Status Report: Litigation Concerning Medicaid Services for Persons with Developmental and Other Disabilities

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This periodic report is updated and reissued periodically as developments warrant. When you receive an update, you should discard the previous version. Changes since the last update (January 16, 2003) are highlighted in yellow. The report has direct links to materials available on the Internet that provide additional information concerning a topic or a lawsuit. With each update, we check these links to confirm that they are still "live." The report is distributed only by e-mail and without charge; it may be freely distributed to other interested persons. If you wish to receive this report directly, e-mail the author. The report also is posted on the HSRI web-site (http://www.hsri.org/index.asp?id=news). Please e-mail the author if there are developments concerning the lawsuits summarized here or other litigation not included in this update.

I. Introduction

Since 1998, there has been a flood of lawsuits concerning Medicaid long-term services for people with developmental and other disabilities. Many lawsuits challenge the practice of indefinitely wait listing individuals who need and are eligible for Medicaid home and community services. Others aim at securing community services in the most integrated setting for institutionalized persons as provided by the Americans with Disabilities Act (ADA). Still more lawsuits challenge state policies that result in individuals not being able to obtain services they are authorized to receive.

This litigation stems from the growing demand by people with disabilities for community services and supports. In the past and still today, the majority of federal-state Medicaid long-term services dollars underwrite institutional services in nursing facilities and ICFs/MR. States, however, have substantially boosted spending for home and community services (personal care/ assistance, home health and home and community-based services (HCBS) waiver pro-

A lawsuit that we won't need to track … Thank goodness!

In January, Nick Dupree filed a lawsuit in federal court. Nick is an Alabama college student with severe disabilities who lives at home with his family, aided by 16 hours of nursing care daily paid for by the Medicaid program. On February 23, Nick will turn 21. He faced the prospect of having his nursing care sharply cut back because the state severely limits the amount of care it offers to adults. So long as Nick qualified for EPSDT services, he was entitled to all medically necessary treatment. The state, however, would have paid for Nick to move into a nursing home, a move he feared would place him in real danger and leave his life a shambles.

Two years ago, Nick took matters into his own hands and started a crusade to persuade the state to continue benefits to individuals like himself after they turn 21. Although Nick gained allies in Alabama and around the country, the change was stymied for budget reasons. Nick then filed suit and asked for a temporary restraining order to stop his nursing care from being cut-off. As the day of the hearing on the restraining order neared, there was a flurry of activity to continue Nick's services. On February 10, state officials announced that they had cobbled together a HCBS waiver program to support people like Nick. On February 11, the waiver was approved by HHS Secretary Tommy Thompson. The new program will help Nick and a few others like him who use ventilators, need lots of assistance and face the prospect of being institutionalized after they "age out" of the EPSDT program. Nick's situation appears to be resolved but there are many other young adults with severe disabilities in the same predicament – their robust EPSDT benefits may disappear when they age out.

There is a lot of information about Nick and his situation at http://discover.npr.org/features/feature.jhtml?wfId=974391, including a National Public Radio interview of Nick and a link to his own web site: http://www.nickscrusade.com/.

grams). For more than a decade, outlays for community services have grown more rapidly than institutional spending. Since 1990, HCBS waiver expenditures have increased more than ten-fold, reaching $14.4 billion in 2001. As a consequence, the share of Medicaid long-term services spending devoted to home and community services climbed to about 29% in 2001, compared to a little over 10% in 1990. [1] In developmental disabilities services, HCBS waiver spending surpassed ICF/MR expenditures in 2001 (Prouty et al., 2002).

Despite rapid expansion of Medicaid home and community services, states are finding it difficult to keep pace with upward spiraling demand for long-term services (Smith, 1999). Demographic and other factors are prompting a growing number of individuals and families to seek assistance, especially community services. But, community services often are in short supply. This has led to waiting lists and mounting frustration for individuals who want but do not receive community services. It is not surprising that this frustration has boiled over into litigation.

Federal Medicaid law (Title XIX of the Social Security Act) requires every state to offer nursing facility services. States also may offer ICF/MR services. States can elect to provide personal care/assistance services as a regular Medicaid benefit. A state also may furnish community services by operating HCBS waiver programs.[2] In general, states must provide institutional services to all Medicaid beneficiaries who qualify for them. However, states have more latitude in offering home and community services. For example, federal law allows a state to limit the number of individuals served in an HCBS waiver program.

The lawsuits now enveloping Medicaid long-term services aim not only to secure services promptly but also establish that Medicaid beneficiaries with developmental and other disabilities have access to community services on equal footing with institutional services. The lawsuits assert that key provisions of federal Medicaid law oblige a state to furnish Medicaid home and community services to eligible individuals when needed and challenge the premise that states have unfettered authority to restrict the availability of Medicaid long-term services. In many cases – especially in the wake of the U.S. Supreme Court's landmark Olmstead v. L.C. ruling – the ADA is cited as grounds that states must furnish home and community services in the most integrated setting.

The Olmstead decision has sparked lawsuits by institutionalized persons seeking community services. These lawsuits demand changes in state policy so that individuals served in institutional settings can readily obtain community services. Still other lawsuits challenge state policies and practices that lead to individuals being unable to access the full-range of community services to which they are entitled. Some of these lawsuits argue that low state payments create major barriers in securing services or cause service quality to degrade.

This report describes the issues raised in three broad categories of lawsuits concerning Medicaid long-term services and the status of these lawsuits as of February 2003 (along with descriptions of settlement agreements where they have been reached):

- **"Waiting List" Lawsuits** that claim a state has failed to provide Medicaid long-term services with "reasonable promptness" to otherwise eligible persons;
- **"Olmstead" Lawsuits** that contend institutionalized persons have been improperly denied the opportunity to receive community services in the most integrated setting; and,
- **"Access to Benefits" Lawsuits** that allege Medicaid beneficiaries have not been provided or cannot access services that they have been approved to receive.

Many lawsuits cut across these categories. Most lawsuits are recent and in different stages of litigation. As the courts rule on these lawsuits, the legal and policy implications of this litigation will come into sharper focus.

In almost all cases, these lawsuits have been filed in federal court. In a few cases, plaintiffs have brought suit in state court when a state's policies are alleged to violate not only federal but also state law. Federal Medicaid law itself does not expressly provide that a beneficiary may seek redress through the federal courts for violations of federal Medicaid law or regulations. Federal Medicaid law requires only that states

[1] Information concerning Medicaid spending for long-term services nationwide and by state in 2001 is available at: http://www.hcbs.org/data/medicaid_lte2001.htm.
[2] See ASPE, 2000 for additional information concerning Medicaid home and community services.

make available an administrative appeals process (called Fair Hearing) through which a beneficiary may appeal adverse decisions concerning eligibility or services. If a state is not complying with federal Medicaid law and regulations, the principal remedy available to the federal government is to withhold or deny payments to the state.

In order to bring suit in federal court, plaintiffs rely on provisions of the U.S. Constitution and/or federal law in seeking relief. In particular, the Civil Rights Act of 1871 (42 U.S.C. §1983) grants citizens a private right of action when state officials are alleged to violate the Constitution or federal law. Dating back many years, federal courts – including the U.S. Supreme Court – have affirmed that lawsuits involving Medicaid services may be brought in federal court law so long as the plaintiffs seek prospective relief from alleged violations and federal law has conferred an enforceable right. Some states have claimed "sovereign immunity" from these lawsuits under the provisions of the 11th Amendment to the U.S. Constitution. The 11th Amendment bars suits against states in federal court. With rare exceptions, federal courts have rejected this defense.[3]

However, some observers believe that recent Supreme Court decisions (in particular, Gonzaga University v. Doe) potentially have had the effect of narrowing access to the federal courts under §1983. Please see the article at http://www.healthlaw.org/pubs/courtwatch/200206gonzaga.html for a discussion of this topic. In response to these lawsuits, states increasingly are challenging the premise that Medicaid law confers individual rights that can be enforced under the provisions of §1983. They contend that federal law only governs a state's overall administration of its Medicaid program but does not give beneficiaries enforceable rights. In general, most courts have rejected this defense, deciding that key provisions of Medicaid law establish individual rights. Recently, however, in the Pennsylvania Sabree et al. v. Houston lawsuit (see below), the court ruled that federal Medicaid law does not confer individually-enforceable rights and dismissed the lawsuit, based on its interpretation of the Gonzaga decision. On the other hand, in the McCree et al. v. Odom[4] lawsuit in North Carolina, the district court denied several motions by the state that would have resulted in throwing out the litigation. The court decided that the Supreme Court's Gonzaga ruling eliminated some of the plaintiffs' claims under §1983 but ruled that most of the claims asserting individual rights were valid (http://www.healthlaw.org/pubs/McCree(Antrican).v.Odom.pdf) to view this ruling). Going forward, the fundamental question of whether individuals can seek redress through the federal courts to remedy alleged state violations of federal Medicaid law likely will be litigated more and more.

II. Waiting List Lawsuits

A. Overview

"Waiting list" lawsuits assert that a state violates federal law when it does not promptly provide Medicaid long-term services (i.e., ICF/MR or HCB waiver services) to eligible individuals. These lawsuits attack the practice of wait listing individuals rather than providing services right away. Federal courts are asked to direct the defendant state to furnish necessary Medicaid long-term services with "reasonable promptness." Key provisions of federal Medicaid law, Title II of the ADA and §504 of the Rehabilitation Services Act of 1973 along with the 14th Amendment to the U.S. Constitution are the basis for these lawsuits. A thorough discussion of the legal issues in these lawsuits is at http://www.healthlaw.org/pubs/200005FactSheet_hcbw.html.[5] Each lawsuit's specific legal claims vary.

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[3] In May 2002, the 4th and 6th Circuits issued decisions that rejected state sovereign immunity claims in lawsuits concerning Medicaid EPSDT services. The 4th Circuit decision rejected North Carolina's immunity claim in the Antrican v. Odom lawsuit (http://www.healthlaw.org/pubs/200205.antrican.html). The 6th Circuit ruling overturned a controversial Eastern Michigan District Court ruling in the Westside Mothers v. Haveman litigation (http://laws.findlaw.com/6th/02a0172p.html). In August 2002, North Carolina and Michigan petitioned the U.S. Supreme Court to review the Circuit Court decisions. In October 2002, the Court turned down the North Carolina petition (see http://www.healthlaw.org/pubs/courtwatch/200210.antrican.html). In December 2002, the Court denied Michigan's writ of certiorari. In each case, the Court let the Circuit Court decision stand.

[4] Previously, Antrican v. Odom, described previously.

[5] See also: S. Rosenbaum et al. (2002). "Defining 'Reasonable Pace' in the Post-Olmstead Environment." Washington, DC: Center for Health Care Strategies. Available at: http://www.chcs.org/publications/consumer.html along with other papers concerning the Olmstead decision.

In general, waiting list lawsuits rely on the link in federal Medicaid law (§1915(c) of the Social Security Act) between eligibility for institutional (nursing facility or ICF/MR) services and HCBS. Federal law permits a state to offer HCB waiver services as an alternative to institutional services. In order to qualify for waiver services, a person must meet institutional eligibility criteria. The same (or equivalent) eligibility criteria must be used for both institutional and HCBS waiver services. A state may decide to offer HCB waiver services only to certain groups (e.g., adults but not children). Lastly, when a person is offered waiver services, s/he has the freedom to choose between institutional and waiver services. [N.B., See ASPE (2000) for a more detailed discussion of federal policy concerning the HCBS waiver program.] A state may limit or "cap" the number of individuals who receive HCB waiver services. There is no equivalent authority in federal law for a state to limit the number of persons who receive institutional services. If waiver services are unavailable, it is presumed that eligible individuals will have unfettered access to institutional services.

Waiting list lawsuits also cite the statutory requirement that a state must provide Medicaid services to eligible individuals with "reasonable promptness." In particular, §1902(a)(8) of the Social Security Act and associated federal regulations require that a state promptly determine eligibility when a person applies for services. Federal courts have interpreted this provision as requiring that a state must furnish services promptly once an application is approved. The regulatory standard for processing Medicaid applications is no more than 90-days. Courts have ruled that wait-listing individuals indefinitely violates the intent of §1902(a)(8).

In March 1998, the 11th U.S. Circuit Court of Appeals handed down a watershed decision in the Florida Does v. Chiles (now Does v. Bush) litigation that made it clear that federal Medicaid law does not allow a state to "wait list" individuals for ICF/MR services indefinitely. Florida had tried to limit the availability of both ICF/MR and HCB waiver services. The Court ruled that ICF/MR services are no different than any other non-waiver Medicaid service and, hence, must be furnished with reasonable promptness to eligible applicants. This decision is located at http://laws.findlaw.com/11th/965144man.html.

The 11th Circuit decision spoke directly to ICF/MR but not HCB waiver services. Most waiting list lawsuits seek expanded access to Medicaid community services. Often, plaintiffs argue that a person's eligibility for ICF/MR services also extends to "equivalent" or "ICF/MR level" services under the HCBS waiver program. In some cases, plaintiffs also claim that §1915(c)(2)(C) of the Social Security Act means that persons eligible for ICF/MR services have a clear right to waiver services because eligible persons must be offered a choice between ICF/MR and HCBS.

In some lawsuits, the plaintiffs assert that, when a state limits the availability of both ICF/MR and HCB waiver services, eligible individuals cannot obtain either type. Plaintiffs also have argued that wait listing individuals violates §1902(a)(10) of the Social Security Act since a state is not making Medicaid long-term services available on a "comparable" basis to all eligible persons, either by furnishing such services to some but not all persons or by making institutional but not community services available.

Lawsuits also have challenged state practices in handling applications for HCBS. Plaintiffs assert that states have effectively denied individuals the right to apply for Medicaid long-term services by not allowing them to submit applications for HCBS or not making a determination concerning their applications. Plaintiffs argue these practices violate §1902(a)(3) of the Social Security Act by denying individuals their right to appeal a denial of Medicaid eligibility or services along as well as deny them the due process protections afforded by the U.S. Constitution.

Some (but not all) lawsuits also claim that a state's not making community services available on equal footing with institutional services violates Title II of the ADA and §504 of the Rehabilitation Services Act of 1973. Title II requires public entities to provide services in the "most integrated setting" appropriate to a person's needs. Plaintiffs assert that Title II mandates that individuals have access to community services on equal footing with institutional services.

Federal court rulings in most waiting list cases by and large have relied principally on Medicaid law rather than the ADA. For example, in the West Virginia Benjamin H. litigation, the federal District Court decided that the plaintiffs' claims concerning Medicaid law alone were sufficient to justify a preliminary injunction against the state without the court's taking up the plaintiffs' ADA claims.

B. Description of Lawsuits

As of February 2003, waiting list lawsuits on behalf of people with developmental disabilities had been filed in twenty-three states. Each lawsuit is summarized below. Some lawsuits (e.g., Mandy R in Colorado) principally seek residential services for wait-listed individuals. Others (e.g., Brown in Tennessee and Benjamin H in West Virginia) aim at securing prompt enrollment to the state's HCBS waiver program so that individuals can access any of the services offered in the program.

At present, sixteen of waiting list lawsuits are being actively litigated. Settlement agreements have been reached in six lawsuits (FL, HI, MA, OR, VA and WV). Two lawsuits (IL and PA) have been dismissed by district courts that have ruled against the plaintiffs. Both of these dismissals are under appeal to the respective Circuit Courts of Appeal. The parties mutually agreed to dismiss another lawsuit (AK). The parties arrived at a settlement agreement in the Washington State litigation but the District Court rejected the agreement. Settlement agreements spell out steps to resolve the central issues in a fashion satisfactory to each side. The court of jurisdiction must approve the agreement by conducting a "fairness hearing." Before agreements can be put into effect, they also require executive and legislative branch concurrence, including an agreement to appropriate additional funds. In settlements, states typically have consented to increase the number of individuals who receive Medicaid HCBS over a multi-year period (e.g., three to five years). Depending on the case, the agreement also may include revisions in state policies concerning the processing of applications for services or the order in which the state will offer services to wait-listed persons. Settlements also describe how the parties will interact during the agreement's implementation, the circumstances that might cause the agreement to be voided (e.g., insufficient funds are appropriated to implement the settlement), and how disputes will be resolved, including returning to court if need be.

1. Alabama: Susan J. et al. v. Siegelman et al.

This complaint (00-CV-918) was filed in July 2000 in U.S. District Court for the Middle District of Alabama on behalf of six named plaintiffs with mental retardation. The lawsuit alleges that Alabama has violated federal Medicaid law, 42 USC §1983, and the 14th Amendment to the U.S. Constitution by failing to furnish ICF/MR or HCBS waiver services to eligible individuals. The plaintiffs are persons wait listed for HCBS waiver services. Specifically, the plaintiffs argue that Alabama's limiting the number of persons who receive Medicaid long-term services violates: (a) the requirement that services must be furnished with reasonable promptness per §1902(a)(8); (b) the requirement that Medicaid services be furnished to all eligible individuals on a comparable basis, as provided in §1902(a)(10)(B); and, (c) 42 USC §1983 and the 14th Amendment to the U.S. Constitution by depriving individuals of their right to services.

The State moved to dismiss the complaint, arguing that: (a) HCB waiver services differ from other optional and mandatory Medicaid services and, thus, are not subject to the same requirements; (b) states have the authority to limit the number of individuals served through an HCBS waiver program; and, (c) the plaintiffs have no enforceable right under federal or state law to the services they are seeking and, thereby, an action cannot be brought in federal court. This lawsuit is still active albeit quiet. The Court has not handed down rulings of note one way or another.

2. Alaska: Carpenter et al. v. Alaska Department of Health and Social Services

A private attorney filed this lawsuit on behalf of 15 individuals in January 2001 in the U.S. District Court for the District of Alaska. The lawsuit asserted that Alaska violated federal Medicaid law, the ADA, §504 of the Rehabilitation Act, and the 14th Amendment to the U.S. Constitution by wait listing indefinitely eligible children and adults with developmental disabilities who needed services. The complaint asserted that Alaska's wait listing individuals violated the ADA's integration mandate as well as Medicaid's "reasonable promptness" requirement. The plaintiffs also argued that Alaska violated federal requirements by not properly processing applications for Medicaid services or giving individuals the opportunity to appeal adverse decisions concerning service authorization or changes in services. In March 2002, the Court accepted a stipulated agreement by the parties to dismiss the litigation.

3. Colorado: Mandy R. et al. v. Owens et al.

Private attorneys filed this class action complaint (00cv01609) in the U.S. District Court for the District of Colorado in August 2000. The complaint asserts that Colorado has violated federal Medicaid law, the ADA and §504 of Rehabilitation Services Act of 1973, and the U.S. Constitution by failing to provide ICF/MR residential services with reasonable promptness to eligible individuals with developmental disabilities. The plaintiffs are specifically seeking ICF/MR small group home services rather than services through Colorado's HCBS waiver programs. In Colorado, only a handful of individuals are served in ICFs/MR. The vast majority of individuals who receive Medicaid residential services participate in the state's Comprehensive Services HCBS waiver program. The Arc of Colorado supports this lawsuit (see its March 2002 position statement at http://www.thearcofco.org/waitinglist.html). In response to the complaint, the state filed a motion to dismiss in September 2000.

In March 2002, Judge Richard P. Matsch ruled on the accumulated motions in the case. His rulings on four motions are of particular interest. First, he denied the state's motion to dismiss the plaintiffs' claim that Colorado is violating the §1902(a)(8) reasonable promptness requirement. In making this ruling, Matsch relied on the opinion handed down by the 10th Circuit Court of Appeals in the New Mexico Lewis litigation (see below). Second, Matsch granted the motion by the Colorado Association of Community Centered Boards (CACCB) to intervene in the case. CCBs are non-profit agencies responsible for providing or arranging community services for individuals with developmental disabilities. The CACCB intervened because outcome of the litigation could have a substantial impact on CCBs. In its motion to intervene, the CACCB introduced the claim that Colorado also is violating §1902(a)(30) of the Social Security Act because its payments are inadequate and have caused community services to deteriorate. Under federal judicial rules, an intervener can raise new claims germane to the litigation.

Third, Judge Matsch denied the plaintiffs' motion to certify the complaint as a class action. Matsch ruled that the plaintiffs (who seek ICF/MR group home services) were not necessarily representative of the class as proposed (which includes individuals who may want different types of services). Matsch also observed that, if the plaintiffs prevail, systemic change would follow, thereby making class certification unnecessary. Last, Matsch denied the plaintiffs' motion for a preliminary injunction, principally on two grounds. He noted that it was not clear that the plaintiffs would prevail on the merits of their complaint. Second, he pointed out that the relief sought by the plaintiffs would cause major changes in the Colorado Medicaid program that would have significant budgetary consequences. Matsch decided that he did not have the authority or the basis to order increased state spending by issuing a preliminary injunction. In early April, the plaintiffs appealed the denial of class action certification to the 10th Circuit. The 10th Circuit, however, decided not to take this appeal because the case had not run its course at the District Court level.

In July 2002, the state filed a motion for summary judgment to dismiss the plaintiffs' claims. The state argued in part that it had no affirmative responsibility to establish ICF/MR facilities but instead that its role was akin to an "insurer," limited to paying for services once delivered. In August 2002, the plaintiffs filed a motion for partial summary judgment. In a brief accompanying the motion, the plaintiffs attacked the state's reasoning, arguing that the state's responsibilities under federal Medicaid law extend well-beyond claim payment to include assuring that services actually are furnished to eligible persons. The plaintiffs asked the Court to summarily find the state in violation of §1902(a)(8) and §1902(a)(10) of the Social Security Act by failing to furnish ICF/MR services with reasonable promptness and providing them

to some but not all eligible persons. The plaintiffs strongly urged the Court to take up their claims under the ADA and §504 of the Rehabilitation Act after making a determination that they have an entitlement to ICF/MR services. In the plaintiffs' view, the Court should apply the ADA and §504 in fashioning the remedy for the alleged violations of the Medicaid Act by directing the state to actively sponsor the provision of ICF/MR services in small group homes. The plaintiff's full brief in support of their motion for partial summary judgment is at http://www.thearcofco.org/current.html. Also in August 2002, the CACCB filed a brief in support of the plaintiffs' motion for summary judgment and in opposition to the state's motion to dismiss. In its brief, the CACCB stressed that the state is obligated by its state plan to furnish services with reasonable promptness. The CACCB pointed out that the state's decision to limit the number of persons served through the HCBS waiver program did not relieve the state of its obligation to furnish necessary services to individuals, including ICF/MR services. To date, the court has not ruled on these motions.

4. Connecticut: Arc/Connecticut et al. v. O'Meara and Wilson-Coker

This complaint (located at http://www.arcct.com/WaitingListComplaint.doc; 01-cv-1871) was filed in October 2001 in United States District Court for the District of Connecticut by Arc/Connecticut against the Commissioners of the Connecticut Departments of Mental Retardation and Social Services (the state's Medicaid agency) on behalf of nine named plaintiffs who have been wait-listed for Medicaid home and community-based waiver services. The complaint asserts that Connecticut has failed to furnish the waiver services to which the named individuals are entitled. The complaint notes that many individuals have been waiting for residential services for upwards of ten years and residential services have not expanded at a pace sufficient to meet needs. The plaintiffs are seeking class action certification.

Specifically, the complaint alleges that the state has: (a) not furnished adequate residential and day habilitation services to HCBS waiver participants in violation of the requirements spelled out in §1915(c) of the Social Security Act and the January 2001 policy guidance issued by the Centers for Medicare and Medicaid Services (CMS) in Olmstead Letter #4 (http://cms.hhs.gov/states/letters/smd11001.pdf); (b) not afforded individuals a realistic choice between waiver and institutional services in violation of §1915(c)(2)(C); (c) failed to furnish services with reasonable promptness as required by §1902(a)(8); (d) violated the plaintiffs' due process rights under the 14th Amendment by not giving them an opportunity to appeal a denial of services; and; (e) violated Title II of the ADA by not providing services in the most integrated setting. Among its provisions, CMS Olmstead Letter spelled out the requirement that HCBS waiver participants must be furnished the services they need within a reasonable period of time.

In August 2002, the Court ruled on two pending motions. In February 2002, the plaintiffs filed a motion to extensively amend the original complaint. The amended complaint included additional alleged violations of federal Medicaid law and regulations, especially surrounding the state's administration of its HCBS waiver program. The plaintiffs' new claims alleged that (a) wait listed individuals are not allowed to apply for HCBS waiver services; (b) the state has improperly restricted the services that individuals can receive; (c) persons have been denied Medicaid fair hearing rights; and, (d) the state has not informed individuals of HCBS alternatives to institutional services. The state objected to the amendment, arguing that it substantially broadened the original complaint. The Court accepted the amended complaint because it had been submitted on a timely basis. In June 2002, fifteen more individuals asked that they to be included as plaintiffs. Again, the state objected but the Court decided to allow the individuals to join the case. These rulings are at http://www.ctd.uscourts.gov/Opinions/082002.jba.omeara.pdf. In September 2002, the state moved to dismiss the complaint. In October, the Court denied the state's motion.

Recently, the district court granted class certification, thereby expanding the scope of the litigation to all 1,700 individuals on the state's waiting list. An attorney for the plaintiffs said that their view is that Congress meant the waiver program to be "an entitlement for individuals with disabilities." At present, however, it appears that rulings on the central issues in the litigation may be a year away as the lawsuit enters the "discovery phase." State officials acknowledge that, in recent years, funding to serve people on the waiting list has slowed to a trickle and the number of people waiting for services has been climbing.

5. Delaware: The Arc of Delaware et al. v. Meconi et al.

On April 8, 2002, nine individuals – joined by The ARC of Delaware, Homes for Life Foundation, and Delaware People First – filed a class action complaint (02-cv-255) against the Delaware Department of Health and Social Services and its Division of Developmental Disability Services (DDDS) in the U.S. District Court for the District of Delaware. The lawsuit charges Delaware has failed to serve more than 1,180 individuals who are eligible for but have been denied access to Medicaid HCBS waiver and/or community ICF/MR services. The Public Interest Law Center of Philadelphia and the Community Legal Aid Society's Disability Law Program (Delaware's P&A agency) are representing the plaintiffs.

The plaintiffs include individuals who live with aging caregivers along with persons served at Stockley Center (Delaware's public institution) who have been assessed as appropriate for community services. The complaint alleges that these individuals have been waiting for community residential services for many years but have little prospect of receiving them any time soon. The proposed class would include: (a) all individuals presently on DDDS' waiting list for community residential services; (b) all individuals presently receiving DDDS services eligible for but not receiving HCBS waiver or ICF/MR services; and, (c) all institutionalized persons who qualify for services in the community. An estimated 100 Stockley Center residents reportedly have been assessed as appropriate for community residential services.

The plaintiffs claim that Delaware operates its service system in violation of Medicaid law, as well as Title II of the ADA and the U.S. Constitution, thereby causing the "denial of necessary care and services, inappropriate placement in state institutions, restraint [of] ... liberty without due process, unnecessary and needless deterioration and regression in health status, the loss of opportunities to maximize self-determination and independence, and the loss of opportunities to live in integrated settings and to receive programs and services development in accordance with professional standards."

In particular, the plaintiffs claim that Delaware is violating: (a) §1902(a)(8) of the Social Security Act by failing to provide Medicaid services with reasonable promptness and denying individuals the opportunity to apply for services; (b) Title II of the ADA and §504 of the Rehabilitation Act by not furnishing services in the most integrated setting. In addition, the complaint alleges that Delaware does not have a "comprehensive effectively working plan" for placing qualified persons in less restrictive settings and has not moved its waiting list at a reasonable pace, as provided in Olmstead; (c) §1902(a)(10) of the Social Security Act by failing to provide Medicaid services in adequate amount, duration and scope; (d) the Due Process Clause of the 14th Amendment to the Constitution and 42 U.S.C. §1983; and, (e) §1915(c)(2)(C) of the Social Security Act by not providing a choice between ICF/MR or HCB waiver services. The plaintiffs have moved for class certification, a temporary restraining order and a preliminary injunction. The state has moved for dismissal. To date, the Court has not ruled on these motions.

6. Florida: John/Jane Does v. Bush et al. and Wolf Prado-Steiman et al. v. Bush et al.

In 1992, a class action complaint was filed (as Does v. Chiles et al.) on behalf of individuals who had been wait-listed for ICF/MR services. The Does complaint asserted that Florida violated federal Medicaid law by not furnishing ICF/MR services with reasonable promptness to otherwise eligible Medicaid recipients with developmental disabilities. In March 1998, the U.S. 11th Circuit Court of Appeals upheld the District Court's 1996 ruling that the state's practice of wait listing individuals for ICF/MR services violated federal Medicaid law (see above). A second complaint – Prado-Steiman – was filed by The Advocacy Center (Florida's P&A agency). This complaint directly challenged Florida's policies in operating its HCBS waiver program for people with developmental disabilities and was amended to contest the state's practice of waiting listing individuals. In August 2001, the District Court approved a settlement agreement in Prado litigation that provided that all individuals waiting for services on July 1, 1999 would receive services by 2001 and for the state to make major changes in the operation of its waiver program.

Led by Governor Jeb Bush, Florida has undertaken a major expansion of developmental services, including its HCBS waiver program for people with developmental disabilities. Since Bush took office in 1998, funding for developmental disabilities services has tripled and now exceeds $1 billion. Between 1998 and 2001, the number of persons participating in Florida's HCBS waiver program for people with developmental disabilities doubled from 12,000 to 24,000. Among its other provisions, the Prado settlement agreement includes an "operational definition" of how the state will comply with the reasonable promptness requirement.

While Florida has made major strides in its provision community services, additional issues have arisen since the settlement was reached, including the emergence of a "post-Prado" waiting list that reportedly has reached in excess of 6,000 individuals. These individuals sought services after July 1999 and, hence, are not covered by the settlement.

In March, 2002, the Advocacy Center filed a 20-page Notice of Material Breach of the Prado settlement, contending that systemic problems have led to the authorization of services that are "less than necessary to provide services in the community and in small facilities." The letter outlined deficiencies in the Florida service system in eighteen areas including: provider development and access in various geographic areas, quality assurance, service delivery timelines, and due process. In late March, Florida's Office of the Attorney General denied that the state had broken the terms of the agreement in "any material or systemic way." Failure of the legislature to appropriate the funds necessary to implement the Plan of Compliance was the main defense put forward. According to Advocacy Center officials, "Barring unforeseen developments, it is the center's view that the court will dissolve the Prado agreement, setting the stage for litigation." In an effort to address the issues, mediation began in October 2002 and is continuing.

7. Hawai'i: Makin et al. v. State of Hawai'i

The state's P&A Agency filed this class action complaint in December 1998. The complaint alleged that the state's practice of wait listing individuals for HCB waiver services violated federal Medicaid law and the ADA. The state challenged the applicability of the ADA, arguing that the U.S. Supreme Court's Olmstead decision dealt with only institutionalized persons. The District Court rejected this argument by reasoning that the lack of community services would leave institutionalization as the only option available to individuals.

In April 2000, the state and plaintiffs forged a settlement agreement wherein the state agreed to increase the number of individuals participating in the state's HCBS waiver program by approximately 70% over a three-year period. In its 2000 session, the Hawai'i legislature approved an additional $4.3 million in funding to underwrite the first stage of this expansion. In its 2001 session, the legislature appropriated additional funds in order to meet the terms of agreement. The settlement agreement may be accessed at http://www.pixi.com/~pahi/stlmnt.htm or http://mano.icsd.hawaii.gov/doh/settlement.pdf.

8. Illinois: Boudreau et al. v. Ryan et al.

This lawsuit was filed in September 2000 by a private attorney in the U.S. District Court for the District of Northern Illinois on behalf of five named plaintiffs with developmental disabilities eligible for Medicaid services but not receiving HCBS waiver services. The complaint alleged that Illinois does not furnish Medicaid services to eligible individuals with reasonable promptness and furthermore does not afford individuals freedom of choice in selecting between ICF/MR and HCB waiver services. The suit also alleged violations of other provisions of the Social Security Act, Title II of the ADA, §504 of the Rehabilitation Act of 1973 and the 14th Amendment to the U.S. Constitution.

The lawsuit called on the Court to "issue preliminary and permanent injunctive relief requiring the Defendants ... offer the Plaintiffs the full range of ICF/MR services or HCB waiver services and other services for which they are eligible within 90 days or some other specifically defined, reasonably prompt period." The suit also alleged "... the State has created additional barriers to prevent or discourage potentially eligible persons from seeking Medicaid services."

In response, the state filed a motion to dismiss, claiming immunity under the 11th Amendment and also challenging the merits of plaintiffs' other claims. In May 2001, Senior District Judge John F. Grady ruled on the state's motion. Siding with the state, Judge Grady dismissed the plaintiffs' ADA claim because the complaint had been filed against public officials acting in their official capacity whereas Title II of the ADA speaks to the policies of a "public entity." However, he rejected the state's arguments concerning the other claims, including the state's claim of sovereign immunity.

In February 2002, following extended hearings, Judge Grady dismissed the lawsuit (this decision is at http://home.attbi.com/~baldiesplace/lawsuit/grady040202.pdf). He concluded that the plaintiffs' main claim was their lack of access to services near where their families lived. He was persuaded by the state's arguments that (a) federal law has no requirement that a state arrange for services on this basis of

proximity to family and (b) the services the plaintiffs sought might be available elsewhere in Illinois. In March 2002, the plaintiffs appealed Judge Grady's decision to the 7th Circuit Court of Appeals. The plaintiff's attorney also announced plans to file additional lawsuits based on "... testimony during the 22 day evidentiary hearing before Judge Grady which revealed that the State of Illinois has been systematically violating the rights of the developmentally disabled and those legal claims which were not before Judge Grady and were not part of his ruling."

In June 2002, the plaintiffs submitted their appellant's brief to the Circuit Court.[6] The brief asks the Circuit Court to review the District Court's rulings on the original Medicaid, ADA, and Rehabilitation Act claims. The brief argues that facts unearthed during trial demonstrate that the state has failed to furnish Medicaid services to the plaintiffs in compliance with federal law. Also in June 2002, the U.S. Department of Justice (USDOJ) Civil Rights Division submitted an *amicus* brief. The brief focuses only on the District Court's dismissal of the ADA claim. The brief notes that the dismissal was based in part on a previous 7th Circuit ruling that USDOJ contends was in error. The USDOJ brief argues that there is ample support for the proposition that individuals may sue public officials in federal court to enjoin violations of the ADA and such suits need not be confined to suing public entities.

In July 2002, another *amicus* brief was filed by the American Civil Liberties Union (ACLU) of Illinois, Equip for Equity (the Illinois P&A agency), and a coalition of Centers for Independent Living. This brief also argues that the Circuit should reinstate the ADA claim. The brief further contends that the District Court's dismissal of the ADA claim led to inadequate attention to the interplay of Illinois' policies and their impact on access to services in the most integrated setting. As a consequence, the brief urges the Circuit to "leave for another day the many larger legal questions ... regarding whether the Illinois system for providing services ... complies with federal law."

In October 2002, the state filed its reply brief. In asking the Circuit Court to uphold the District Court decision, the state contends that, for several reasons, the plaintiffs lack standing to bring suit. The brief also argues that there is no enforceable federal requirement that individuals receive services in close proximity to their families. Next, the defendants assert that the state's only responsibility under federal Medicaid law is to "provide appropriate rates of payment" rather than see to it that individuals receive necessary services. The state also took exception to the USDOJ and ACLU *amici* briefs concerning the ADA. Finally, the state asserted that it had not waived its 11th Amendment rights and, consequently, the lawsuit should be dismissed on sovereign immunity grounds.

In November 2002, the plaintiffs filed their reply brief. The plaintiffs' disputed the state's claim that its responsibility under Medicaid is merely to pay for services provided by vendors that have elected to offer them in the market place. The plaintiffs contend the state has interfered with the market place by refusing to fund additional ICF/MR facilities. The plaintiffs also disputed the state's sovereign immunity defense as well as the state's claim that plaintiffs did not have standing to bring the lawsuit. Also in November 2002, USDOJ submitted a brief disputing the state's position that it had not waived sovereign immunity under the provisions of §504 of the Rehabilitation Act. The Circuit Court heard oral arguments on January 6, 2003.[7] To date, the Circuit Court has not handed down a decision. Information concerning the lawsuit also is available at www.illinoisclassaction.com.

9. Kentucky: Michelle P et al. v. Morgan et al.

In February 2002, the Kentucky Division of Protection and Advocacy filed a lawsuit (02-CV-23) in the U.S. District Court for the Eastern District of Kentucky (Frankfort) on behalf of four people with mental retardation and their family caregivers against the state's Cabinet for Health Services and the Departments for Medicaid Services and Mental Health and Mental Retardation. The lawsuit charges Kentucky has improperly wait-listed individuals for Medicaid services. The plaintiffs also sought class action certification on behalf of another estimated 1,800 wait-listed persons. In recent years, the Kentucky legislature has substantially boosted funding in order to reduce the waiting list but a long waiting list remains. More information about the lawsuit is at http://www.kypa.net/waitinglist.html.

[6] This brief and other briefs in this case are available at http://www.ca7.uscourts.gov/briefs.htm. To obtain the briefs, enter case number 02-1730.

[7] A recording of the oral argument may be accessed at http://www.ca7.uscourts.gov/farg/arg.fwx by entering case number 02-1730.

In the complaint, the plaintiffs argue that, despite being eligible for "ICF/MR level" services, they have been wait-listed and have indefinite prospects for receiving services. They also note that even individuals in "emergency status" are unable to receive services promptly despite their priority status. The complaint claims that Kentucky is in violation of: (a) §1902(a)(10)(A) of the Social Security Act for failing to provide ICF/MR level services to all Medicaid beneficiaries who are eligible for them; (b) §1902(a)(8) for failing to furnish services with reasonable promptness; (c) §1902(a)(10)(B) for making ICF/MR level services available to some Medicaid beneficiaries but not all; (d) Title II of the ADA and §504 of the Rehabilitation Act by failing to operate its programs so that individuals are served in the most integrated setting; and, (e) §1915(c)(2)(C) by not giving eligible individuals a practical choice between ICF/MR or other available alternatives through the state's HCBS waiver program.

In March 2002, District Court Judge Joseph Hood granted class certification and ruled in plaintiffs' favor on other motions over the defendants' objections. The class is defined as "as all present and future Kentuckians with mental retardation and/or related conditions who live with caretakers who are eligible for, and have requested, but are not receiving Medical Assistance community residential and/or support services." In June 2002, the 6th Circuit Court of Appeals denied the State's petition appealing the District Court's order granting class certification. Trial currently is scheduled to begin in January 2004.

10. Maine: Rancourt et al. v. Maine Department of Human Services et al.

In August 2001, a complaint (01-CV-159) was filed in the U.S. District Court for the District of Maine (Bangor) on behalf of three adults with developmentally disabilities waiting for services. The lawsuit was filed against the Maine Departments of Human Services (the state's Medicaid agency) and Behavioral and Developmental Services (the agency that administers Maine's HCBS waiver program). The lawsuit argues that the state is not furnishing services to people with developmental disabilities in a "reasonably prompt" manner. Class-action certification was also sought on behalf of an alleged 1,000 adults with developmental disabilities in Maine who are not receiving timely services.

In November 2001, the Court denied the state's motion to dismiss the lawsuit based on a claim of sovereign immunity under the 11th Amendment. The Court portrayed the state's arguments for this claim as "...while intellectually intriguing, are a didactic exercise in historical legal formalisms, apparently inspired by the musings of Justice Scalia ...." The Court pointed out that many other previous other 1st Circuit decisions affirmed the federal court's jurisdiction in these types of lawsuits. (http://www.med.uscourts.gov/opinions/carter/2001/GC_11282001_1-01cv159_Rancourt_v_Concannon.pdf).

In May, 2002, the Court certified the lawsuit as a class action complaint over the state's objections. The Court accepted the plaintiffs' proposed class which includes: "All developmentally disabled individuals who: (1) are current or future recipients of Medicaid in the State of Maine; (2) are no longer entitled to receive benefits through the Maine public school system; (3) are eligible to receive intermediate care facilities and/or other services for the mentally retarded or care under the HCB waiver program; and, (4) are not receiving the services to which they are entitled to in a "reasonably prompt" manner. This decision may be found at http://www.med.uscourts.gov/opinions/carter/2002/GC_05082002_1-01cv159_Rancourt_v_MeDHS.pdf. The state quickly petitioned the 1st Circuit to review the District Court's class action certification. In July 2002, the 1st Circuit denied the state's petition. Trial presently is scheduled to begin in May 2003.

11. Massachusetts: Boulet et al. v. Cellucci et al.

This class action complaint was filed in March 1999 (originally as Anderson v. Cellucci) by private attorneys on behalf of the plaintiffs and their families who were dissatisfied with the state's pace in reducing its waiting list. The complaint asserted that Massachusetts violated federal Medicaid law and the ADA by failing to provide residential services with reasonable promptness to otherwise eligible individuals and instead wait-listing them indefinitely. While the state had made significant progress in reducing its waiting list from a peak of almost 3,000 individuals in 1998, the plaintiffs filed the lawsuit to accelerate the expansion of residential services.

In July 2000, the District Court issued a summary judgment in the plaintiffs' favor, ruling that the state was required to furnish Medicaid residential services with reasonable promptness. However, the Court certified a narrower class than originally proposed by the plaintiffs who had asked that it include all individuals presently wait listed for Medicaid residential services along with persons who would be eligible

in the future. The Court narrowed the class to individuals presently participating in the HCBS waiver program who had been wait listed for "residential habilitation" services or wait listed persons not served in the waiver program who could be accommodated under the program's participant cap. In its ruling, the Court directed the state to furnish residential services to these class members within 90-days or, if that was infeasible, to propose a plan to bring the state into compliance with the reasonable promptness requirement. This ruling is recapped at http://www.bostonbar.org/sc/hl/nl111200.htm.

In November 2000, the parties agreed in principle to settle the lawsuit. In December 2000, the parties forged a settlement agreement. The Court approved the settlement agreement in January 2001 but decided to maintain jurisdiction to ensure that the agreement is carried out. The settlement agreement modified the class to include all individuals wait listed as of July 2000, regardless of whether the person was receiving or would be eligible to receive HCB waiver services. The modified class had 2,437 members, including 1,961 waiting for out-of-home residential services only, 266 waiting for both residential and non-residential services (e.g., day services), and 210 waiting for non-residential services only. Under the terms of the agreement, the state agreed to provide residential services to an additional 300 individuals during 2000-2001 using already appropriated funds. Over the next five years (FY 2002 – 2006), the state committed to seek funding sufficient to extend residential services to an additional 1,975 individuals at a pace of 375 – 400 persons per year. Individuals who do not receive residential services right away would receive "interim services" (in-home, family support and other services) until residential services became available. The parties also agreed to procedures for preparing residential and interim service plans. The agreement commits the state to increase annual funding for services from pre-existing levels by $114 million in 2006 when the agreement is expected fully implemented. Over the five-year period 2002 – 2006, the state committed $355.8 million in total to expand services. While Massachusetts' budget has been adversely affected by the economic downturn, the Legislature nonetheless approved $36.5 million in new dollars for FY 2002-2003 to continue implementation of the settlement agreement.

12. Montana: Travis D. et al. v. Eastmont Human Services Center.

Filed in 1996 by the Montana Advocacy Program (the state's P&A agency), this complaint contended that Montana was in violation of federal Medicaid law, the Americans with Disabilities Act integration mandate and the U.S. Constitution by failing to provide community services to residents of the state's two public MR/DD institutions and individuals in the community at risk of institutionalization.

Court action in this litigation stalled for a variety of reasons, including on and off settlement negotiations between the parties, the ill-health of the presiding judge and a one-year stay pending the U.S. Supreme Court's Olmstead decision. In June 2001, the plaintiffs filed an amended class action complaint that drew into sharper focus the waiting list dimensions of the litigation. In late August 2001, the presiding judge declared all the pending motions moot and gave the parties until October 2001 to file new motions, deciding that starting over with a fresh set of motions would expedite the case. Final briefs on these motions were submitted in mid-May. There are two pending plaintiff motions (class certification and a motion for summary judgment on behalf of institutional residents recommended by the state for community services) and five motions by the defendants to dismiss various plaintiff claims.

In June, District Court Judge Charles C. Lovell held a hearing on the plaintiffs' motion for summary judgment, defendants' motion for summary judgment, defendants' four motions to dismiss the ADA, Title XIX, §504 and Constitutional claims, and on plaintiffs' motion for class certification. Following this hearing, at the state's urging, the presiding judge recused himself because he has a relative with a developmental disability. The lawsuit has been reassigned to the District Chief Judge.

13. New Hampshire: Cumming et al. v. Shaheen et al.

In January 2002, the Disabilities Rights Center (the state's P&A agency) filed a class action complaint in Hillsborough County Superior Court, arguing that New Hampshire has failed to provide adequate community-based services for people with developmental disabilities. The suit alleges that there are "well over 500 individuals" in the proposed class, including 325 Medicaid-eligible individuals who have been wait-listed for services and a large number of persons who are receiving inadequate or inappropriate services not included on the waiting list. The plaintiffs demand that the state furnish a "comprehensive array" of individualized community-based services.

The suit charges the state has failed to develop an adequate system of community-based services and programs, "including sufficient numbers of ICF/MR and other community living arrangements that meet the individualized needs of persons with developmental disabilities…" The suit asks the court to order the state to furnish improved services not only for the wait listed persons but also for individuals receiving services who have been "…left to languish in inappropriate and, sometimes, overly restrictive placements." The plaintiffs express dissatisfaction with the state's attempts to develop programs and services for this group, calling such efforts "piece-meal and inadequate."

This lawsuit suit was filed in state rather than federal court and relies both on state and federal law as its basis. In particular, the suit claims that the state is in violation of: (a) New Hampshire law (RSA 171-A:13) which provides that "Every developmentally disabled client has a right to adequate and humane habilitation and treatment including psychological, medical, vocational, social, educational or rehabilitative services as his condition requires to bring about an improvement in condition within the limits of modern knowledge"; (b) §1902(a)(8) for waiting listing otherwise eligible persons and §1902(a)(3) for failing to provide a fair hearing for individuals whose claim for Medicaid services has not been acted upon with reasonable promptness; (c) Title II of the ADA for not having developed a sufficiently comprehensive program for all persons with developmental disabilities "to remain in the community with their family and friends" and putting them "at risk of being provided with inadequate, inappropriate or overly restrictive programs and services; (d) the 5th and 14th Amendments to Constitution and 42 U.S.C. §1983 for abridging the plaintiffs' due process rights; and, (e) the 14th Amendment and 42 U.S.C. §1983 for violating individuals' right to Equal Protection by serving some individuals but wait-listing others.

In April 2002 Judge James J. Barry, Jr. denied the plaintiffs' petition for injunctive and declaratory relief. The plaintiffs' petition for injunctive and declaratory relief included six requests that covered class certification and called for the state to offer all eligible plaintiffs a range of community services within 90 days. Judge Barry denied the plaintiffs' petition based on his conclusion that the request did not meet the four tests for granting such relief used by New Hampshire courts. Specifically, Judge Barry found that the plaintiffs were not able to prove that: (1) an immediate threat of irreparable harm exists; (2) no adequate, alternative remedies exist; (3) there is a likelihood of success when the merits of the case are tried; and, (4) the public interest would not be adversely affected if the injunction was granted. Noting that the "proposed class members' claims… include claims that extend far beyond those of the named plaintiffs," Judge Barry also denied the request for class certification. Courts have high thresholds for granting injunctive and/or declaratory relief in litigation of this type. Consequently, Judge Barry's decision was not necessarily surprising. In a subsequent proceeding, the court reversed itself concerning the denial of class certification and left that question for trial. Trial will likely start in Fall 2003. Newly-elected Governor Craig Benson has earmarking an additional $3 million in each year of the state's upcoming biennium to serve people on the waiting list.

14. New Mexico: Lewis et al. v. New Mexico Department of Health et al.

This lawsuit was filed in January 1999 by state's P&A agency with the support of The Arc of New Mexico. The class action complaint alleged New Mexico violated federal Medicaid law and the ADA by failing to provide Medicaid services in the community to otherwise eligible individuals with disabilities, thereby causing them to go without services or forcing them to accept institutional services. The proposed class included: (a) people with developmental disabilities wait-listed for HCB waiver services; (b) persons served in ICFs/MR who would benefit from waiver services [Note: New Mexico no longer operates large state institutions; the proposed class members are served in small ICF/MR group homes]; (c) persons with other disabilities served in nursing facilities who would want community services; and, (d) persons with other disabilities in the community who seek access to the state's HCB waiver program for persons who are aged or disabled.

In April 2000, the court rejected the state's motion to dismiss the lawsuit and upheld the plaintiffs' right to access to HCB waiver services with "reasonable promptness" – essentially treating Medicaid-financed HCB waiver services the same as state plan services. In part, the state based its motion to dismiss the lawsuit on 11th Amendment sovereign immunity claims. In the wake of this decision, in May 2000, the state appealed to the 10th U.S. Circuit Court of Appeals, asking for reconsideration of the state's 11th Amendment sovereign immunity defense. Under federal judicial rules, an appeal based on a sovereign

immunity claim stays further lower court action until the appeal is decided. Finally, in August 2001, the 10th Circuit decided to deny the state's appeal (http://laws.findlaw.com/10th/002154.html).

In September 2001, the state filed a new motion to dismiss the complaint, arguing that the lawsuit was moot because all the original named plaintiffs either are presently receiving HCB waiver services or deceased. The state also challenged the New Mexico P&A's standing to continue to pursue this litigation in its own right in light of the status of the originally named plaintiffs. In November 2001, the P&A filed a counter brief, arguing that it had standing in its own right to pursue the lawsuit and filed a motion to amend the original complaint.

In July 2002, the plaintiffs submitted a motion for summary judgment, contending that the "case presents a simple, straight forward question of law: Are the Defendants required to provide Medicaid waiver services to all eligible individuals with reasonable promptness? The law is clear and unequivocal: the defendants are so required." In support, the plaintiffs point to the fact that 2,600 individuals are wait listed for the state's HCBS waiver program for people with developmental disabilities. The program serves 2,300 individuals and has a federally approved cap of 3,200. There are 2,500 persons wait listed for the state's HCBS waiver program for individuals who are disabled or elderly; that program serves 1,500 individuals or 450 fewer than the federally-approved "cap." The plaintiffs also pointed out that the average period that state officials estimate that the period individuals with developmental disabilities must wait for waiver services is worsening and will reach 60-months. The plaintiffs argue that these facts offer ample evidence that New Mexico does not furnish HCB waiver services with reasonable promptness. The plaintiffs also take the state to task for not properly taking applications for HCB waiver services. Instead, individuals are assigned to the "Central Registry" and eligibility is only determined once their name comes up. Individuals assigned to the Central Registry were portrayed by the state as having "applied to be considered" for waiver services rather than applicants for such services. The plaintiffs contend this practice violates federal Medicaid law.

In October 2002, District Court Judge Martha Vasquez issued her pretrial order. The order identifies the contested issues of law as: (a) whether Medicaid's reasonable promptness requirement applies to waiver programs and how reasonable promptness is defined; (b) the reassertion of the 11th Amendment sovereign immunity defense by the defendants; (c) the state's contention that the plaintiffs lack standing; (d) the defendants contention that the relief sought by the plaintiffs is "class-like" but the plaintiffs have failed to plead and prove class allegations; and, (e) the propriety of the injunctive and declaratory relief sought by the plaintiffs. Reportedly, the trial phase of this lawsuit will begin in Spring 2003.

In November 2002, Judge Vasquez handed down rulings on some outstanding issues. She affirmed that the New Mexico P&A has standing to bring the lawsuit because Congress has granted P&As the authority to bring suit on behalf of individuals. The Court also accepted the plaintiffs' amended complaint and accepted the state's motion to dismiss plaintiffs who have received services since the lawsuit was filed.

15. Ohio: Martin et al. v. Taft et al.

Filed by Ohio Legal Rights Services (OLRS - the state's P&A agency) in 1989 (as Martin v. Voinovich), this class action complaint (89cv0362) alleges that Ohio violates Medicaid law as well as the ADA by failing to provide integrated residential services to all persons with developmental disabilities eligible for them. In 1993 the court rejected the state's motion to dismiss the ADA claim on the basis of an 11th Amendment sovereign immunity defense, holding that Congress, in this instance, had the authority to abrogate immunity. In 1998, the parties agreed to a motion to stay further district court proceedings in this litigation in the hope that an agreement could be worked out to expand services. However, in July 2000, OLRS filed a motion for partial summary judgment asking the Court to find that the State is violating the ADA integration mandate because its Medicaid waiver waiting list is not "moving at a reasonable pace."

In September 2002, the Court ruled on various motions. The Court denied the state's motion to dismiss on sovereign immunity grounds and upheld some of the plaintiffs' claims. However, the Court turned down the plaintiff motion for partial summary judgment. The Court urged the parties to settle the lawsuit, which has now dragged on for more than a decade. No date has been set for trial. (Priaulx, 2002)

16. Oregon: Staley et al. v Kitzhaber et al.

This complaint (00cv00078) was filed in January 2000. The complaint alleged that the state violated federal Medicaid law and the ADA by failing to furnish Medicaid long-term services to otherwise eligible individuals with developmental disabilities with reasonable promptness. In September 2000, the parties agreed to settle the lawsuit. The Court approved the settlement agreement in December 2000. The agreement is at http://oddsweb.mhd.hr.state.or.us/Pubs/settlement/settlement.htm. The settlement agreement implements Oregon's Universal Access Plan, submitted to the Oregon Legislature in February 2000.

The Plan aims to ensure that all individuals who need publicly funded services will receive at least a basic level of supports. The parties agreed that the settlement would include not only the named plaintiffs but also "all other similarly-situated individuals with developmental disabilities under the federal Medicaid program," thereby treating the lawsuit as a class action. The settlement agreement extends to 2007. It provides that the state will increase funding for community services by a cumulative total of $350 million. Under the agreement, the number of persons receiving "comprehensive services" (which include 24-hour residential services) would grow by 50 per year over and above the number of individuals who would receive such services due to crises or emergencies. The state agreed to continue furnishing comprehensive services to all individuals who are in crisis. The number of persons receiving "support services" (defined as "in-home and personal supports costing up to $20,000 per year") would increase by 4,600 over the agreement's six-year period. Also, the agreement called for reducing case management workload from a 1:95 ratio to 1:45 and making additional investments in system infrastructure.

A Universal Access Planning Committee was established in 2000 and continues to be active. The Committee's minutes and other information concerning the implementation of the plan are found at: http://www.open.org/~arcoforg/uapc.htm. In its 2001 session, the Oregon Legislature approved funding for the first two-year phase of the Universal Access Plan. Also, to implement the plan, Oregon launched a new "self-directed support services" HCBS waiver program. An April 2002 progress report describing where Oregon stood in expanding home and community services is at http://oddsweb.mhd.hr.state.or.us/Admin/staley/Staley_April2002_rpt.html.

However, Oregon has experienced a precipitous drop in state revenues and there have been deep cuts in state spending to address an ever mounting budget deficit. In August 2002, the Oregon Advocacy Center (the state's P&A agency) warned the state that it was prepared to return to court to seek relief under the material breach provisions of the settlement agreement if budget cutbacks caused the state not to provide the dollars specified in the Agreement.

In January 2003, Oregon voters turned down a referendum to increase income taxes. A measure enacted last year by the Oregon legislature directed the termination of the "supports services" waiver program that was created as a result of the lawsuit settlement agreement in the event that the referendum did not pass. However, the scheduled March 1 elimination of the program has been delayed while state officials attempt to "work out a way to make the cut without landing back in court." Oregon already has instituted other cuts in Medicaid services for seniors and people with disabilities that have triggered new lawsuits.

17. Pennsylvania: Sabree et al. v. Houstoun

In May 2002, the Philadelphia-based Disability Law Project and two private attorneys filed a class action complaint (02-CV-03426) in the U.S. District Court for the District of Eastern Pennsylvania against the Pennsylvania Department of Public Welfare on behalf of four named plaintiffs who contend that the state has improperly wait listed them for ICF/MR services. Reportedly, this complaint was filed in reaction to the proposed reduction of the dollars previously committed for the upcoming budget year to reduce Pennsylvania's waiting list for community services.

In February 2000, then Governor Tom Ridge announced that the state would provide an additional $850 million over the next five years to reduce the waiting list for mental retardation services. Due to a $1.2 billion state budget shortfall, Governor Schweiker reduced (but did not eliminate) the amount of dollars earmarked for wait list reduction for the upcoming budget year. The state budget for the new fiscal year provides funding to expand HCB waiver services to an additional 1,175 individuals. This lawsuit is sponsored by the Community Advocacy Coalition, composed of advocacy organizations around Pennsylvania.

The Sabree lawsuit is the fourth in Pennsylvania concerning individuals wait listed for Medicaid services. In 1999, the Disability Law Project filed two suits (Elizabeth M et al. v. Houstoun and Gross v. Houstoun). The Gross lawsuit was withdrawn following Governor Ridge's announcement. Another lawsuit (Delong et al. v. Houstoun (00-CV-4332)) was filed in August 2000 contending that the Department of Public Welfare had improperly limited the number of individuals who would be served through the state's Person/Family-Directed Supports waiver[8]. Delong was dismissed in October 2002. In April 2002, the parties agreed to a settlement wherein the state would request sufficient funding from the legislature to serve the number of individuals authorized in the approved waiver program.

The plaintiffs' complaint was brief. It simply contended that Pennsylvania has not furnished ICF/MR services as required under its Medicaid state plan to eligible individuals with reasonable promptness, in violation of §1902(a)(10)(A) and §1902(a)(8) of the Social Security Act. The plaintiffs are seeking class action certification of the complaint. The proposed class would include "all Pennsylvanians with mental retardation living in the community who are entitled to, in need of, but not receiving appropriate residential and habilitative programs under the Medical Assistance program." The complaint may be viewed at: http://www.paproviders.org/Pages/infos%20archive/WaitingListComplaint.pdf.

The state filed motions to dismiss and in opposition to class certification. The state's motion to dismiss contended that the plaintiffs' complaint did not satisfy the test for bringing a lawsuit under §1983 because there is no federally enforceable individual right to ICF/MR services in small community residences and the "reasonable promptness" requirement applies in the "aggregate" but not to individuals. In July 2002, the plaintiffs urged the Court to deny the motion to dismiss, arguing that ICF/MR services are an individual entitlement under federal law and citing numerous federal court decisions that reasonable promptness also is an enforceable individual right. The plaintiffs also contended that Congress had affirmed the enforceability of these rights.

On January 16, 2003, the court dismissed this lawsuit, accepting the state's arguments. The court based its dismissal on: (a) its view that federal Medicaid law does not confer an individually-enforceable right to services and, hence, the action does not meet the criteria for bringing a lawsuit under §1983. The court decided that federal Medicaid law has an "aggregate" focus (e.g., whether the state overall is following its plan) rather an "individual focus" ; (b) Congress included a mechanism for individuals to appeal adverse decisions (the "fair hearing" process) and, because there is this type of mechanism, an action cannot be brought under §1983, based on the Supreme Court's Gonzaga University v. Doe decision; and, (c) in any case, federal Medicaid law does not contain a requirement that a state furnish ICF/MR services in small community group homes, and, thereby, the plaintiffs have no enforceable right to services in such settings. The Court concluded the "individuals referenced [in the lawsuit] are merely beneficiaries, not persons entitled to privately enforce the statute." The Court also decided that only the federal government could sue the state over its implementation of the Medicaid program.

On January 29, 2003, the plaintiffs filed a notice of appeal at the 3rd Circuit Court of Appeals. Ilene Shane, director of the Disabilities Law Project said, "We're appealing because we believe it's not a correct decision. If this decision were to be followed, it would reverse 30 years of jurisprudence where people with disabilities have litigated their rights."

18. Tennessee: Brown et al. v. The Tennessee Department of Mental Health and Developmental Disabilities and Rukeyser) and People First of Tennessee v. Neal et al.

Brown. Filed in July 2000 by the state's P&A agency, this class action complaint alleges that Tennessee has violated federal Medicaid law by not furnishing ICF/MR or HCB waiver services with reasonable promptness to otherwise eligible individuals with developmental disabilities. The complaint estimated that about 850 individuals have been wait listed for HCB waiver services. This complaint relies solely on provisions of Medicaid law and the U.S. Constitution for its basis and makes no claims based on the ADA.

People First. In March 2001, People First of Tennessee filed its own class action complaint (01cv00272) in the U.S. District Court for the Middle District of Tennessee. This complaint asserts that the state: (a) has failed to provide ICF/MR or HCB waiver services with reasonable promptness; (b) is in violation of the

[8] Delong was settled in April 2002 by the state's agreeing seek funding from the legislature sufficient to serve 3,382 persons as provided in the federally-approved waiver application. (Priaulx, 2002)

ADA by failing to make reasonable modifications and accommodations so that individuals (including institutionalized persons) can obtain services in the most integrated setting; (c) is out of compliance with §1902(a)(10) of the Social Security Act since it has not made ICF/MR or waiver services available to all eligible persons; (d) has denied individuals the right to apply for or be made aware of Medicaid services; (e) has discriminated against some people with disabilities by not permitting all otherwise eligible persons to obtain services for which they are eligible, in violation of the ADA; (f) is in violation of §1902(a)(3) of the Social Security Act and the Due Process Clause of the 14th Amendment to the U.S. Constitution by not providing individuals written notice of denial of Medicaid services and, thereby, preventing them from exercising their appeal rights; (g) has denied individuals the ability to exercise free choice in receiving HCB waiver or ICF/MR services; and, (h) also has violated the Individuals with Disabilities Education Act by denying Medicaid payment for services to which school-age children are otherwise entitled.

The complaint alleged that approximately 2,000 persons with developmental disabilities were waiting for HCB waiver services in Tennessee. The State defendants, the petitioners contend, give insufficient attention to the growing backlog of people who need home and community services because most new resources are committed to placing residents out of state-operated institutions in compliance with court orders in several earlier institutional treatment lawsuits (People First v. Clover Bottom, et. al and United States of America v. State of Tennessee).

Brown has been consolidated with People First. Brown also had been amended to include an ADA integration mandate claim. The consolidated complaint is scheduled for trial in May 2003. (Priaulx, 2002)

19. Texas: McCarthy et al. v. Hawkins et al. [Previously, McCarthy et al. v. Gilbert et al.]

On September 4, 2002, eleven individuals and The Arc of Texas filed a class action complaint (02-cv-600) in the United States District Court for the Eastern District of Texas (Beaumont Division) against the Commissioners of the Texas Health and Human Services Commission (THHSC), the Texas Department of Mental Health and Mental Retardation (TDMHMR) and the Texas Department of Human Services (TDHS). The complaint charges that Texas has failed to "provide Plaintiffs and other Texans with mental retardation and developmental disabilities with community-based living options and services to which they are legally entitled and that meet their needs." The lawsuit seeks court intervention to require Texas to expand the availability of Medicaid home and community-based waiver services.

By way of background, THHSC is the Texas Medicaid Agency; TDMHMR operates the state's Medicaid home and community-based services (HCS) waiver program for persons with mental retardation; TDHS operates the Community Living Assistance and Support Services (CLASS) Medicaid waiver program for persons with developmental disabilities other than mental retardation. The complaint was filed by Advocacy Inc., the state's Protection and Advocacy agency.

The complaint charges that about 17,500 people with mental retardation are wait listed for the HCS waiver program (which presently serves about 4,600 individuals) and another 7,300 individuals have requested but are not receiving CLASS waiver services (the program presently serves about 1,800 individuals). The plaintiffs are seeking certification of a class that includes "all persons eligible to receive Medicaid waiver services, who have requested but not received waiver services with reasonable promptness." The class also would include 11,000 individuals served in ICFs/MR in Texas and who "are eligible to be considered for the kind of residential services that will enable them [to] become more fully integrated into the community." This class is the largest proposed in any of the waiting lawsuits to date.

Eight plaintiffs are individuals who presently live with their families. They range in age from 3 to 54. The three other named plaintiffs are persons served in ICFs/MR who seek more integrated services in the community. Motions have been filed to include additional plaintiffs.

The complaint charges that the state has violated: (a) §1902(a)(10)(A) of the Social Security Act by failing to make ICF/MR-level services available in an adequate amount, duration and scope to all eligible persons; (b) §1915(c)(2)(C) of the Social Security Act by failing to provide individuals a choice between institutional and home and community-based services; (c) §1902(a)(8) of the Social Security Act by (i) not allowing individuals to apply for waiver services and instead wait listing them and (ii) not furnishing services to eligible individuals with reasonable promptness; (d) the 14th Amendment to the U.S. Constitution by not affording individuals equal protection; (e) the Due Process Clause of the U.S. Constitution; (f) the ADA by failing to afford individuals residential services in the most integrated setting;

and, (f) §504 of the Rehabilitation Act, also by failing to provide services in the most integrated setting. The state has filed a motion to dismiss along with a motion to change venue.

20. Utah: D.C. et al. v. Betit et al.

On December 19, 2002, the Utah Disability Law Center (the state's P&A) filed suit (02cv01395) against the Utah Department of Health and the Division of Services for People with Disabilities in the United States District Court for the District of Utah on behalf of nine individuals and the Arc of Utah challenging the wait listing of individuals with developmental disabilities for Medicaid home and community-based waiver services. The Center alleges that wait listing otherwise eligible individuals violates federal Medicaid law, the ADA, and the Rehabilitation Act. The Center is seeking class certification on behalf of approximately 1,300 individuals who have been determined to have an immediate need for waiver services but have been wait listed.

Plaintiffs contend that the state has: (a) refused to provide medically necessary waiver services to individuals who have been determined to require them; (b) failed to operate its Medicaid program in the best interest of recipients, as required in §1902(a)(19) of the Social Security Act; (c) not operated its Medicaid program to assure that services are sufficient in amount, scope and duration; (d) violated §1915(c)(2)(C) of the Social Security Act by not making available waiver services to individuals who qualify for ICF/MR services; (e) violated §1902(a)(8) of the Act by not making services available with reasonable promptness; (f) violated the integration mandate of the ADA by putting individuals at risk of institutionalization; and, (g) violated §504 of the Rehabilitation Act. The plaintiffs are seeking declaratory and injunction relief in the form of a directive from the court ordering the state to develop a plan to serve wait listed individuals.

On January 31, 2003, the state filed a motion to dismiss the complaint. The state contends that:

> "[the] plaintiffs lack standing because they have no protected right to HCBS waiver services. Specifically, plaintiffs possess no protected right to HCBS waiver services because of the upper limit [on the number of participants] and other Medicaid limitations placed on HCBS waiver services, and the substantial discretion granted [the state] in administering and providing HCBS waiver services."

In its motion, he state argued that, because federal law allows it to limit the number of individuals served in its waiver program, people who are wait-listed for the program cannot have an enforceable right to waiver services. Since they lack such a right, the state contended that the reasonable promptness requirement could not apply. Also, lacking a right to waiver services, the state argued that plaintiffs do not have standing to bring suit under §1983. With respect to the plaintiffs' claim that the state is violating §1915(c)(2)(C) of the Social Security Act by not giving individuals eligible for ICF/MR services a choice of waiver services instead, the state argued that it is only obligated to inform individuals of "feasible alternative, if available under the waiver." If services are not available, then a "feasible alternative" would not exist. The state also contended that the Supreme Court's Olmstead does not apply in this case because "plaintiffs are not being held in institutional placements against their will, [and therefore] the ADA and Rehabilitation Act are inapplicable. Lastly, the state argued that, in order to furnish services to all wait-listed individuals, it would be forced to make a "fundamental alteration" by having to shift funds away from other programs in order to meet the needs of the plaintiffs. The state pointed out that both ADA regulations and the Olmstead decision "allows states to resist modifications that entail a 'fundamental alteration' of the state's services and programs."

21. Virginia: Quibuyen v. Allen and Smith

Filed in December 2000 in the U.S. District Court for the District of Virginia by a coalition of attorneys, this complaint alleged that the state impermissibly wait-listed individuals already enrolled in the state's HCBS waiver program rather than furnishing the additional services that they had been assessed as needing, including residential services. The complaint alleged that Virginia had imposed restrictions on furnishing services to waiver participants that "... are foreign to the statutory and regulatory Medicaid scheme, and indeed are inimical to it in that they establish additional unapproved barriers for otherwise eligible persons to obtain assistance to which they are entitled under federal law." Especially at issue was a June 1999 directive issued by the Department of Medical Services that restricted the circumstances

when additional services (including residential services) would be authorized. The directive limited new or expanded services to instances when an individual no longer can remain in the family home due to caregiver incapacity or other critical situations. The complaint argued that this and other policies led to wait listing waiver participants for the receipt of services for which they were otherwise eligible. In September 2001, the state agreed to change its policies so that individuals would receive all the services that they have been determined to require. As a result, the plaintiffs agreed to dismiss the lawsuit.

22. Washington: The Arc of Washington State et al. v. Lyle Quasim et al.

Filed in November 1999, this class action complaint (99cv5577) charged that Washington violated federal Medicaid law and the ADA by failing to provide Medicaid long-term services with reasonable promptness to eligible individuals with developmental disabilities. The complaint alleged that there are several thousand individuals with developmental disabilities in need of Medicaid funded services but not receiving them or current Medicaid recipients who would benefit from additional services.

In rulings in this litigation, the District Court determined that: (a) eligibility for ICF/MR services is not sufficient to establish an entitlement to HCB waiver services but (b) Medicaid law in fact does require services to be furnished with reasonable promptness. In December 2000, the Court granted the state's motion for a summary judgment to dismiss the plaintiffs' ADA claims. The plaintiffs had claimed that the ADA requires that, if a state makes HCB waiver services available to some individuals with disabilities, it must furnish such services to all similarly situated individuals. The Court ruled that the ADA cannot serve as the basis for ordering a state to increase its limit on the number of individuals who receive HCB waiver services because such an order would require the state to make a "fundamental alteration" in its services.

In April 2001, the parties reached a settlement agreement and submitted it to the court in August 2001. The agreement hinged on action by the Washington legislature to authorize $14 million in additional funding to expand services during FY 2003 and annualize these dollars to $24 million in subsequent years. The legislature approved the first installment of the agreement during its past session. The agreement also called for the parties to identify additional dollars to meet the needs of more individuals during the next biennium. Initially, 1,800 individuals are expected to benefit from the agreement. The full text of the agreement is at http://www.arcwa.org/lawsuitsettlement1.htm and a summary is at http://www.arcwa.org/june3,2002.htm.

However, in December 2002, the Court rejected the settlement agreement. The Court's decision is located at http://www.arcwa.org/arc_lawsuit_12-2-02.htm. Washington Protection and Advocacy Services (WPAS, which represents individuals in two other lawsuits concerning institutional services) and Columbia Legal Services (which represents individuals in another lawsuit (Boyle v. Braddock, described in Section IV below) objected to the settlement. In essence, both parties argued that the agreement provided insufficient assurances that the class members (including individuals they represent) would receive the services that they require. The Court was persuaded by these arguments and expressed additional reservations about the proposed settlement. As a result, the Court rejected the settlement, dissolved the class, lifted the stay on proceedings that had been in effect while the agreement was before the court, and put in motion scheduling trial. Trial is scheduled to begin in October 2003.

23. West Virginia: Benjamin H. et al. v. Ohl

Filed in April 1999, this class action complaint (99-0338) was filed in the U.S. District Court for the Southern District of West Virginia and alleged that West Virginia violated federal Medicaid law and the ADA by failing to provide Medicaid long-term services with reasonable promptness to eligible individuals. In July 1999, the court quickly granted the plaintiffs' motion for a preliminary injunction based on its finding that the plaintiffs were likely to prevail at trial based solely on the requirements of Medicaid law. The decision is at: http://www.healthlaw.org/pubs/199907benjamin.html. The state was ordered to develop a plan that would eliminate waiting lists; establish reasonable time frames for placing persons in the waiver program; allow persons to exercise their freedom of choice in selecting institutional or home based care; and, develop written policies to inform persons of the eligibility process along with policies and forms to afford proper notice and an opportunity for a fair hearing when applications for ICF/MR level services are denied or not acted on with reasonable promptness.

In March 2000, the court approved agreements between the parties to address the topics spelled out in the preliminary injunction. The settlement order is at http://www.healthlaw.org/docs/benh_order.pdf.

West Virginia agreed to increase the number of individuals with developmental disabilities who receive HCB waiver services by 875 over a five-year period. The parties also agreed on revised procedures concerning service applications and providing individuals with proper notice concerning the disposition of their applications. The also state submitted an application to HCFA to renew its HCBS waiver program, incorporating policy changes stemming from the agreement and increasing the number of persons served. This request was approved in December 2000. See also the final section for a discussion of issues concerning payment rates raised in this litigation. The court dismissed this case in August 2002 but retained jurisdiction to enforce its orders.

III. "Olmstead" Litigation

A. Overview

In June 1999, the U.S. Supreme Court handed down its historic decision in the Olmstead v. L.C. litigation, ruling that unnecessary segregation of individuals with disabilities in institutions constitutes prohibited discrimination under the ADA. In its majority opinion, the Court concluded that Title II of the ADA requires a state to place institutionalized persons with disabilities in community settings when: (a) the state's treating professionals have determined that a community placement is appropriate; (b) the transfer from an institution to a more integrated setting is not opposed by the affected individual; and (c) the placement can be reasonably accommodated, taking into account the resources available to the state along with the needs of other persons. This decision is at http://supct.law.cornell.edu/supct/html/98-536.ZS.html. More materials are at http://www.protectionandadvocacy.com/lcolmste.html, also at the Atlanta Legal Aid Society website (which brought the lawsuit and includes information about the plaintiffs) http://www.law.emory.edu/PI/ALAS/olmstead.htm and other websites as well. In March 2000, the Kaiser Commission on Medicaid and the Uninsured published a Policy Brief concerning potential Medicaid implications of the decision (http://www.kff.org/content/2000/2185/OlmsteadDecision.pdf). Also, the Center for Health Care Strategies has issued a series of working papers concerning various facets of the decision (available at: http://www.chcs.org/publications/consumer.html). Also, see "Community Integration of Individuals with Disabilities: An Update on Olmstead Implementation"[9] (http://www.bazelon.org/500852.pdf) for a review of court decisions that have revolved around the Olmstead decision and Title II of the ADA.

"Olmstead" lawsuits principally aim at securing access to community services for institutionalized persons with disabilities. In other words, these lawsuits raise issues similar to those decided in the Olmstead litigation. In developmental disabilities, there is a long history of litigation predating the Olmstead decision that led to the community placement of institutionalized persons. This litigation established that institutionalized persons must be discharged when their needs can be met in a less restrictive setting. The Olmstead decision furnishes another basis for "deinstitutionalization" litigation as well as clearly establishing that individuals with disabilities (developmental, cognitive or otherwise) served in other institutional settings (e.g., nursing facilities or privately-operated ICFs/MR) also have the right to services in the "most integrated setting."

Some "waiting list" lawsuits (e.g., Travis D and Lewis) include institutionalized persons in the plaintiff class. There have been other lawsuits filed that principally (but not always exclusively) seek community services for institutionalized persons, mainly on behalf of persons with disabilities (including developmental disabilities) served in nursing facilities. Some of these lawsuits (e.g., the Indiana Inch litigation) also include individuals in the community who want HCBS but claim that the lack of such services effectively forces them into institutions. Whether the volume of these lawsuits will grow is uncertain and may hinge on the extent to which states develop "comprehensive, effectively working plans" to address the needs of institutionalized persons who might benefit from community services. In its decision, the Supreme Court noted that, if a state were implementing such a plan, then the state might be in compliance with the ADA. Information concerning the status of state "Olmstead Plans" is available at: http://www.hcbs.org/Olmstead/olmsreport.htm. Institutionalized persons who believe that their access to community services has been wrongfully denied may file a complaint with the DHHS Office

[9] Jennifer Mathis, Journal of Poverty Law and Policy (November-December 2001)

of Civil Rights instead of seeking redress through the federal courts. Individuals in several states have filed such complaints.

B. Description of Lawsuits

1. California: Capitol People First et al. v. California Department of Developmental Services et al.

This class action complaint was filed on January 25, 2002 in Alameda County Superior Court by California Protection and Advocacy, Inc. on behalf of 12 individuals with developmental disabilities presently served in state Developmental Centers or other large congregate facilities (including nursing facilities), three community organizations and two taxpayers. The lawsuit was filed against the Departments of Developmental Services, Health Services and Finance along with California's Health and Human Services Agency and the 21 non-profit Regional Centers charged by state law to manage services to people with developmental disabilities.

The lawsuit argues that California has caused thousands of individuals to be "needlessly isolated and segregated" in large congregate public and private facilities and also contends that the lack of appropriate community services causes persons with disabilities to be put at risk of institutionalization. The plaintiffs contend that California's policies violate the state's Lanterman Act and own Constitution along with the ADA, federal Medicaid law, and §504 of the Rehabilitation Act. The plaintiffs have petitioned the Court to certify a class of "all Californians with developmental disabilities who are or will be institutionalized, and those who are or will be at risk of institutionalization in either public or private facilities, including but not limited to, the Developmental Centers, skilled nursing facilities, intermediate care facilities (ICF/DDs), large congregate care facilities, psychiatric hospitals or children's shelters." If the class is approved, it would include roughly 6,000 persons residing in large congregate facilities and an estimated 400 individuals each year at risk of institutionalization. According to the plaintiffs, some 1,000 of the 3,700 persons served at the state's Developmental Centers have been recommended for discharge to the community but continue to be inappropriately institutionalized.

The lawsuit asks the Court to order sweeping changes in California's services for people with developmental disabilities, including requiring the state to offer the full range of Medicaid home and community-based services to individuals and strengthening other dimensions of community services. Numerous documents concerning this lawsuit (including the complaint itself and a summary) are located at: http://groups.yahoo.com/group/CAL-DDCOMMIMP/files/Complaint/. Additional information is at http://www.pai-ca.org/BulletinBoard/Index.htm#CPF. In March 2002, the Court decided that the lawsuit should be treated as "complex litigation" and assigned to it a division expressly charged to handle such cases. In November 2002, the California Association of State Hospital Parent Councils for the Retarded (CASH/PCR) and the California Association for the Retarded (CAR) petitioned to intervene in the litigation. These associations are composed of parents of individuals served in state-operated facilities. They sought intervenor status because they do not believe that the defendants will adequately represent the interests of institutionalized persons who might be endangered by community placement. This petition was opposed by the plaintiffs along with some of the Regional Center defendants. On January 28, 2003, the Court gave the parents leave to intervene but confined the scope of their intervention to the "parameters of the complaint." The court admonished the intervenors not to attempt to enlarge the issues in the litigation and confine themselves to two issues: "ensuring that the legal rights of parents to participate in the planning process and the ability of professionals to recommend placement in developmental centers are not adversely affected by any judgment in this action." Over the next one-two months, it is expected that the Court will lay out a schedule for how the case will proceed, including setting a trial date and requiring the parties to spell out the motions that they intend to file.

2. Florida: Brown et al. v. Bush et al.

This is 1998 class action complaint seeks a declaratory judgment and permanent injunction to prevent the state from unnecessarily institutionalizing individuals with developmental disabilities in violation of the ADA integration mandate, §504 of the Rehabilitation Services Act of 1973, federal Medicaid law, and the U.S. Constitution. In March 1999, the U.S. District Court for the Southern District of Florida adopted wholesale Plaintiffs' proposed class and certified the class as: "all persons who on or after January 1, 1998, have resided, are residing, or will reside in DSIs [Developmental Services Institutions] including all

persons who have been transferred from [institutions] to other settings, such as ICF, group homes, or SNF's but remain defendant's responsibility; and all persons at risk of being sent to DSIs."

Florida appealed the District Court's class certification to the 11th Circuit. The 11th Circuit agreed that the proposed class was overly broad and remanded the case to the District Court with instructions to certify the class as composed of "all individuals with developmental disabilities who were residing in a Florida DSI as of March 25,1998, and/or are currently residing in a Florida DSI who are Medicaid eligible and presently receiving Medicaid benefits, who have properly and formally requested a community-based placement, and who have been recommended by a State-qualified treatment professional or habilitation team for a less restrictive placement that would be medically and otherwise appropriate, given each individual's particular needs and circumstances." Reportedly, the parties are seeking to negotiate a gradual reduction in the number of persons served in Florida's DSIs.

3. Georgia: Birdsong et al. v. Perdue et al.

On January 31, 2003, private attorneys in tandem with the Atlanta Legal Aid Society filed a class action complaint in the U.S. District Court for the Northern District of Georgia on behalf of individuals with physical disabilities who reside in nursing homes or are at risk of nursing home placement and want home and community services. The plaintiffs contend that Georgia's policies cause them to be unnecessarily segregated when they could be supported in the community instead. The complaint alleges that "[i]n the three and one-half years since the *Olmstead v. L.C.* decision, the State has made no significant effort to operate its long-term care services in an even-handed manner so that persons who need [home and community-based] services have this option." The Olmstead decision, of course, revolved around the unnecessary institutionalization of Georgians with disabilities and the litigation that led to the decision was filed by Atlanta Legal Aid Society.

The plaintiffs are persons who have severe physical disabilities and, except in one instance, reside in nursing facilities. They believe that, with appropriate supports, they could live in the community. Georgia operates two HCBS waiver programs – the Community Care Services Program and the Independent Care Waiver Program – for persons who do not have mental retardation. The plaintiffs are on waiting lists for these programs; however the waiting lists are quite lengthy. In their complaint, the plaintiffs point out that Georgia spends about five times as much on institutional as home and community services.

In particular, the plaintiffs contends that Georgia's policies and practices violate: (a) ADA and §504 of the Rehabilitation due to the state's failure to furnish services in the most integrated settings and its utilization of discriminatory criteria and methods of administration in its programs; (b) §1915(c)(2)(C) of the Social Security Act for failing to provide timely and adequate notice to individuals who might benefit from waiver services and provide individuals freedom of choice between institutional and waiver services; (c) §1902(a)(8) of the Social Security Act for failing to provide individuals with home and community services with reasonable promptness.

4. Indiana: Inch et. al. v. Humphrey and Griffin

In July 2000, this class action lawsuit was filed by the Indiana Civil Liberties Union (ICLU) in Marion County Superior Court on behalf of individuals with disabilities who reside in nursing homes or who are at risk of nursing home placement but want to live in integrated settings with services from Indiana's HCB waiver program for individuals who are elderly or disabled. The Indiana Family and Social Services Administration is the named defendant. The lawsuit alleges that 2,000 individuals with disabilities are either on waiting lists for community services or suffering "unjustified institutional isolation" and, hence, experiencing discrimination prohibited by the ADA. The complaint further states that Indiana spends less than 9% of its of elderly and disabled services budget to support individuals in integrated home and community settings. It further alleged that new enrollments in the state's elderly and disabled programs have been closed for two years and new applications are not being taken.

The suit argues that people in nursing home facilities or at risk of nursing home placement must be given the choice of HCB waiver services rather than *de facto* being limited to receiving institutional services. The plaintiffs seek preliminary and permanent injunctions to enjoin the state from continuing to violate the ADA and direct that Medicaid eligible individuals be offered Medicaid long-term services in the community. This complaint is at: http://groups.yahoo.com/group/CAL-DDCOMMIMP/files/indiana.doc.

ICLU reports that this case "is proceeding." In December 2000, a second class action complaint was filed in St. Joseph County Superior Court (South Bend) on behalf of individuals with developmental disabilities placed in nursing facilities due to the lack of availability of HCB waiver services.

5. Kentucky: Doe v. Kentucky Cabinet for Human Services

This class action lawsuit alleged that Kentucky was not properly administering the federally mandated Medicaid Pre-Admission Screening and Resident Review (PASRR) process with respect to individuals with mental retardation served in nursing facilities. Under federal PASRR requirements, a state must take steps to furnish appropriate specialized services for persons with mental disabilities who reside in nursing facilities and/or arrange for their community placement if nursing facility services are inappropriate. The litigation was dropped after the state and Kentucky Protection & Advocacy hammered out an agreement to employ a consultant to evaluate the state's PASRR process and make recommendations. So far, it has been determined that a substantial number of nursing facility residents with mental retardation are inappropriately placed in such facilities and should be offered services in the community.

6. Louisiana: Barthelemy et al. v. Louisiana Department of Health and Hospitals

In April 2000, five individuals (two with developmental disabilities and three with physical disabilities) along with Resources for Independent Living filed a complaint against the Louisiana Department of Health and Hospitals alleging that the state was violating the ADA and §504 of the Rehabilitation Act by restricting the availability of services to "unnecessarily segregated settings" (i.e., nursing facilities). The plaintiffs with non-developmental disabilities sued for access to the state's elderly and disabled and/or personal care attendant waiver programs; the plaintiffs with cognitive disabilities want access to Louisiana's developmental disabilities and personal care attendant waiver program. The plaintiffs pointed out that Louisiana spends "90% of its Medicaid funds on institutional services" but only a small amount for community services. The plaintiffs asked the Court to: 1) grant class action status to Louisianans with disabilities who are unnecessarily institutionalized and 2) find the state in violation of the ADA and §504 of the Rehabilitation Act.

On August 16, 2001, Louisiana Department of Health and Hospitals Secretary David Hood unveiled a proposed settlement that would boost state spending $118 million over a four year period to provide community services to 1,700 more individuals and reduce the waiting time for services to 90 days or less. The settlement plan submitted by DHH and agreed to by the plaintiffs addresses four broad areas: (a) reducing the waiting time for community-based services; (b) allowing people to make informed choices about service options; (c) the addition of a Medicaid personal care services option; and, (d) instituting individual long-term care assessments through a new single point of entry system. The state would spend an additional $18 million to extend services to 650 people and $32 million in 2003 for another 650 people. In 2004 and 2005, the state would spend another $34 million to expand services to an additional 400 individuals. The state also would expand outreach to inform individuals about community services. Information about the settlement is at: http://www.dhh.state.la.us/NEWS/BarthelemySettlement.htm. The settlement is further described in another document at http://aging.senate.gov/events/hr74lb.htm.

The Louisiana legislature approved $83.8 million to expand home and community services during state FY 2002 – 03. Some $27.9 million is earmarked to extend personal care attendant services to 3,000 more individuals with disabilities. The remaining dollars will be used to expand HCBS waiver services, including services for older persons and individuals with developmental disabilities. Altogether, the expansion of HCBS waiver services is expected to reach about 1,400 people who have been waiting for services. Go to http://www.advocacyla.org/whatsnew.html for a report concerning the implementation of the settlement.

7. Maryland: Williams et al. v. Wasserman et al.

This lawsuit (CCB-94-880) was filed in 1994 in the United States District Court for the District of Maryland against Maryland Department of Mental Health and Hygiene officials by institutionalized persons who had suffered a traumatic brain injury or had another developmental disability and were demanding that the state develop and implement home and community services on their behalf. The plaintiffs' alleged that Maryland had violated (a) the U.S. Constitution by unnecessarily confining them to institutions and (b) the ADA by not furnishing them services in the most integrated setting. In 1996, the Court denied both parties' motions for summary judgment. Finally, in September 2001, the Court dismissed the lawsuit,

based on its determination that Maryland had made good faith efforts to (a) meet the needs of the plaintiffs and (b) accommodate individuals in the community.[10]

This lawsuit was filed before the U.S. Supreme Court handed down the Olmstead decision. The District Court's final decision followed the Olmstead decision and hinged in part on the District Court's determination that ordering Maryland to step up its efforts to support individuals in the community would result in a "fundamental alteration" in Maryland's programs for individuals with disabilities. In arriving at this decision, the Court noted that Maryland had substantially reduced its institutions and increased home and community-based services. With respect to the plaintiffs, the Court noted that the state had sought to arrange community services on their behalf, sometimes successfully but sometimes not. The Court decided that ordering the state to increase its efforts would result in increased expenditures in the short run and thereby would affect the state's capacity to serve other individuals. In the Court's view, this result would lead to a fundamental alteration and thereby go beyond the parameters laid down by the Supreme Court.

8. Massachusetts: Rolland et al. v. Romney et al. [N.B., previously Rolland et al. v. Celluci et al.]

In October 1998, a complaint was filed on behalf of seven Massachusetts residents with mental retardation and other developmental disabilities who reside in nursing facilities. The plaintiffs contended that they were denied alternative community placements or "specialized services" as mandated under the annual resident review (ARR) provisions of the federal 1987 Nursing Home Reform Amendments enacted in the Omnibus Budget Reconciliation Act of 1987. The law directed that states arrange alternative placements for inappropriately placed residents with developmental disabilities or a mental illness or, if the person opts to remain in a nursing facility, furnish specialized services. The plaintiffs also alleged that the failure to provide such services violated of Title II of the ADA.

In October 1999, the state agreed to offer community residential services and specialized services to nursing home residents with developmental disabilities under the terms of a mediated settlement agreement. The state consented to underwrite community placements to class members (858 individuals) unless it was determined that an individual cannot 'handle or benefit from a community residential setting." The placement process will take place over a multi-year period. In FY 2000 – 2001, $5.6 million was earmarked to start the placement process. The case and the settlement agreement are described in more detail at http://www.protectionandadvocacy.com/Rollandsum.htm.

In 2000, the Plaintiffs filed a motion asking the Court to find the state in violation of the agreement concerning the provision of specialized services to individuals still residing in nursing facilities. In March 2001, the Court ruled that the state was required to furnish specialized services sufficient to ensure "active treatment." The Court found that, if the services furnished by a nursing facility did not meet the active treatment standard, the Department of Mental Retardation is obligated to furnish supplementary services. In May 2002, the Court granted the plaintiffs injunctive relief and mandated that all class members receive services that meet the "active treatment" standard. The state appealed this ruling to the 1st Circuit Court of Appeals on 11th Amendment grounds and other grounds.

On January 28, 2003, the Circuit Court rejected the state's appeal. The court's decision is located at http://laws.findlaw.com/1st/021697.html and is discussed in greater depth in a Bazelon Center for Mental Health Law release at http://www.bazelon.org/newsroom/2-3-03rolland.htm. In a nutshell, the court held that, under federal law, specialized services, including "active treatment" must be furnished to all individuals who need them. The state also had argued that the nursing home reform provisions did not confer a private right to action. The court rejected this argument, holding that the legislation in fact did confer a private right to action, enforceable through the federal courts.

9. Michigan: Eager et al. v. Engler and Havemen

On March 19, 2002, six individuals and five advocacy organizations filed a lawsuit (5-02-00044-DWM) in the U.S. District Court for the Western District of Michigan seeking to overturn the state's freeze on enrollments to the MIChoice Program, a Medicaid home and community-based waiver program for

[10] To obtain a copy of this decision, go to http://www.mdd.uscourts.gov/Opinions152/SelectOpsMenu.asp, select "query by case number" and enter CCB-94-880.

individuals with disabilities and seniors that is designed to support individuals who otherwise would be eligible for nursing facility services. The approved capacity of the MIChoice program is 15,000 individuals. As a result of the freeze on enrollments that began in October 2001, the plaintiffs contend that fewer than 11,000 individuals are now participating in the program even though demand for home and community services remains high. The lawsuit was filed on behalf of the plaintiffs by Michigan Protection and Advocacy Service and the Michigan Poverty Law Program and is supported by a broad coalition of disability advocacy organizations.

The plaintiffs are advancing two major legal claims in the lawsuit. The first is that the freeze on enrollments violates the ADA by forcing individuals to seek nursing facility care rather than receive services in the most integrated setting. The second claim is that Michigan – under the terms of the waiver program as approved – cannot close enrollments to the program so long as fewer than 15,000 individuals participate. The plaintiffs also claim that Michigan is failing to provide individuals a choice between institutional and waiver services, not maintaining a proper waiting list for the MIChoice program, and violating Medicaid's reasonable promptness requirement. Additional information is at http://www.mpas.org/Article.asp?TOPIC=10854. So far, the Court has not made major rulings in this litigation. The proceedings are on hold until March 2003 to give newly-elected Governor Granholm's administration time to formulate its position concerning the litigation.

10. Michigan: Olesky et al. v. Haveman et al.

In September 1999, Michigan's P&A agency filed a complaint in state court on behalf of six individuals with developmental disabilities and/or mental illness who resided in nursing facilities but who wanted services in the community instead. In June 2000, this litigation was referred to the U.S. District Court for Western Michigan. The plaintiffs' counsel estimated that there were 500 individuals with cognitive disabilities in nursing facilities who could be served in the community. The plaintiffs allege that Michigan is violating the "Nursing Home Reform Act of 1987" and the ADA. This complaint is similar to the Massachusetts Rolland v. Cellucci (see above) except that it includes persons with a wider range of cognitive impairments (i.e., individuals who have a mental illness or another neurological disorder). The Court turned down the state's motion to dismiss the case on sovereign immunity grounds. The parties then settled. The state agreed to "assure the appropriate and timely community placement of individuals determined to not require nursing facility care. (Priaulx, 2002).

11. Mississippi: Billy A. and Mississippi Coalition for Citizens with Disabilities v. Lewis-Payton et al.

In May 2002, the Coalition for Citizens with Disabilities filed a class action complaint (02cv00475) on behalf of the five nursing facility residents in the U.S. District Court for the Southern District of Mississippi on behalf of five named plaintiffs alleging that Mississippi's policies result in the unnecessary segregation of individuals with disabilities in nursing homes by not making home and community services available to them. The named defendants in the lawsuit are the state's Division of Medicaid and the Departments of Human Services and Rehabilitation Services. Plaintiffs allege that the state is violating: (a) the ADA and §504 of the Rehabilitation Act by failing to provide Medicaid services in the most integrated setting; (b) the Medicaid Act by not informing individuals who qualify for nursing facility services of feasible alternatives to institutionalization and thereby denying them the freedom to choose home and community services as an alternative; (c) §1902(a)(8) of the Social Security Act by not providing services with reasonable promptness; and, (d) §1902(a)(30)(A) of the Social Security Act by not making payments for Medicaid services that are "consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers." (Priaulx, 2002). The plaintiffs are seeking class action certification. At present, this lawsuit is scheduled for trial in November 2003.

12. New Hampshire: Bryson et al. v. Shumway and Fox

In December 1999, two persons with neurological disabilities who reside in nursing facilities but are wait listed for services through New Hampshire's Acquired Brain Disorder (ABD) "model" HCBS waiver program filed a class action complaint (99-cv-558) to gain access to community services. The plaintiffs alleged that the New Hampshire Division of Developmental Services (DDS) (the agency that administers the state's ABD waiver program) operates its long term services programs with "inadequate, capped funding through the HCB/ABI program, arbitrary limits home health and other HCB services, and lack of

coordination between the various public and private agencies which administer the Medicaid program."

The plaintiffs argued that "states must ensure that services will be provided in a manner consistent with the best interests of the recipients" and that a state's Medicaid program must be "sufficient in amount duration, and scope to reasonably achieve its purpose." Furthermore, they argued that the state's "administration of the HCB/ABI program, which results in a failure to provide [HCB] services to eligible Medicaid recipients in a timely manner, defeats the purpose of the program and is insufficient in the amount, duration, and scope to reasonably achieve its purpose." The plaintiffs also cited additional grounds, including: 1) failure to provide needed Medicaid services in a "reasonably prompt manner;" 2) violation of Title II of ADA by making mainly facility-based services available to eligible persons; and, 3) the "due process" clause of the Fourteenth Amendment as well as other provisions of federal Medicaid law.

On October 23, 2001, U.S. District Court Judge Steven J. McAuliffe handed down a decision concerning both sides' motions for summary judgment. This decision is found at: http://www.nhd.uscourts.gov/ (by searching "opinions" for keyword "Bryson"). Judge McAuliffe dismissed two of the seven counts in the complaint, ruled in the plaintiffs' favor on a third and decided a fourth was moot. However, he deferred judgment on three central issues in the complaint: (a) whether wait listing individuals violates Medicaid law concerning reasonable promptness; (b) whether New Hampshire's policies are at odds with the ADA; and, (c) whether the state's policies violate §504 of the Rehabilitation Act. Judge McAuliffe rejected that the state's motion to dismiss the complaint on 11th Amendment grounds.

On December 10, 2001, Judge McAuliffe entered a final order in the case. He found that HCBS waiver services must be furnished with reasonable promptness and, furthermore, that individuals are entitled to model waiver services until 200 persons are served in the program. Federal law provides that the Secretary of Health and Human Services may not limit model waiver programs to fewer than 200 individuals. McAuliffe's order incorporated a stipulated agreement between the parties that eligible individuals should be enrolled in the program within twelve months of their date of eligibility.

The state appealed the District Court ruling to the 1st Circuit Court of Appeals. In mid-October, the 1st Circuit decided that the District Court erred in its interpretation of §1915(c)(10) of the Social Security Act. The District Court interpreted the statute as requiring that a model waiver program must serve no fewer than 200 individuals. The Circuit Court found that this provision instead barred the Secretary of HHS from denying a state's request to serve up to 200 individuals but that states retained the authority to limit the number of individuals served in a model waiver to fewer than 200 at their discretion. The Circuit thereby vacated the District Court order that New Hampshire expand its program to accommodate at least 200 individuals in its program. But, the Circuit also made it clear that the state was obligated to furnish waiver services to individuals with reasonable promptness up to the limit it had established. The Court also affirmed that the plaintiffs had standing to pursue their claims in federal court under §1983. The Circuit also remanded the case to the District Court to determine whether changes that New Hampshire had made in its notice provisions complied with federal requirements and determine whether the state is operating the waiver program in accordance with the reasonable promptness requirement up to the participant cap. As a side bar, in January 2002, New Hampshire expanded its waiver program to increase the number of slots from 89 to 117. The Circuit Court's decision may be found at http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=02-1059.01A.

13. Oregon: Miranda B. et al. v. Kitzhaber et al.

In December 2000, the Oregon Legal Center filed suit (CV-00-01753) in the U.S. District Court for the District of Oregon on behalf of ten named plaintiffs served state psychiatric institutions, contending that these individuals had been found by the state's own treating professionals to be ready for discharge to the community but continued to be institutionalized due to the lack of suitable community placements. The plaintiffs allege that the state is violating Title II of the ADA, §504 of the Rehabilitation Act and the 14th Amendment's Due Process Clause. In the plaintiffs' view, this lawsuit revolves around issues analogous to those decided by the U.S. Supreme Court in its Olmstead. The plaintiffs also are seeking class certification.

The state moved for dismissal on various grounds, including 11th Amendment immunity. In September 2001, the Court denied the state's motion for dismissal. The state then appealed to the 9th Circuit Court

of Appeals (01-35950). In May 2002, the 9th Circuit decided to take the appeal. Further proceedings at the District Court are stayed, pending the 9th Circuit's disposition of the appeal. The Court is scheduled to take up this case in March 2003.

14. Pennsylvania: Frederick L., et al. v. Department of Public Welfare et al.

In September 2002, the U.S. District Court for the District of Eastern Pennsylvania ruled against the plaintiffs in the Frederick L. v. Department of Public Welfare class action complaint. The plaintiffs were residents of Norristown State Hospital who claimed that their continued institutionalization at a state facility – despite recommendations for community placement – violated the ADA and § 504 of the Rehabilitation Act. The Court ruled that the plaintiffs' circumstances fell within the criteria spelled out in the Olmstead decision. However, the Court then decided that accelerating the pace of their community placement into the community would lead to increased expenditures and thereby potentially result in reductions in services to other individuals. The Court decided that this would constitute a "fundamental alteration" and thereby ruled that he could not grant relief under the ADA. In reaching this conclusion, the Court relied in part on the decision handed down in the Maryland Wasserman v. Williams litigation (see above). The decision is at: http://www.paed.uscourts.gov/documents/opinions/02D0675P.HTM. On October 3, 2002, the plaintiffs appealed this decision to the 3rd Circuit of Appeals (02-3721).

15. Pennsylvania: Pennsylvania Protection & Advocacy v. Department of Public Welfare et al.

In September 2000, Pennsylvania Protection and Advocacy (PPA) filed a lawsuit (CV-00-1582) in the U.S. District Court for the Middle District of Pennsylvania on behalf of the residents of South Mountain Restoration Center (SMRC), a state-operated nursing facility that services elderly individuals who have severe mental disabilities, many of whom have experienced long-term institutionalization. PPA contended that SMRC residents could be served in more integrated settings in the community and, hence, their continued institutionalization at the facility violated both Title II of the ADA and §504 of the Rehabilitation Act. PPA petitioned the court for declaratory and injunctive relief in the form of the appointment of an independent expert to identify SMRC residents who could be placed in the community and a directive to the Department of Public Welfare to commence a program of community placement.

On January 15, 2003, the court ruled in the state's favor and dismissed the lawsuit. In its ruling, the court noted that both parties agreed that many SMRC residents could be served in the community. The state, however, had maintained that the costs involved in serving these individuals in the community would require a "fundamental alteration" in its programs for persons with mental disabilities. The state argued that community placement would require a net increase in expenditures and, thereby, require the state to shift dollars from services provided to other individuals with mental disabilities to accommodate the community placement of SMRC residents. The court was swayed by the testimony of a defense expert who calculated that the average costs of community placement would exceed average costs at SMRC and, further, that costs of community placement would not be completely offset by reduced expenditures at SMRC. Based on its reading of the Olmstead decision, the court decided that the net increase in expenditures necessary to underwrite community placements and continue to operate SMRC for individuals who would not be placed in the community, in fact, would cause a fundamental alteration. PPA had urged the court to take a broader view of the fundamental alteration question by considering not only the budget for services for persons with mental disabilities but also take into account the overall state budget and other spending within the Department of Public Welfare. The Court rejected this approach, again relying on its interpretation of the Olmstead decision that it should confine itself to the effects on the dollars allocated for services for persons with mental disabilities.

16. Other Litigation

Other litigation in this arena has included lawsuits concerning individuals who have a mental illness who are served in state mental health facilities. Some of these lawsuits include the Charles Q v. Houston and Kathleen S v. Department of Public Welfare litigation in Pennsylvania as well as certain California lawsuits. Also in Pennsylvania, the Helen L. v. Dedario litigation raised "Olmstead"-like issues: namely, the access of nursing facility residents to community waiver services (specifically personal assistance/attendant care). In this litigation, the 3rd Circuit Court of Appeals held that the state's failure to provide services in

the most integrated setting appropriate to a person's needs violated the ADA. Additionally, the Court held that the provision of waiver services to the plaintiff would not fundamentally alter the nature of the waiver program because the services the plaintiff needed were already provided in the waiver program.

In 2000, a class action complaint (Davis v. Johnson) was filed on behalf of residents at Laguna Honda Hospital (a 1,200-bed nursing facility in San Francisco) that argues that the City and County of San Francisco along with several state agencies are violating federal Medicaid law and the ADA by denying individuals with disabilities access to community services and thereby forcing them to remain institutionalized. The complaint is located at http://www.dredf.org/final.html. Plaintiffs are represented by a coalition that includes Protection and Advocacy, Inc. in Oakland, California; Disability Rights Education and Defense Fund, Inc. in Berkeley, California; the National Senior Citizens Law Center in Los Angeles, California; the Bazelon Center for Mental Health Law in Washington, D.C.; and, the American Association of Retired Persons (AARP). The US Department of Justice filed a friend of the court brief in support of the plaintiffs. In August 2001, the Court rejected San Francisco's motion to dismiss the lawsuit (http://www.dredf.org/press_releases/laguna.html). The case is on hold as the parties attempt to work out a settlement agreement with a mediator (Priaulx, 2002).

IV. "Access to Benefits" Litigation

A. Overview

"Access to benefits" lawsuits revolve around the ability of Medicaid recipients to obtain services and supports that they have been approved to receive. For example, while a person's HCB waiver plan of care may authorize the individual to receive a service, he or she may be prevented from obtaining the service due to budget restrictions and/or other obstacles.

Litigation in this arena includes lawsuits that contend that low state payment rates prevent recipients from being able to find a personal assistant or other workers to provide needed services. The Medicaid statutory issues concerning the interplay among payments, adequacy, quality, and access to benefits/services are discussed in detail in a National Health Law Project paper located at: http://www.healthlaw.org/docs/200009IssueBriefHCBC.pdf. In other cases, the availability and quality of services available through an HCB waiver program also has been the subject of litigation. Recent litigation has raised issues about the effects of low state payments on service quality.

This litigation differs from "waiting list" or "Olmstead" litigation principally because it revolves around individuals already authorized to receive Medicaid community-based services. However, some waiting list lawsuits (e.g., Quibuyen in Virginia) have raised similar issues. These lawsuits argue that state policies or practices concerning the operation of community programs constitute barriers to individuals obtaining authorized services. In some cases, these barriers are alleged to violate the ADA, either because they force individuals to seek institutional services due to a shortage of community services or more generous state funding for institutional services, thereby discriminating against people who want community services. In the Arizona and California lawsuits, the plaintiffs also allege that state's funding practices violate §1902(a)(30)(A) of the Social Security Act, which requires states to make payments for Medicaid services sufficient to ensure their availability to Medicaid recipients. In particular, §1902(a)(30)(A) provides that the "State plan for medical assistance must … provide such methods and procedures relating to the … the payment for care and services under the plan … as may be necessary … to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." HCBS waiver programs are not exempt from §1902(a)(30)(A).

B. Description of Lawsuits

1. Arizona: Ball et al v. Biedess et al. (00-cv-67)

In January 2000, the Arizona Center on Disability Law and the Native American Protection and Advocacy Agency filed a class-action complaint in federal district court arguing that Medicaid payment rates for direct service and support professionals (attendants) in the community are insufficient to enlist enough providers to ensure that Medicaid services are available to persons with disabilities who have been authorized to receive them. Among its other claims, the lawsuit argues that the state is violating

§1902(a)(30)(A) failing to make payments sufficient to attract enough providers to meet the needs of Medicaid recipients. The plaintiffs also claim that the state also is violating other Medicaid requirements, including: 1) reasonable promptness; 2) amount, duration and scope; and, 3) freedom of choice. Also, the plaintiffs argue that Arizona violates Title II of the ADA and §504 of the Rehabilitation Act because the lack of a sufficient pool of community-based support workers puts individuals with disabilities at risk of institutionalization. The complaint is at http://www.acdl.com/pdfs/BallAmendedComplaint.pdf. The District Court has granted class-action certification.

Other information about this lawsuit is found at http://www.acdl.com/legalnews.html, including the plaintiffs' October 2001 "Statement of Material Facts in Support of Motion for Summary Judgment" and "Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment." The trial phase of this litigation is slated to begin in February 2003.

2. Pediatric Speciality Care, Inc. et al. v. Arkansas Department of Human Services et al.

In November 2001, the Arkansas Department of Human Services (ADHS) announced plans to cut back Medicaid benefits due to state funding shortfalls. Among other actions, ADHS proposed eliminating early intervention day treatment and therapy furnished to children with developmental disabilities ages 0-6. Three providers of these services and three affected families filed suit in the U.S. District Court for the Eastern District of Arkansas to enjoin ADHS against eliminating these early intervention services. In December 2001, The District Court granted a permanent injunction debarring ADHS from eliminating these services, reasoning that the federal requirements concerning Early and Periodic Screening, Diagnosis and Treatment (EPSDT) mandated that these services be provided so long as they had been ordered by a physician as a result of a diagnostic evaluation and would result in the "maximum reduction of medical and physical disabilities and restoration of the child to his or her best functional level." State officials had argued that they had the "legal right to decide whether to include the services" in the state's Medicaid program.

ADHS appealed the injunction to the 8th Circuit Court of Appeals. In June 2002, the Circuit handed down a decision (http://caselaw.lp.findlaw.com/data2/circs/8th/013971p.pdf). In its ruling, the Circuit Court affirmed that Medicaid-eligible children have a right to early intervention services, ruling that ADHS "must pay part or all of the cost of treatment discovered by doctors who first diagnose and evaluate the children." The Circuit decided that federal law does not require ADHS to specifically list the services at issue in its Medicaid state plan. However, so long as the services have been determined as necessary by a physician, it must pay for them since federal law dictates that Medicaid-eligible children receive physician-ordered services whether the state has formerly listed them or not. The Circuit also reminded "the state that it has a duty under [§1902(a)(43) of the Social Security Act] to inform recipients about the EPST services that are available to them and that it must arrange for the corrective treatments prescribed by physicians. The state may not shirk its responsibilities to Medicaid recipients by burying information about available services in a complex bureaucratic scheme." The Court remanded the case to the District Court to revise the injunction and consider the remaining plaintiff claims.

In November 2002, the District Court Judge William Wilson issued a new order ruling in favor of the plaintiffs. The effect of the new order was to continue a revised injunction to compel the state to continue to furnish the disputed services. In his order, Judge Wilson expressed considerable chagrin concerning recent state actions, which in his view were attempts to end-run the injunction. The state then filed a motion asking for a modification of the order, arguing that it had secured federal approval for a Medicaid state plan amendment that complied with the 8th Circuit decision and the effect of the new order would be that the state could not receive federal Medicaid funds for early intervention day treatment services under the federally approved change in the state plan. The plaintiffs countered, arguing that the change in the Medicaid plan coupled with other state actions had the effect of sharply reducing access to the services or putting new obstacles in the way of obtaining such services. The plaintiffs also asked that the Court to review changes that the state might propose in the future to ensure that they would not have the effect of eliminating the disputed services.

On December 18, 2002, Judge Wilson modified his order. He ruled that his latest order was not inconsistent with the 8th Circuit ruling; he continued the injunction directing the state to continue to provide the services. He also ruled that his latest order applied to the federal Centers for Medicare and

Medicaid Services (CMS) and ordered CMS to continue to provide federal Medicaid funding for early intervention services. However, he declined to directly supervise the state's administration of these services. He again enjoined the state to continue to provide and pay for early intervention and related services and barred the state from implementing changes to the provision of these services. On January 3, 2003, the state appealed the district court's order to the 8th Circuit Court of Appeals. The Circuit Court has directed that all briefs and replies be filed by April 2003.

3. California: Sanchez et al. v. Johnson et al.

Filed in May 2000 in the U.S. District Court for the Northern District of California on behalf of individuals with developmental disabilities, this compliant (00cv01593) alleges that the state of California has "established and maintained highly differential payment and wage and benefit structures between the institutional and community-based components of California's developmental disability services program, which has the effect of subjecting people with developmental disabilities to unnecessary institutionalization and segregation." The plaintiffs – persons with disabilities, provider and advocacy organizations – claim the state, in creating such payment differentials, violates Title II of the ADA, both with respect to the integration mandate and other regulations "prohibiting a public entity from providing different or separate aids, benefits or services to individuals with disabilities of to any class of individuals with disabilities that is provided to others." Additionally, the plaintiffs point out that ADA regulations prohibit public entities from "utilizing criteria or methods of administration … that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability." As a result, they allege that California has discriminated against the plaintiffs by "utilizing criteria and methods of administration that discriminate against people with disabilities by [offering] low wages for direct care and professional staff."

Claims based on federal Medicaid law include the allegation that state payments for community-based services are not sufficient to assure efficiency, economy, and quality of care and enlist sufficient qualified providers to ensure access to services as required by §1902(a)(30)(A). The plaintiffs petitioned the court to order the state to improve the community services payment and benefit structure and correct other problems that lead to unnecessary institutionalization. The text of this complaint may be found at http://www.sanchezvsjohnson.org/lawsuit.html. Other materials concerning this complaint are found at http://www.sanchezvsjohnson.org/updates.html.

In August 2001, the Court certified the lawsuit as a class action. The Court's class certification order is at http://www.sanchezvsjohnson.org/order1593.html. In September 2001, the Court rejected the state's motion for partial summary judgment to dismiss the plaintiffs' claims with respect to §1902(a)(30)(A). The state had argued that neither people with disabilities nor providers may bring a lawsuit in federal court to enforce these provisions.

In March 2002, the plaintiffs filed a motion for summary judgment. The motion for summary judgment requested that the issue "an order enjoining defendants at least to double current community direct care wages and benefits, making them substantially equal to institutional direct care wages and benefits and to index them to meet defendants' future, continuing duties under federal statutes." This motion is located at http://www.sanchezvsjohnson.org/summary.html.

In August 2002, District Court Judge Claudia Wilken turned down the plaintiffs' motion for summary judgment and ruled that the issues raised by the plaintiffs did not constitute violations of the ADA or §504 of the Rehabilitation Act.[11] At the same time, Judge Wilken denied the state's motion to dismiss the case on sovereign immunity grounds. She then ruled that a "bench trial" will be held regarding the remaining issues in the case and instructed both sides to submit additional evidence and other briefs/motions. Even though Judge Wilken had expressed a desire to move the lawsuit along to trial quickly, it is unclear when trial will commence.

The remaining issues for trial concern whether California's payments are sufficient to enable providers to furnish quality services and individuals to be able to access to necessary services, as required by

[11] Marty Omoto, Legislative Director, California UCP (August 9, 2002). "CA UCP Legal Update: Sanchez v. Johnson Case: Federal District Court Orders Case to Trial; Judge Denies Plaintiffs' Summary Judgment Motion, Ruling Partially in Favor of State," available at www.lanterman.org/Legislative/SanchezvJohnsonUpdate.PDF.

§1902(a)(30)(A). With respect to service quality, Judge Wilken expressed the view that the plaintiffs had so far not marshaled sufficient evidence to show that the state's rates do not bear a reasonable relationship to the costs of providing quality services. However, she allowed that the plaintiffs' claim might have validity based on other evidence. She also noted that plaintiffs had put forward facts that bore on the question of whether individuals had sufficient access to services. But, she also observed that the evidence that the plaintiffs' had submitted thus far was insufficient to prove that access problems directly stem from insufficient payments. The outcome of this case seems likely to hinge on whether the plaintiffs' can present sufficient hard, direct evidence to show that the state's payments prevent providers from furnishing quality services or cause individuals not to be able to access services.

4. Colorado: Mandy R et al. v. Owens et al.

As previously noted, the Colorado Association of Community Centered Boards (CACCB) has intervened in this "waiting list" lawsuit and specifically brought forward the claim that Colorado is violating §1902(a)(30)(A) by not making adequate payments for community services. The presiding judge has agreed to this broadening of the original complaint.

5. Connecticut: Pragano et al. v. Wilson-Coker

In November 2002, three Medicaid beneficiaries with disabilities filed a lawsuit (02-CV-1968) against the Connecticut Department of Social Services (the state's Medicaid agency) alleging that the state was refusing to pay for durable medical equipment they need to improve their health and live independently. The plaintiffs contend that the state has adopted "an unwritten and unpublished policy of denying Medicaid payment for any equipment not covered by the federal Medicare program", thereby impermissibly restricting their access to necessary equipment. The plaintiffs are seeking a preliminary injunction and class certification. The plaintiffs are represented by the New Haven Legal Assistance Association and Connecticut Legal Services.

In 1997, the New Heaven Legal Assistance Association filed a similar lawsuit (DeSario v. Thomas) challenging Connecticut's practice of limiting payment for medical equipment to items included on a list established by the Department. Ultimately, this case was settled by the state's agreeing to periodically update its list of covered items and allow individuals to obtain items not on the list when necessary. This litigation also prompted the federal Health Care Financing Administration (HCFA; now the Centers for Medicare and Medicaid Services) to clarify its policies concerning the coverage of medical equipment, including requiring states to provide individuals "a meaningful opportunity for seeking modifications of or exceptions to a State's pre-approved list." This policy was promulgated via a September 1998 State Medicaid Director letter (located at: http://cms.hhs.gov/states/letters/smd90498.asp).

In this lawsuit, the plaintiffs allege that the Department is once again employing an arbitrary list to deny individuals of equipment that is necessary for them to function in the community and thereby increase their risk of institutionalization.

6. Florida: Wolf Prado-Steiman et al. v. Bush et al.

One of the central topics addressed in this lawsuit was the allegation that individuals who participated in Florida's HCB waiver program did not receive the full range of services that they needed or were authorized to receive. The lawsuit alleged that Florida denied or did not make available HCB waiver services to participants, even though services had been authorized in the person's service plan. In May 2000, the parties entered into an 18-point settlement agreement that, in addition to committing Florida to provide the full-range of HCB waiver services to program participants, required the state to take a wide variety of steps aimed at improving the quality of HCB waiver services, including improving support coordinator workload ratios and undertaking a study of HCB waiver payment rates.

7. Kansas: Interhab, Inc. et al. v. Schalansky et al.

In October 2002, Interhab and five other community service providers filed a class action lawsuit in Shawnee County District Court (02C001335) against the Kansas Department of Social and Rehabilitation Services (SRS) claiming that the state's payments are insufficient to meet the needs of the state's citizens with developmental disabilities and thereby violate provisions of Kansas and federal law. Interhab is an association of Kansas community service providers. The plaintiffs assert that community services are underfunded by $88 million in the current budget year. The lawsuit also seeks damages for alleged

underfunding in previous years; such damages might total $300 million, according to the plaintiffs.

The lawsuit claims that the state has violated the state's 1996 Developmental Disabilities Reform Act (DDRA), which the plaintiffs argue mandates that the state provide "adequate and reasonable" funding for community services. In particular, the plaintiffs point out that the DDRA made it Kansas policy that:

> "…this state …assist persons who have a developmental disability to have: (a) Services and supports which allow persons opportunities of choice to increase their independence and productivity and integration and inclusion into the community; (b) access to a range of services and supports appropriate to such persons; and (c) the same dignity and respect as persons who do not have a developmental disability." (K.S.A. 39-1802).

The DDRA also provides that SRS establish "a system of adequate and reasonable funding or reimbursement for the delivery of community services that ….:

> "requires an independent, professional review of the rate structures on a biennial basis resulting in a recommendation to the legislature regarding rate adjustments. Such recommendations shall be adequate to support: (A) A system of employee compensation competitive with local conditions; (B) training and technical support to attract and retain qualified employees; (C) a quality assurance process which is responsive to consumers' needs and which maintains the standards of quality service (D) risk management and insurance costs; and (E) program management and coordination responsibilities." (K.S.A. 39-1806)

The plaintiffs charge that the review of rates required by statute has not taken place and the wage rates upon which SRS is basing payments are inadequate. As a consequence, provider agencies are not able to recruit and retain qualified staff to meet the needs of individuals. In addition to violating the DDRA, the plaintiffs also charge that SRS has violated §1902(a)(30)(A) of the Social Security Act by not making payments sufficient to ensure that "consumers of community programs and services have access to high quality care." The plaintiffs also are advancing an equal protection claim under both the U.S. and Kansas Constitutions by contending that the state discriminates between community providers and its own institutions by funding similar services differently. The plaintiffs also allege break of contract.

The plaintiffs are petitioning the court to: (a) review all payment rates for the period 1996 – 2003; (b) order the state to pay for all "underfunding" during that period; (c) enjoin the state to pay "adequate and reasonable reimbursement rates"; (d) enjoin the state to establish a rate setting methodology that complies with federal and state law; and (e) enter a judgment directing SRS to reimburse all costs incurred by the plaintiffs in delivering services, including hourly wages and benefits that reflect the amounts paid to equivalent workers in each locality. In December, the state filed motions to dismiss the federal and state law claims.

On January 3, 2003, the plaintiffs amended the complaint and asked the court to issue a temporary restraining order to block payment and other funding cuts ordered in August and November 2002 by outgoing Governor Bill Graves to address the state's mounting budget deficit. Included in these cuts were developmental disabilities HCBS waiver rate reductions.

On February 11, 2003, the court turned down the plaintiff's request for a temporary restraining order. The Court ruled that there was no evidence that the state acted "arbitrarily, capriciously or unreasonably in [its] choices of program reductions." While acknowledging that the budget cuts "appear potentially harmful," the "court could not conclude that its interference would not do more harm than good to the public interest if it issued a temporary restraining order." With the rejection of the request for a temporary restraining order, activity in this litigation will turn to the issues raised in the original complaint.

8. Louisiana: Malen v. Hood

This class action compliant was filed in December 2000 against the Louisiana Department of Health and Hospitals in the U.S. District Court for the Eastern District of Louisiana. At issue in this case was the state's proposed method of implementing a new "Children's Choices" HCBS waiver program for children with severe disabilities. The new waiver program offers a dollar-capped set of benefits that is less broad than that offered under Louisiana's pre-existing HCBS waiver program. The state had proposed that, if a child were on the waiting list for Louisiana's existing HCB waiver program for people with developmental

disabilities, the family would have to agree to give up the child's place on that waiting list if they accepted enrollment in the new waiver program. Families objected to this proposal because it meant that their children would be disadvantaged if they needed more intensive services than offered under the new program. Plaintiffs contended that this requirement was impermissible under federal law.

When the lawsuit was filed, the federal officials had not made a final decision to approve the new program. Subsequently, CMS determined that the state's proposal with respect to the waiting-list status of children could not be approved. The state then removed this provision. CMS then approved the request and the Children's Choices program is now being implemented. This lawsuit has been settled.

9. Maine: Risinger et al. v. Concannon et al.

Filed in June 2000, this complaint (00-116-B-C) alleged that Maine violated federal Medicaid law by failing to furnish medically necessary Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services to children with mental disabilities. The lawsuit was filed by private attorneys in collaboration with Maine Equal Justice Partners, Inc. The Disability Rights Center of Maine joined the lawsuit as a named plaintiff. The lawsuit argued that federal law requires the state to arrange for medically necessary EPSDT services – including in-home mental health services – in a reasonably prompt manner. Consequently, at issue is Maine's assuring access to non-waiver Medicaid services for children. Under federal law, a state may not limit the availability of medically necessary EPSDT services. The lawsuit also contends that Maine's payments for services are insufficient to ensure their availability when and as needed and thereby the state is violating §1902(a)(30)(A). As a consequence, the plaintiffs argue that 600 Maine children with mental disabilities have been wait listed for services or are unable to receive entitled services. More information is at http://www.healthlaw.org/pubs/200006release.html.

In July 2001, the District Court granted the plaintiff's motion for class action certification. This decision is at http://www.med.uscourts.gov/opinions/carter/2001/GC_07022001_1-00cv116_Risinger_v_Concannon.pdf. In May 2002, the parties reached a settlement. Reportedly, the settlement provides that children who need services will be evaluated more quickly and no child will wait more than six months to receive approved treatment and services. There has been a plethora of litigation regarding EPSDT services for children with mental disabilities. It is summarized at: http://www.healthlaw.org/pubs/EPSDTdocket.mh.html.

10. Montana: Sandy L. et al. v. Martz et al.

On September 18, 2002, eight individuals and the Montana Association of Independent Living Services, Inc. (M.A.I.D.S.) filed a class action lawsuit in state court against Governor Judy Martz and the Department of Public Health and Human Services alleging that the state's payments for community services are inadequate and thereby violate the Montana Constitution and other laws concerning the provision of services to individuals with developmental disabilities. The proposed class includes: (a) all persons who receive community services but are at risk of being institutionalized because of the closure, reduction or termination of their services and (b) institutionalized persons who should be served in the community but cannot due to inadequate payments.

M.A.I.D.S. is an association of 34 community developmental disabilities provider agencies. These agencies furnish HCBS waiver services. The plaintiffs are persons who receive community services. Some of these persons are served in community residences; others live on their own or with their families.

In the complaint, the plaintiffs point out that state institutional staff is paid between 23 and 38% more than their community counterparts, even though community workers perform much the same work. This wage disparity is alleged to cause high turnover among community workers and providers have a difficult time recruiting workers. As a result of these recruitment/retention problems, it is alleged that providers are increasingly unable to meet the needs of many of the individuals they serve, thereby placing individuals at high risk of institutionalization. In addition, the complaint alleges that low payments prevent the placement of institutionalized persons who could be supported in the community.

The plaintiffs argue that the wage disparity between institutional and community workers results in violations of: (a) provisions of Montana law that require the administration of state and federal funds in a fashion that ensures the proper fulfillment of their purpose, including assisting people with developmental disabilities to live as independently as possible and securing "for each developmentally disabled person such treatment and habilitation as will be suited to the needs of the person and assure that such

treatment and habilitation are skillfully and humanely administered with full respect for the person's dignity and personal integrity in a community-based setting whenever possible;" (b) provisions of Montana law that set forth the state's policy aims with to people with developmental disabilities, including supporting individuals to live as independently as possible in the least restrictive setting; (c) state statutory provisions that require uniform payment for Medicaid-covered services "where the actual cost of, quality of, knowledge and skills for the delivery of, and availability of, Medicaid-covered services is equivalent or similar;" and, (d) various provisions of the Montana Constitution, including equal protection.

The plaintiffs are seeking preliminary and permanent injunctions to bar the state from maintaining the current disparity in wages and benefits between institutional and community workers. It is estimated that eliminating the disparity in wages and benefits would cost about $20 million.

11. Pennsylvania: <u>Network for Quality M.R. Services in Pennsylvania v. Department of Public Welfare</u>

This lawsuit was filed in March 2002 in the Commonwealth Court of Pennsylvania by a coalition of agencies that furnish services to individuals in ICFs/MR and/or Pennsylvania's HCBS waiver program for people with mental retardation. The plaintiffs contend that Pennsylvania has depressed payments for ICF/MR services and held down waiver funding by predicating funding levels on depressed, inadequate compensation of direct care workers. As a result, the plaintiffs contend that they are unable to furnish an appropriate level of services to the persons they serve due to high staff turnover and workforce instability. They also cited a federal review of Pennsylvania's HCBS waiver program that questioned the adequacy of the state's payments for services. The plaintiffs are asking the Court to intervene to order the state to "fairly, reasonably and lawfully reimburse providers … to ensure the quality, and continuity, of care provided by these providers."

In particular, the lawsuit contends that the state is in violation of: (a) the State's Public Welfare Code and implementing regulations that require providers to be reimbursed for "reasonable costs"; (b) §1902(a)(30)(A) because payments are insufficient to ensure the quality of care; (c) federal Medicaid requirements by not providing an effective and timely process for reconsideration of payment rates; and, (d) equal protection by providing for higher payments to publicly-operated programs than for services furnished by non-state agencies. The plaintiffs have asked the Court to order that the state ensure that fair and reasonable direct care staff costs are reimbursed and updated going forward. The plaintiffs also are seeking the appointment of a Master to over see this process.

12. Texas: <u>Private Providers Association of Texas v. Texas Health and Human Services Commission et al.</u>

This lawsuit was filed in January 2002 in Travis County District Court. The plaintiffs contend that the state has violated its own rules concerning the determination of rates paid to non-state ICFs/MR and payments for HCBS waiver services. A few years ago, Texas revamped its ICF/MR and HCBS waiver payment determination system. The new system provided that the state would periodically update (rebase) its payments to take into account changes in the costs of furnishing services. This rebasing has not occurred causing payments to be adversely affected. The plaintiffs also argue that payments made for similar services to state-operated and non-state ICFs/MR must be commensurate but state-operated facilities have received greater increases in payments than non-state facilities. The plaintiffs are asking the Court to order the state to rebase and update payment rates for the period beginning September 1, 2001.

13. Washington State: <u>Boyle et al. v. Braddock</u>

This class action complaint (C01-5687) was filed by Columbia Legal Services in December 2001 in the U.S. District Court for the Western District of Washington. The complaint alleges that Washington State has failed to furnish or make available the full range of services offered through the Community Alternatives (HCBS waiver) Program (CAP) to individuals who participate in the program. The plaintiffs cite examples of program participants not receiving necessary services or being informed of the array of services offered through the program. This complaint somewhat parallels the <u>Arc of Washington State v. Quasim</u> complaint (see above) but focuses exclusively on problems existing waiver participants have in accessing the full range of CAP services. The proposed class is composed of all current or future participants in CAP.

Specifically, the complaint alleges that the state has: (a) violated §1902(a)(8) of the Social Security Act by not advising waiver participants of the availability of CAP services, failing to instruct them on how to request such services, and approving or covering them for services they are known to need; (b) violated the requirement that the state put into place necessary safeguards to protect the health and welfare of participants; (c) failed to provide or arrange for appropriate assessments; (d) not furnished necessary services with reasonable promptness; (e) not permitted participants to exercise free choice of providers; (f) failed to provide participants with adequate written notice and an opportunity for a fair hearing when their requests for services are denied or the services they receive are reduced or terminated; and, (g) deprived individuals of property interest in Medicaid services without due process of law and thereby violated the 14th Amendment to the U.S. Constitution. Proceedings in this case were stayed while the Court considered the proposed settlement agreement in the Arc of Washington State v. Quasim litigation. Because the Court rejected that settlement, it has now lifted the stay on proceedings in this case and they have resumed. Recently, state officials made declarations to the court that waiver policies have been changed to make it clear that lack of funding "... is not a valid reason to deny a needed service to someone on the ... waiver." They also declared that numerous other changes have been made to waiver program policies and procedures that address issues raised by the plaintiffs.

The state is opposing class certification and has raised additional objections to the lawsuit. In particular, the state argues that changes it made in its HCBS waiver program in response to a review by CMS have addressed the issues originally raised by the plaintiffs. In addition, the state has pointed out that it is in the midst of converting its existing program into four separate waiver programs and, consequently, certifying the class with respect to the current program would be inappropriate. The state also argues that there is no right of private action to enforce individual claims for Medicaid services in any event. Finally, because each individual's situation would need to be addressed, the state contends that class certification is inappropriate.

14. West Virginia: Benjamin H et al. v. Ohl

Last, we note that a claim was added by the plaintiffs in this lawsuit aimed at requiring the state to increase its payment rates for HCB waiver services. This claim was based on both the ADA as well as Medicaid law. However, the District Court ruled that the plaintiffs did not marshal sufficient evidence in support of this claim. The court nonetheless expressed strong concerns regarding the interplay between the adequacy of payment rates and meeting the needs of recipients of Medicaid services. As a result, West Virginia officials have committed to conducting a thorough review of the state's payment rates.

V. Conclusion

These lawsuits obviously raise many issues concerning the interplay between federal and state policies concerning the provision of home and community services to people with developmental and other disabilities. Federal courts are being asked to decide whether Medicaid eligible individuals with disabilities are entitled to receive community services if they have been determined to need or are receiving institutional services. In addition, the courts are being asked to rule on the extent to which states are obliged to ensure access to authorized services by Medicaid home and community services recipients.

Many of the issues posed by these lawsuits are new. Until recently, there has been relatively little litigation concerning state administration of Medicaid HCB services. As a consequence, it remains unclear about the extent to which this litigation will lead to alterations in the fundamental parameters under which states offer such services. The unifying theme of this litigation is the desire of people with disabilities to obtain ready and reliable access to home and community services. The litigation sends strong messages to policy makers concerning the expectations of people with disabilities.

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Resources

National Health Law Project (NHeLP) – Health Activist Court Watch Project is an excellent source of information about litigation that bears on access to health and other long-term services. Its web-site is http://www.healthlaw.org/courtwatch.shtml.