and other States, we have found

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[21] J.W. Conroy, Deinstitutionalization: The Theory of the 'Must Stay' Group is Not Supported (Center for Outcome Analysis, 2003) at 2; *see* Conroy & Feinstein Assoc., The Results of Deinstitutionalization in the State of Connecticut, 1985-1990 (2001) (finding that the persons with ID/DD who moved into the community as a result of the settlement agreement in the Mansfield litigation, who ranged in age from 22 to 93, were seriously disabled, aging, often had more than one disabling condition and "were emphatically not the kind of people who would have been described as "easy to serve in the community" in the past."

[22] *Id.* at 3.

[23] *See* Spreat, *et al., Attitudes toward deinstitutionalization: A national survey of the families of institutionalized mentally retarded persons,* Philadelphia: Temple University Woodhaven Center and Developmental Disabilities Center/UAF (1987).

that anxiety about the transfer process does not vitiate the process itself, nor does it harm the success of future services in the new environment. By carefully tailoring services to meet residents' needs, and keeping channels of communication open with residents and family members, the transfer process can be successful and allay initial anxieties.

II. THE LOWER COURT'S ORDER IS INCONSISTENT WITH THE SUPREME COURT'S DIRECTIVES IN *OLMSTEAD,* BY PROMOTING INSTITUTIONALIZATION AND SEVERELY LIMITING MASSACHUSETTS' LATITUDE TO PROVIDE EFFECTIVE SERVICES TO ITS ENTIRE POPULATION OF PERSONS WITH ID/DD.

The lower court's order promotes the continued institutionalization of residents with ID/DD and impermissibly binds the hands of State officials charged with the duty to provide the best care possible for its entire population of persons with ID/DD. That order cannot be reconciled with the lessons of *Olmstead v. L.C.*, 527 U.S. 581 (1999).

A. *The lower court's order impermissibly limits the ability of Commonwealth officials to even-handedly provide ID/DD services.*

The lower court's decision has very serious policy implications on the standard of care available to individuals with ID/DD, and how limited State funds must be allocated for that care. Those policy decisions are best left for the Commonwealth, not the lower court.

In *Olmstead*, the Supreme Court cautioned courts against commandeering complex ID/DD policy decisions and displacing the State's rightful authority to determine which facilities and programs they should operate. The Court observed the State's unique responsibility to care and treat a "large and diverse population of persons with mental disabilities" with "a range of services" and with "an even hand" – and discouraged a rush to judgment based on petitioners' sympathetic requests for "immediate relief" in a different setting. *Id.* at 604. In particular, the Supreme Court warned of the inequity that could result from providing relief for a small number of institutional residents without sufficient regard to the costs of those services and without permitting the State to otherwise "take advantage of the savings associated with the closure of institutions." *Id.* (internal citations omitted).

The district court's ruling here is a classic example of the very inequity the Supreme Court warned against in *Olmstead.* Massachusetts officials administering ID/DD programs are responsible not only for delivering adequate services to the hundreds of persons in public institutions, but also for serving a large and diverse population that includes tens of thousands of people receiving home and community-based services, people living at home with aging caregivers, and young persons leaving school and transitioning to the adult service system. The Commonwealth's program administrators are also responsible, as professionals and

public servants, to implement best practices and assure that people with intellectual and developmental disabilities receive services that reflect the state of the art.

Fernald, by contrast, is outdated, and its fixed costs divert a disproportionately large share of limited funds to serve a disproportionately small group of residents. This case brings to life the improvident judicial overstepping that the *Olmstead* court cautioned against by making it nearly impossible for the State to "administer services with an even hand" and dictating that the State maintain an outdated mode of service. *See id.* at 605-606.

B. *Massachusetts ID/DD officials are responsible to ensure that available funds are used in the most efficient and equitable manner and that as many eligible persons as possible receive the services they require.*

Like other States, Massachusetts receives significant federal financial assistance through the Medicaid program and thus is subject to the requirements of that program set forth in Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. Those requirements include the obligation to provide services with reasonable promptness, 42 U.S.C. 1396a(a)(8), and to provide methods and procedures for utilization and payment for services that are consistent with efficiency, economy, and quality of care, 42 U.S.C. 1396a(a)(30)(a).

In contrast, nothing in federal law requires that States allow residents to remain in a particular institution. Significantly, the Intermediate Care Facilities for

the Mentally Retarded ("ICF/MR") regulations governing admissions, transfers, and discharge confer no right upon residents to remain in a particular ICF/MR facility. *See* Title XIX, 42 C.F.R. §§ 442.1 *et seq.*, 440.150 (2007). Instead, those regulations require only that residents be transferred for "good cause," that residents and their families be given time to prepare for the transfer, and that residents have a discharge summary and discharge plan. 42 C.F.R. §§ 440.150, 483.440 (b)(4) (2007).[24] Moreover, the Social Security Act allows Medicaid beneficiaries to choose among qualified and willing providers; however, nothing in the Act allows a beneficiary to force an unwilling provider to serve him. 42 U.S.C. § 1396a(a)(23). This principle applies with equal force both to private service providers and to public facilities like Fernald, where the State is the provider of services.

The Commonwealth has successfully navigated those technical obligations and complex funding criteria to honor its commitments to its large and diverse population of persons with ID/DD. It is irresponsible to require that the Commonwealth maintain Fernald, regardless of budgetary constraints and policy decisions for the most effective treatment. *See Olmstead* at 604-606. That is especially true when the Commonwealth has abundantly met all of its requirements

[24] Unlike the regulations governing ICF/MRs, the regulations for private nursing facilities place far stricter conditions on discharge and transfer. *See* Title IX, 42 C.F.R. § 483.12 (a)(2) (2007). Even those regulations, however, permit discharge without residents' consent when "[t]he facility ceases to operate." *Id.* at 483.12 (a)(2)(vi).

under federal law, and more, by the transition process established by the court orders in this case. *See O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 785 (1980) (Medicaid regulations do not confer a right to continued residence in the home of one's choice); *Doe v. Kidd,* 501 F.3d 348, 358 (4th Cir. 2007) (Medicaid beneficiary's choice of provider does not entitle her to choose a more segregated category of residential service than Olmstead requires); *Bruggeman v. Blagojevich,* 324 F.3d 906 (7th Cir 2003) (Medicaid beneficiary's freedom of choice does not require a choice among different type so facilities); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991) (State properly may eliminate a particular facility as a qualified provider without violating 42 U.S.C.§ 1396a(2)(23); Health Care Financing Administration, comments on final rule 42 C.F.R. § 431.51(b)(1), 56 Fed. Reg. 8832, 8835 (March 1, 1991) (rule amended to clarify that while 42 U.S.C. § 1396a(a)(23) allows Medicaid beneficiaries to seek services from any qualified provider, the provider determines whether to furnish services to the particular recipient).

C. *The lower court improvidently adopted the Monitor's economically wasteful and unrealistic suggestions for addressing Fernald's excess capacity.*

The Monitor's proposed "solution" to solving the Fernald crisis is no solution at all, and only highlights the limitations of his own expertise and the court's

improvident reliance on his recommendation to require the Commonwealth to maintain Fernald indefinitely. In his report, the Monitor suggests that the Commonwealth invest tens of millions of dollars to develop new and renovated buildings or construct new units on the Fernald campus to replace antiquated units – which inevitably would require the State to spend large sums of money to maintain. Jt. Appx. v. VI, 1691, 1715-16. The lower court endorsed those proposals in its August 14, 2007 order. Jt. Appx. v. VIII, 2374, 2379 n.18. However, those recommendations are impractical and costly, and would cause the State to continue providing services in a form that, in our experience, is largely disfavored across the country. Those recommendations are also without basis or support, whereas our work, discussed *supra*, has underscored the necessity for all decisions on ID/DD services and funding to be carefully planned.

Moreover, the proposals are self-contradictory: By recommending that Fernald residents be moved to newer facilities elsewhere on campus, the Monitor is implicitly acknowledging that residents can, in fact, be safely and responsibly transitioned into new settings. It would turn *Olmstead* on its head to allow a non-expert appointed by a court to dictate social services options and State budgeting for years to come, especially in such a grossly disproportionate and ineffective manner.

CONCLUSION

For the foregoing reasons, Amicus Curiae the National Association of State Directors of Developmental Disabilities Services respectfully requests that this Court vacate the district court's order dated August 14, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Jeffrey S. Follett, certify that:

1. This amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6368 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportional typeface using WordPerfect 12 in a 14-point Times New Roman font.

Dated March 27, 2008

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CERTIFICATE OF SERVICE

I, Jeffrey S. Follett, certify that on March 27, 2008 I have caused two copies of this brief to be served upon all counsel of record for the parties by first class mail, postage prepaid, addressed to:

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