IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PHYLLIS BALL, by her General Guardian, PHYLLIS BURBA, et al.,	:	
Plaintiffs,	:	Case No. 2:16-cv-282
v.	:	JUDGE EDMUND A. SARGUS
JOHN KASICH, Governor of Ohio, in his official capacity, et al.,	:	MAGISTRATE JUDGE ELIZABETH A. PRESTON DEAVERS
Defendants.	:	

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Now come John Martin, Director of the Ohio Department of Developmental Disabilities, Kevin Miller, Director of Opportunities for Ohioans with Disabilities, Barbara Sears, Director of the Ohio Department of Medicaid, and John Kasich, Governor of the State of Ohio, (collectively, the "State Defendants") and respond to the Motion to Intervene as Plaintiffs filed on April 19, 2017. Doc. 107. The State Defendants ask that the Motion to Intervene be granted for the limited purpose of allowing the Intervenor ICF Residents to contest class certification.

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Memorandum in Response

I. Introduction

Despite disagreements with the Intervenor ICF Residents about both the present and future of the service system for individuals with intellectual and developmental disabilities in the State of Ohio, the State Defendants urge this Court to support their intervention here for the limited purpose of contesting class certification. The Intervenor ICF Residents are members of this proposed class, disagree with the sweeping relief demanded by Plaintiffs, and are not served by proposed class counsel or representatives who disregard their concerns. Their voices should be heard here and, given their past disagreements with the State Defendants over the balance of community-services and facility-based services the State seeks to provide, their interests are best represented by intervening in this matter to address class certification.

Because of the vague class definition proposed by Plaintiffs, the Intervenor ICF Residents have every reason to believe that they are members of this class. In fact, it is unclear, given the fiduciary obligations they owe to absent class members, how the proposed class representatives could even challenge the intervention of the Intervenor ICF Residents here. If

there is a disagreement within the proposed class about the claims brought or relief sought, the proposed class representatives have a duty to allow those absent class members to be heard. *See* 5 A. Conte & H. Newberg, Class Actions § 16:7, p. 154 (4th ed. 2002) ("[M]embers of a class have a right to intervene if their interests are not adequately represented by existing parties").

Plaintiffs seek relief that the Intervenor ICF Residents oppose. Plaintiffs explicitly seek to close Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs) in Ohio and to decrease the amount of money that is available for care in ICFs. This is in contrast to the State Defendants' position, which recognizes that ICFs play an important role in providing services to some individuals with intellectual or developmental disabilities. The intervention of the Intervenor ICF Residents should be granted so that, while evaluating class certification, this Court may consider the interests of all members of the proposed class affected by this lawsuit.

II. The Plaintiffs seek far-reaching relief that would affect the Intervenor ICF Residents. The Motion to Intervene should be granted, so that the Intervenor ICF Residents' interests may be considered when this Court addresses class certification.

A. The Intervenor ICF Residents meet the standards for both intervention of right and permissive intervention with regard to whether class certification should be granted in this case.

The Intervenor ICF Residents have been pulled into a proposed class that seeks to close their homes and workshops. Their intervention should be permitted so that they may defend these interests. A "proposed intervenor must establish four factors before being entitled to intervene: (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest." *Coal. to Defend*

Affirmative Action v. Granholm, 501 F.3d 775, 779 (6th Cir. 2007). Each of these factors is met here.

The motion is timely. The parties are currently contesting class certification, an issue that will determine whether the relief sought by Plaintiffs will affect the Intervenor ICF Residents. Granting intervention at this stage in the litigation will not prejudice any party and will help the Court determine whether any common questions of fact or law exist among the proposed class. The Intervenor ICF Residents have a substantial legal interest in the subject matter of the case and, because they are members of the proposed Rule 23(b)(2) class, with no possibility of opting out of the relief sought, would have their right to protect the interest impaired if intervention is denied.

The State Defendants openly admit that they have significant policy disagreements with the Guardian-Intervenor. *See* Section II.C.2, p. 11. These disagreements, and the conflict within the class exposed by the Motion to Intervene, demonstrate the unique posture of the Intervenor ICF Residents. The Intervenor ICF Residents are entitled to intervene here as a matter of right for the limited purpose of contesting class certification.

At the very least, the Court should recognize that permissive intervention at the class certification stage is appropriate. "Upon timely application anyone may be permitted to intervene in an action ... when an applicant's claim or defense and the main action have a question of law or fact in common." *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007) (quoting Fed. R. Civ. P. 24(b)). The Intervenor ICF Residents here are asking the same questions of law and fact as the Plaintiffs. They just reach radically different conclusions. Considering the Plaintiffs seek a mandatory injunction that would impact the Intervenor ICF

Residents' homes and day programs, the Intervenor ICF Residents should also be entitled to permissive intervention to present their opposition to class certification.

Two other cases involving issues similar to those raised here, *Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pennsylvania*, 701 F.3d 938, 948 (3d Cir. 2012), and *Ligas v. Maram, No. 05C4331, 2010 WL 1418583, at *1 (N.D. Ill. Apr. 7, 2010)*, show the importance of considering the diverse viewpoints in a proposed class *before* certifying a class. In both of these cases, plaintiffs alleged, on behalf of a proposed class, that the state failed to offer sufficient community options to them in violation of the Integration Mandate of the Americans with Disabilities Act. *Benjamin* at 941; *Ligas* at *1. And, in both cases, motions to intervene filed by ICF residents seeking to challenge class certification were initially denied. *Benjamin* at 945, *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 772 (7th Cir. 2007). However, both the Seventh Circuit in *Benjamin ex rel. Yock* and the district court in *Ligas*, ultimately were forced to reconsider these decisions when, after years of litigation, the Courts discovered the views and interests of the ICF residents were not adequately represented by the class. *Benjamin* at 949-959; *Ligas*, 2010 WL 1418583, at *6. This Court should allow the Intervenor ICF Residents to intervene to challenge class certification now so that their position can be adequately considered at the outset of the case, before a decision on class certification is made.

B. Plaintiffs' vague and overbroad proposed class definition includes many, like the Intervenor ICF Residents, who disagree with the Plaintiffs' allegations and requested relief. The Intervenor ICF Residents have a substantial legal interest in responding to a class action that claims to speak for them.

The Intervenor ICF Residents seek to intervene because they are members of the proposed class here. "Rule 23 class representatives owe fiduciary duties to absent class members and are responsible for critical litigation decisions on behalf of the class." *Dunford v. Am. DataBank, LLC*, 64 F.Supp.3d 1378, 1396 (N.D. Cal. 2014). If the Plaintiffs seek to exclude

dissenting voices within their own proposed class definition, they may be breaching the fiduciary duties they owe to the Intervenor ICF Residents and other class members. Fairness and due process should allow the dissenting class members to intervene at this stage.

At least some of the Intervenor ICF Residents are members of the proposed class, and the outer limits of this class are so vague that they may all be members. Plaintiffs seek to certify a class that includes Medicaid-eligible adults with intellectual and developmental disabilities living in an ICF, excluding only individuals who have documented their opposition to receiving integrated, community-based services. *Plaintiffs' Motion for Class Certification*, Doc #42, PAGEID # 454-55. But it is unclear what "documented their opposition to receiving integrated, community-based services" means, and who would actually be excluded from the class definition because of that clause. Plaintiffs have not explained this clause, and the Intervenor ICF Residents recognize that they are being swept up in an unclear class definition that seeks relief they actively oppose.

The confusion starts with the term "documented." In Plaintiffs' proposed definition does "documented" mean that the individual must have written this down, or could an oral opposition suffice? What if a county board of developmental disabilities employee or an ICF employee documented the oral wishes of an individual? Whose documentation would be considered? Could a comment in a letter or an email be sufficient? Must it be the individual's documented opposition, or would a guardian's opposition be enough? And what if it is the opposition of a former guardian? Does that still control?

The confusion continues when considering what Plaintiffs mean by the term "opposed," and what must be "opposed." Could opposing one community-based service suffice to exclude an individual from the proposed class? For example, Plaintiffs consider supportive employment,

which is paid employment in community settings for persons with disabilities who need ongoing support to perform their work, to be an appropriate community-based service. They consider sheltered workshops[1], which are private non-profit, state, or local government institutions that provides employment opportunities for individuals who are developmentally, physically, or mentally impaired, to prepare for gainful work in the general economy, to be unacceptable. Perhaps an individual living in an ICF refused supported employment, choosing to continue working in a sheltered workshop. Would documenting this refusal exclude the individual from the proposed class, regardless of his or her interest of moving into the community? Or must an individual document opposition to any and all integrated, community-based services?

Plaintiffs also leave unanswered questions around the timing of this documented opposition. How far back should the Court consider this documentation? If an individual stated that he was not interested in leaving an ICF twenty years ago, is this documentation of opposition sufficient to exclude him from the proposed class? What about an individual who is on a waiver waiting list but has also previously documented his or her opposition to community-based services? Should the Court consider whatever action is last in time, or is any documentation of opposition in the past enough to remove an individual from this proposed class?

It is expected that Plaintiffs will brush aside the concerns of the Intervenor ICF Residents by claiming that the Intervenor ICF Residents are not members of the proposed class. But the vague class definition is too unclear for any of the Intervenor ICF Residents to reach that conclusion with any certainty. And even if they could tell what was required, it may require a laborious search through records maintained in several places for an individual or guardian to even know if this documentation exists.

[1] *Social Security Administration Program Operations Manual System*, RS 02101.270.

The filing of this Motion to Intervene should also not be considered the necessary "documentation" of opposition to class relief. This would result in a proposed class definition with an opt-out provision but without any of the notice requirements that serve to protect absent class members who may opt-out of a class when permitted. This is contrary to the purpose of Rule 23(b)(2). Rule 23(b)(2) class actions are "intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Fed. R. Civ. P. 23, Advisory Committee Notes 1966, Note on Subdivision (b)(2). Unlike a Rule 23(b)(3) class, there is no ability for a class member to opt-out of the proposed class here and the Plaintiffs cannot create such a provision through their class definition. The Intervenor ICF Residents are members of this proposed class. If the Plaintiffs believe that common questions or law and fact do, in fact, exist throughout the class, the class members they purport to speak for should have the opportunity to dispute that.

C. The Plaintiffs' one-size-fits-all policy prescription ignores the choices of the Intervenor ICF Residents, and is not compatible with the vision and policies of the State, which continues to increase community options while also recognizing the role that ICFs play in care for some individuals with intellectual or developmental disabilities. Understanding the Intervenor ICF Residents' choices is essential to a proper class certification decision here.

Plaintiffs seek results in this case that would affect the Intervenor ICF Residents, whether or not they are members of the class. Simply, Plaintiffs seek to close all ICFs in the state of Ohio. *See* Section II.C.1, page 8. The policies they seek to impose through this litigation ignore the wishes of the Intervenor ICF Residents and contrast with the State's approach, which balances continued expansion of community-based services with maintaining ICFs for those that choose to live there. The Plaintiffs also ignore the significant investments that Ohio has made in integrated, community services, and the effects this lawsuit could have on individuals that

currently live in ICFs. This Court should hear from the Intervenor ICF Residents when determining whether they should be included in a class definition that seeks relief they oppose.

1. Plaintiffs ultimately seek to close all ICFs in the state of Ohio.

Plaintiffs argue throughout their motion for class certification that Ohio violates the law by maintaining and continuing to fund its current ICF system. And their vision for the services that Ohio provides to individuals with intellectual or developmental disabilities does not include ICFs (at least for more than emergencies), with no regard for the wishes of those who want to continue to live in an ICF. Counsel for the Plaintiffs has explained their worldview this way, asking "one wonders why people with disabilities who want to and can live in the community should be forced to wait to ensure that other people with disabilities *retain the option* of living in an institution." Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 Cardozo L. Rev. 1, 39 (2012).

While this litigation currently focuses on ICFs with 8 beds or more, the Plaintiffs' ambitions do not end there. In a July 2014 letter to the State Defendants threatening this litigation, counsel for the Plaintiffs demanded that the State stop supporting new, smaller ICFs, claiming that "[m]oving from a large facility to a smaller facility will not mitigate the inherent segregation… By committing to construct and maintain these new facilities, the State is subjecting yet another generation of Ohioans with development disabilities to a life of segregation." *See* July 1, 2014, Letter from Disability Rights Ohio, et al., to John Kasich, Governor, State of Ohio; et al. (attached as Exhibit A). Further, they demanded that the State ensure that future admissions to private ICFs and developmental centers occur only in exigent circumstances, that admissions be short-term only, and that discharge planning occur

immediately upon admission. *Id*. Their demands were clear; smaller ICFs and the opportunity to live long-term in an ICF of any size were not acceptable results to Plaintiffs.

In public statements after the lawsuit was filed, Plaintiffs have not claimed that they have changed their minds and that closing ICFs is no longer their ultimate policy goal. Instead, they note only that nothing in these court filings specifically asks the court to do this. *See* Rita Price, *Families of disabled don't want to be pulled into lawsuit*, The Columbus Dispatch (April 21, 2017). And public comments from the Plaintiffs have also recognized the conflict within the proposed class about the goal of the lawsuit. *See* Rita Price, *Disability advocacy group doesn't want to lose residential programs*, The Columbus Dispatch (April 14, 2016) (quoting Disability Rights Executive Director Michael Kirkman, "For all the people who were asking, 'Why now?', many others are saying, 'It's about time.'") The Intervenor ICF Residents are correct to fear that the Plaintiffs do not recognize their interest in maintaining any ICFs where they may reside on a non-emergency basis.

2. The State has created, and continues to grow, a service system for Ohioans with intellectual or developmental disabilities that expands home- and community-based options while maintaining ICF services for those that choose them.

The State Defendants have a different vision for the services to be provided to individuals with intellectual or developmental disabilities. This vision allows individuals to make distinct and independent choices regarding their housing, day or employment services, medical services, and behavioral services. Ohio Department of Developmental Disabilities, *The Future of the ICF-IID Program* (August 2012) (http://dodd.ohio.gov/Medicaid/Documents/ICF%20White%20Paper.pdf) (last visited 5/8/2017). It recognizes the ability and desire of many individuals with intellectual and developmental disabilities to live fully integrated lives in home-

and community-based setting. And it recognizes that other individuals will choose to receive services in an ICF.

The population of individuals with intellectual or developmental disabilities in Ohio is diverse, with a variety of interests, medical needs, and abilities. Developmental disability is defined broadly as a condition or group of conditions that may impair physical or intellectual/cognitive functions or behavior, and occur before a person is age 22. *Glossary*, Department of Developmental Disabilities, http://dodd.ohio.gov/Glossary/Pages/default.aspx (last visited 5/8/2017). The State is continually working with these individuals and other stakeholders to create and maintain conditions that provide for individual choice while also treating or caring for complex conditions and needs. The State Defendants recognize that maintaining ICFs is an important part of a balanced, strong system to serve this diverse population. Ohio Department of Developmental Disabilities, *The Future of the ICF-IID Program* (August 2012) (http://dodd.ohio.gov/Medicaid/Documents/ICF%20White%20Paper.pdf) (last visited 5/8/2017). And, while the State is committed to rebalancing Ohio's developmental disability service system by, in part, downsizing large ICF facilities and converting ICF funded beds to home- and community-based waiver services, it recognizes that this must be done over time to allow for sufficient planning, funding, and growth of provider networks to serve an increased number of waiver recipients. *Id*.

The Intervenor ICF Residents' Motion to Intervene makes clear that the State has a lasting and effective commitment to providing community services to individuals with intellectual or developmental disabilities. It recounts State policies that the Plaintiffs should celebrate. The Motion notes that, since 2004, the State has "directed over $1.3 billion of taxpayer funds into community services for individuals with [intellectual or developmental disabilities]

while, at the same time, reducing ICF beds, closing four state developmental centers," and spending hundreds of millions of dollars less on care in private ICFs. *See* Motion to Intervene, Doc. 107, PAGEID # 2210. The Intervenor ICF Residents describe how the State's budget is "overwhelmingly balanced" towards community services, spending $1.9 billion in community services compared to $770 million on ICFs. *Id*. And the motion explains that the Plaintiffs fail to acknowledge that the State has made "exit" waivers available to ICF residents who wish to "exit" their ICF and move to a smaller, home- or community-based setting, and "diversion" waivers available to individuals who are considering moving into an ICF but would prefer to remain in the community. *Id*. at PAGEID #2211. These policies ensure that individuals in the State of Ohio currently residing in an ICF or considering residing in an ICF have the option to seek a waiver if they wish to return to or remain in the community. *See also* Motion to Dismiss of Defendants Martin and McCarthy, Doc. 27, PAGEID # 133-36 (describing Ohio's long and successful commitment to providing community options to individuals with developmental disabilities.)

These successes also demonstrate disagreements the State Defendants have with the Intervenor ICF Residents. Guardian-Intervenor Carolyn Lahrman has testified against steps the Department of Developmental Disabilities has taken to downsize large ICFs to smaller settings and to convert funding for some ICF beds into funding for waivers. *See* May 11, 2015, Letter from Carolyn Lahrman to Chairman Dave Burke, Senate Medicaid Committee, and Chairman Scott Oelslager, Senate Finance Committee (attached as Exhibit B). *See also* Petition to Object to Proposals to Close ICFs/IID, Facility-based Day Services & Workshops, http://www.disabilityadvocacyalliance.org/petition.html (Last visited 5/8/2017). These disagreements reveal both the intra-class conflict that pervades this action, and the balance that

the State Defendants must seek as they work to provide choices that best serve this diverse population.

Plaintiffs ignore the options that have been provided to the proposed class members and, instead, denigrate the Intervenor ICF Residents' choices; failing to grapple with the possibility that some individuals in Ohio may, after careful consideration, choose to seek services in an ICF. This Court should not ignore this possibility.

3. The relief sought by Plaintiffs here would affect those receiving ICF services in Ohio, regardless of whether they are members of the proposed class.

Plaintiffs also gloss over the changes that their requested relief in this case would require. The Intervenor ICF Residents now require this Court to reckon with that question. The Plaintiffs explicitly seek to stop the State from funding and maintaining the ICF system as it currently exists. Their current position that, "No one will be forced to move" as a result of this lawsuit is untrue. *Community Integration: Fact Sheet on DRO's Class Action Lawsuit, Ball v. Kasich,* Disability Rights Ohio, http://www.disabilityrightsohio.org/fact-sheet-dd-class-action-lawsuit. Indeed, the same fact sheet later admits that, as a result of the lawsuit, "some ICFs and workshops may downsize or close." *Id*. It may seem too obvious to require explaining but, if the ICF you live in closes, you will be forced to move.

Counsel for Plaintiffs has previously recognized that this transfer of resources from ICFs to home- and community-based services exacerbates the financial pressures on ICF, explaining that "as institutional populations go down, the per-resident costs of institutions rise substantially--largely because of fixed costs that states cannot shed until they have moved a sufficient number of individuals to close a wing, a floor, or an entire facility." Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 Cardozo L. Rev. 1, 45 (2012). But this reality is ignored in both the Plaintiffs' filings and public statements about this lawsuit.

So while the State seeks to carefully balance its increased funding and reliance on home- and community-based services for individuals with intellectual or developmental disabilities with its interest in maintaining an ICF system for individuals who desire or need care in an ICF, the Plaintiffs seek a one-size fits all solution that, if put in place, would force the closure of ICFs that the Intervenor ICF Residents continue to choose for their loved ones.

The personal wishes and choices implicated by this lawsuit, and explained in the affidavits attached to the Intervenor ICF Residents' motion to intervene, demonstrate that this case is not suitable for class relief. This Court should allow the Intervenor ICF Residents to intervene to illustrate their concerns regarding class certification and the risks that a vague class definition and one-size-fits-all policy goal pose.

III. Conclusion

The Intervenor ICF Residents are members of this proposed class and have a different view on every allegedly common question of fact and law identified by the Plaintiffs. They should be allowed to intervene while this Court considers class certification to provide these answers and defend their interests.

Respectfully submitted,

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Certificate of Service

The undersigned herein certifies that a true and accurate copy of the foregoing document was filed electronically on May 10, 2017. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic fling receipt. Parties may access this filing through the Court's system.

/s/ Allan K. Showalter__
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VIA US MAIL AND ELECTRONIC MAIL

Governor Kasich and Directors Moody, Martin, and McCarthy:

We write on behalf of thousands of individuals with intellectual and developmental disabilities in Ohio who are needlessly segregated in private intermediate care facilities for individuals with intellectual disabilities (ICFs/IID) or state-operated developmental centers. As a result of the State's system, these individuals are segregated in institutions, with scarce opportunity for supported employment or integrated day services, in violation of federal law.

In recent months we conducted an extensive investigation[1] that included more than a dozen site visits to ICFs/IID, developmental centers, sheltered workshops and facility-based day habilitation programs. Our analysis was further informed by our collective experience. Disability Rights Ohio is the federally mandated and funded Protection and Advocacy organization for the State. The Center for Public Representation is a public interest law firm based in Northampton, Massachusetts, and one of two national technical assistance and legal support centers for the national Protection and Advocacy system. Samuel Bagenstos is a

[1] Our investigation has included: (1) analyzing and studying Ohio's ICF/IID and developmental center residential programs, and its employment and day service system; (2) meeting with stakeholders, including service providers and other leaders in the field; and (3) visiting many ICFs/IID, developmental centers, sheltered workshops, and facility-based day habilitation sites, including meetings with consumers, staff, and management at each site.

EXHIBIT
A

Professor at University of Michigan Law School,[2] who previously served from 2009-2011 as the Principal Deputy Assistant Attorney General for Civil Rights in the United States Department of Justice.

Throughout our investigation, we met many individuals who are directly affected by the State's policies and practices. Their personal stories are compelling, their capabilities are impressive, and their segregation is plainly unnecessary. Nevertheless, they languish in segregated residential placements, sheltered workshops, and facility-based day programs, without any real prospect of community integration. Here are a few of their stories:

> B.M. is a 28-year-old man who has lived in a 36-bed ICF/IID for the past 8 years. He wants to leave the institution because he has no freedom, no social life, and no opportunity to meet nondisabled people other than staff. He has a 10-year-old son, but he is unable to maintain a meaningful relationship from within the facility. He could enjoy a full life in the community, but instead is infantilized, isolated, and depressed by his placement in the institution.
>
> A.B. is a 35-year-old woman who has lived in a developmental center for 8 years. Her days are highly regimented. She is required to awaken very early each day, at a time not of her choosing, and she loses privileges if she sleeps later. She is not permitted to choose, shop for, or assist in cooking any of her meals. She wants to have a pet, but none are allowed in the facility. She yearns for a home in the community where she can live with people as friends and family. And although she very much wants to work in the community, preferably at a restaurant, she is relegated to a sheltered workshop.
>
> For the past decade, D.J., 35, has lived in a 32-bed ICF/IID, which he describes as a form of incarceration. He wants to live in the community – a choice his guardian supports. But for 12 years he has been stuck on a waiting list for a Medicaid waiver that would provide a home in the community. He also wants to work in the community and earn a pay check, but instead he is assigned to a day habilitation program on-site at the ICF/IID which offers no opportunity for wages or integrated employment.

B.M., A.B. and D.J. are among the thousands of individuals with intellectual and developmental disabilities experiencing segregation in Ohio. Segregation permeates virtually all aspects of their lives, not only where they live, but where and how they spend their days. As the Supreme Court held in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599 (1999), segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, [and] economic independence." Individuals with developmental disabilities are able to live in integrated home and community-based settings, and to work and engage in meaningful day activities in the community. Integrated services provide regular contact with peers without disabilities, foster community inclusion, promote economic independence, and enhance individuals' productivity

[2] Professor Bagenstos is participating in this matter in his personal capacity; his institutional affiliation is listed for identification purposes only.

and sense of self-worth and the chance to live and work in a manner that reflects each individual's strengths and preferences.

We recognize that the State has publicly committed to shifting some aspects of its service delivery system for people with developmental disabilities toward more community integration. But the State's actions are inadequate and, in key respects, the recent actions by the State further entrench the segregation that is endemic to the Ohio developmental disabilities system. The State is constructing new ICF facilities to house individuals who leave state-operated developmental centers and other large ICFs. Moving from a large facility to a smaller facility will not mitigate the inherent segregation. Our investigation found that even smaller ICFs are highly segregated and do not provide or allow for the integration that the law requires. By committing to construct and maintain these new facilities, the State is subjecting yet another generation of Ohioans with developmental disabilities to a life of segregation.

Similarly, although the State has adopted an Employment First policy, the State has taken no meaningful steps toward ensuring that people with developmental disabilities have the supports to enable them to succeed in integrated, competitive employment. And the State has made no visible effort to ensure that day services are provided in an integrated setting. Instead, the State has left sheltered workshops and facility-based day habilitation programs as the mainstay of its system.

I. Background: Ohio's Residential, Employment, and Day Services System for People with Developmental Disabilities

A. *Ohioans with Developmental Disabilities Experience Widespread Segregation*

The State of Ohio administers and funds a system for people with developmental disabilities that promotes segregation and relies heavily on institutional residential placements and facility-based work and day services. Presently, approximately 6,000 individuals in Ohio are institutionalized in private ICFs/IID, and almost 1,000 more in developmental centers. As of fiscal year 2011, no other state has as many beds in large (16 or more beds) private ICFs/IID. Director Martin publicly recognized in a 2014-15 budget review that the national trend over the past 10 years reflects a 33% decrease in the number of people living in large ICFs/IID. But Ohio has experienced a 6% *increase*, with a total of over 3,400 beds in large private ICFs. And under the State's current system, the people in these facilities are stuck there with little hope of community placement: Thousands of ICF/IID residents are on wait lists for waiver slots to transition to integrated residential placement with slim prospects of an opening, given that the median wait time is over 13 years.

The overreliance on institutional, segregated settings is mirrored by Ohio's system of employment and day services. The State funds 93% of its employment services in sheltered work or enclave settings; nearly 17,000 people in Ohio receive services in sheltered workshops—more than in any other state in the nation. Furthermore, nearly all state (and county) funding for day habilitation in Ohio is for congregate facility-based services, and according to the Ohio Department of Developmental Disabilities, nearly all of the roughly 14,000 people receiving adult day support are in congregate facility-based settings.

B. *Ohio's System Design Favors Institutional Placement*

The degree of segregation in Ohio's developmental disabilities system results, in significant part, from financial incentives built into that system. Ohio funds institutional placements at state developmental centers or private ICFs/IID with a combination of federal Medicaid and matching state dollars. In contrast, the State's policies require placement in Medicaid waiver programs providing home and community-based services (HCBS) for individuals with developmental disabilities (primarily the Individual Options (IO) waiver)[3] to be matched with county dollars. For this reason, county boards of developmental disabilities have a strong economic disincentive to provide HCBS waivers to individuals in institutional placements or to those who are at risk of institutionalization. Indeed, the only provision of new IO waivers is in limited emergency situations, and even that varies by a county's ability to leverage local dollars.

This financial disincentive for using waiver placements poorly serves the State's individuals with developmental disabilities and leads the State to contravene its obligations under the ADA. It is also costly and fiscally inefficient. The average annual cost for the IO waiver is $58,181 per person, while the average annual cost for institutional care is substantially higher: $94,313 per person at an ICF/IID with 16 or more beds, $83,688 at an ICF/IID with 15 or fewer beds, and $186,670 at a developmental center. The State has recognized research showing that prioritizing spending on HCBS waiver placements leads to a "decline in institutional spending and long-term cost savings." (*Rebalancing Long-Term Services and Supports* (Hilltop Institute, June 14, 2011) p. 10). But the State has failed to act on this important fact.

Moreover, the State's HCBS waiver programs have arbitrary restrictions on the level and types of services that many people with developmental disabilities would need to live safely and successfully in the community. The IO waiver program, for example, does not cover nursing services or intensive behavior supports. The SELF and Level One waiver programs have strict cost caps and can only support people with minimal needs. Also, excessive administrative billing requirements for providers, inadequate rate structures, and assessment instruments that focus more on financial considerations than a person's actual needs all contribute to this flawed system.

The State's heavy reliance on ICFs/IID and developmental centers also fosters segregation in the provision of employment and day services. Individuals who live in these segregated institutions are relegated to sheltered employment and facility-based day services, either at the site of their residence or in separate facilities. The State has recognized that institutional settings restrict individual choice, whereas home and community-based settings provide individuals with "greater ability to choose where they receive employment or day services." (*The Future of the ICF-IID Program* (DoDD, August 2012) p. 5). But, once again, it has failed to act on that important knowledge.

[3] The only real recent expansion of HCBS in Ohio was the creation of the Self-Empowered Life Funding (SELF) waiver in December 2011; however, its funding limitations ($40,000 for adults, $25,000 for children) make it infeasible as a mechanism for institutionalized persons to return or move to the community.

II. Federal Law Requires Ohio to Provide Services, Programs, and Activities in the Most Integrated Setting Appropriate

When it enacted the ADA in 1990, Congress recognized that "society has tended to isolate and segregate individuals with disabilities" and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. §12101(a)(2). The ADA's implementing regulations specifically require a state to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. §35.130(d). The United States Supreme Court has interpreted this provision, known as the "integration mandate," to mean that unnecessary segregation of individuals with disabilities constitutes discrimination under Title II of the ADA. *Olmstead*, 527 U.S. at 601-02.[4]

The integration mandate speaks broadly about integration in "services, programs, and activities" that the state administers. The *Olmstead* decision specifically addressed the improper residential institutionalization of individuals who were qualified to live in the community. *Olmstead*, 527 U.S. 581. But recent cases and administrative interpretations recognize that the mandate applies as well to the provision of employment-related services and day programs. See *Lane v. Kitzhaber*, 841 F.Supp.2d 1199, 1205 (D. Or. 2012); *U.S. v. State of Rhode Island*, Consent Decree p. 2 ("[T]he integration mandate of the ADA and the *Olmstead* decision… require that the State's day activity services, including employment and day services, for individuals with I/DD be provided in the most integrated setting appropriate to meet their needs."); DOJ Guidance at 3 (*Olmstead* applies to "segregated day programs").

Also, in the most recent expression of the federal government's understanding of the scope of the mandate, the Centers for Medicare and Medicaid Services (CMS) have clarified that an integrated setting is one that "supports full access of individuals… to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community." (42 C.F.R. § 441.301(c)(2)(i); Federal Register, Vol. 79, No. 11 (Jan. 16, 2014) p. 3030).

By continuing to fund, oversee, and rely upon segregated residential placements, sheltered workshops, and facility-based day services for thousands of individuals with developmental disabilities, the State is violating federal law. Despite its recent statements and policy initiatives, Ohio has not made any measurable progress transitioning these individuals to community-based residential settings, supported employment, and meaningful community-based day services. Under the ADA and Rehabilitation Act, the State must take measurable, effective steps to redress this violation, as delineated below.

III. Proposed Remedial Actions

In an effort to promote a resolution of these issues without resort to litigation, and to more quickly address the needs of individuals with developmental disabilities in Ohio, we ask

[4] Similarly, a state violates Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 when, as a recipient of federal funds, it fails to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. 41.51(d).

that the State take immediate action to: (1) significantly reduce the number of persons residing in developmental centers and ICFs/IID, with a transition to small, integrated, community-based, non-ICF/IID placements; (2) reduce its reliance on segregated workshops and enhance its capacity for supported employment; and (3) reduce its reliance on facility-based day habilitation and enhance its capacity to provide integrated day supports in the community. The State should make a firm commitment to transition a substantial number of individuals from segregated residential, employment, and day services and to rebalance its system as quickly and effectively as possible.

Based upon the input of stakeholders we have consulted, and an analysis of successful strategies implemented in other states, including recent settlements reached by the Department of Justice, we propose the State initiate the following remedial actions:

1. Issue a statewide plan, with specific annual numerical targets, to substantially increase the number of persons who receive integrated, individualized home and community-based residential and nursing supports, supported employment, and community-based day services, and concomitantly decrease the number of persons in developmental centers, ICFs/IID, sheltered workshops, and facility-based day services.

2. Utilize cost savings from the reduced reliance on expensive institutional settings to reinvest in a strengthened home and community-based services system.

3. Over the course of the next 10 years, expand home and community-based residential supports to meet the needs of individuals currently in ICFs/IID or developmental centers who choose to transition to an integrated residential setting.

4. To facilitate expansion of adequate home and community-based residential supports, ensure adequate funding for the non-federal share of HCBS services (presently shouldered by the county boards of developmental disabilities), irrespective of where the individual consumer lives; ensure conflict-free assessments so that county boards are not serving a role in determining an individual's funding level for services while also coordinating his or her services; adjust rate structures to enable the development of sufficient capacity for home and community-based services; and commit to expanding the capital assistance programs for the development of housing and the creation of rental subsidy programs to achieve scattered-site housing options in residential neighborhoods.

5. Develop a diversion program to ensure that future admissions to private ICFs/IID and developmental centers occur only in exigent circumstances (an emergency or crisis, for example), that admissions be short-term only, and that discharge planning occur immediately upon admission.

6. Develop adequate safeguards to ensure the health and welfare of all individuals who transition from an institutional setting to the community. This includes the implementation of a discharge planning process at each developmental center and ICF/IID, with a presumption that, with sufficient supports and services, all individuals (including individuals with complex behavioral and/or medical needs) can live in an integrated setting. The decision of any individual not to leave an institutional

placement must be informed and consistent with that person's needs. The process must also include a system whereby discharge is followed by the identification of gaps in care to reduce the risk of re-admission, crisis, or other negative outcomes.

7. Make supported employment in integrated work settings the priority service option for individuals currently placed in developmental centers or ICFs/IID with the goal of competitive employment at or above minimum wage. The decision of any individual not to leave a segregated or facility-based placement must be informed and consistent with that person's needs. As a complement to supported employment, integrated day services shall be designed to allow individuals currently placed in developmental centers or ICFs/IID to participate in mainstream community-based recreational, social, educational, cultural, and athletic activities. These day services should be provided in the amount, duration, and intensity to allow individuals to engage in self-directed activities in the community at times, frequencies, and with persons of their choosing, during hours when they are not receiving residential or supported employment services.

8. Over the course of the next 10 years, facilitate and fund the provision of supported employment opportunities and integrated day services for individuals who currently are in ICFs/IID or developmental centers and sheltered workshops and/or facility-based day services.

9. Ensure that any expanded community-based residential, employment, and day services: (1) are integrated in, and support full access to, the greater community; (2) ensure individual rights of privacy, dignity, and respect, and freedom from coercion and restraint; (3) optimize autonomy and independence in making life choices; (4) facilitate choice regarding services and who provides them; and (5) facilitate opportunities for supported employment and community-based day services. The appropriate community-based residential, employment, and day placement for each individual shall be developed through person-centered assessments and planning to determine the most integrated, least restrictive setting appropriate to that person's unique needs.

10. Ensure the development of sufficient capacity, through qualified providers, to deliver supported employment and integrated day services, as well as training and technical assistance. The State should make any necessary adjustments to rate structures or state practices, policies, and procedures to ensure the development of this capacity. To ensure that consumers receive full integration, funding to providers shall be made contingent upon the attainment of specified numerical and qualitative targets along an implementation timeline. To ensure the quality of these integrated employment and day services, adopt policies and procedures for evidence-based vocational assessments based on person-centered criteria, career development plans, and situational assessments for supported employment and/or integrated day service assessments.

11. Develop a statewide core competency-based and value-based training program for all service provider and State agency staff to manage and facilitate the transition from a primarily institution-based system to one composed of quality community-based

residential and day supports. The training shall include person-centered practices, community integration, and self-determination awareness.

12. Develop an outreach, in-reach, and education program that explains the benefits of home and community-based residential services, supported employment, and community-based day services. The program must address family concerns and perceived obstacles to participating in integrated programs, and encourage individuals in developmental centers and ICFs/IID to seek integrated placements and services.

Toward these transformative goals, we request a meeting with the Governor's Office of Health Transformation, the Ohio Department of Developmental Disabilities, and the Ohio Department of Medicaid, with the hope that we can work collaboratively to resolve these matters without the need for formal legal action. If you are amenable to engaging in a collaborative process, we suggest that the parties enter into a negotiation process to ensure a timely and productive engagement.

We are available to meet with you in early or mid-August 2014 and would welcome the opportunity to discuss these issues and develop an agreed upon plan of action. We know that the State of Ohio shares our goal of improving the system so that people with disabilities can live full and productive lives, integrated in their home communities. We sincerely hope that we can reach a mutually satisfactory agreement without the need to involve the judicial system, and we ask that you respond to this letter by July 31, 2014.

Thank you for your consideration.

Respectfully,

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Kevin J. Truitt
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Cathy E. Costanzo
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Samuel R. Bagenstos

cc: Jim Tassie (electronic mail only)
Kate Haller (electronic mail only)

May 11, 2015

Chairman Dave Burke
Senate Medicaid Committee
1 Capitol Square
Columbus, OH 43215

Chairman Scott Oelslager
Senate Finance Committee
1 Capital Square
Columbus, OH 43215

Dear Chairman Burke and Chairman Oelslager,

As parents, guardians and family members of individuals with intellectual and developmental disabilities, Disability Advocacy Alliance (DAA) is deeply concerned with the Department of Developmental Disabilities' (DODD) effort to downsize large Intermediate Care Facilities (ICFs) and eliminate ICF beds.

The advocacy of families and guardians in the Ohio House of Representatives secured the following amendments:

- Reinstated the grandfather clause regarding number of residents per bedroom and removed the ban on new admissions.
- Removed flat rate on "higher functioning" individuals referred to as "5's and 6's" by the DODD.
- Removed the bed takeaway if a resident should leave an ICF or if a bed is unoccupied for 12 months.
- ICF admission review reduced from 90 days to 5 business days.

We urge the Senate to maintain these amendments in its version of the budget. Without these changes, many ICFs would be forced to close due to the financial burdens placed upon them.

In order to protect health and safety and respect the taxpayer, DAA maintains that ICF system change should be driven by the needs of residents. The following additional amendments work to accomplish this:

- Allow ICFs to build living space on or adjacent to their campuses.
- Remove benchmarks that reduce ICF capacity by dismantling large ICFs and converting ICF beds to waivers.
- Restore the 2% ICF funding increase for 2016 and 2017 without restriction.

The basis for our additional concerns relates to a negotiated agreement between DODD and ICF provider associations to downsize large ICFs and eliminate ICF beds through waiver conversions. Families and guardians were not consulted during these negotiations, nor were we even aware such talks took place even though the lives of 1,200 vulnerable individuals are directly affected.

The resulting agreement calls for the dislocation of 1,200 residents of ICFs, 500 to waiver homes, 500 to small ICFs of six beds, and the remaining 200 unspecified. DAA fully supports the ability of individuals to choose the setting of their choice. We believe that this decision-making should be made by individuals with their guardians, not driven by benchmarks laid down in Ohio Revised Code.

EXHIBIT
B

Given these benchmarks, families and guardians are deeply concerned for the health and safety of their loved ones who reside in ICFs. Residents face significantly less supervision and access to expert care in waiver homes and downsized ICF settings. **The Department's stubborn refusal to allow downsizing to occur on or adjacent to ICF campuses ensures this.**

While downsizing to six bed ICFs may not reduce the number of ICF beds on paper, in practice it reduces program capacity for individuals with the most complex needs - those requiring 24 hour licensed nursing. A licensed nurse and other specialized staff are far too costly to have on site full-time in a six bed facility. Even full-time supervisory staff is financially infeasible in these settings. As such, a small ICF is an inappropriate setting for someone with complex needs. To protect health and safety, ICF providers have asked to accommodate this mandated downsizing by building on their own campuses, but DODD has refused this reasonable solution.

The benchmarks to transfer ICF residents to waivers means the elimination of 350 ICF beds by 2017, and at least another 150 beds by 2018. ICF residents converted to waivers will lose federal funding of room and board, nursing and essential therapy services and will be forced to live off approximately $733 per month in SSI to cover rent, utilities, food, clothing, toiletries, recreation, etc. They will be transferred from a life of appropriate supports to a life of poverty as most if not all of these intellectually and developmentally disabled individuals will be unable to supplement their income with paying jobs. Additionally, a waiver home does not provide an appropriate level of supervision and specialized services for residents requiring a higher level of care.

Given that there are individuals desperate for ICF placement on ICF waiting lists, eliminating system capacity through downsizing to small settings or through conversions to waivers is not wise or prudent. Forcing successfully placed ICF residents to waivers in place of individuals who have been waiting years for waiver services does not address the size of county board waiting lists.

DODD has provided DAA with a cost comparison between large and small ICF settings to support its downsizing mandate. (See attached Exhibit A) In their comparison, DODD contends that six bed facilities are more cost effective than large ICFs. But, DODD's cost comparison does not take into consideration the accuity levels of the individuals served at different settings. Large ICFs serve individuals with the most complex needs. When facility costs are adjusted for acuity levels of residents served, the six bed ICF model is more costly than the large ICF model. (See attached Exhibit B from which the following data is taken.)

ICF Setting	Total Per Diem Costs	Weighted Avg of Accuity Level	Avg Total Cost Adjusted for Accuity Level
50+ beds	$313.71	1.8176	**$172.60**
6 or fewer beds	$301.59	1.6668	**$180.94**

Exhibit B also demonstrates that, unlike other setting sizes, the six bed model is financially unsustainable because the average direct and indirect costs of care of this model are over the ceilings. (See attached Exhibit B.)

In summary, DAA is deeply concerned that DODD's development mandates fail to protect health and safety and impose an unsustainable financial model on the residential settings of Ohio's most vulnerable citizens.

With respect to the restoration of the 2% funding increase for ICFs, these funds are urgently needed to provide a wage increase for ICF direct care staff. To ensure the highest quality care, it is vital that personal care staff are paid at appropriate levels. This funding was removed for 2016 and restrictions were placed on the funding for 2017, earmarking much of the funding for unwanted downsizing.

For the reasons stated above, DAA believes that transferring vulnerable individuals out of safe and successful homes through mandated benchmarks is risky policy. In order to ensure an open and honest debate, all parties involved need to acknowledge that the 1,200 ICF residents affected by downsizing and conversions are being transferred from settings with appropriate funding and supports to settings with significantly less resources and untested service models. These fragile indviduals are completely unaware of the new reality which has been proposed for them; they are wholly dependent upon legislators to make the right decisions to secure their futures.

We urge you, therefore, to think not in terms of ICF beds, but in terms of the residents these policies affect. Residents were placed in their ICF homes through thousands of individual decisions made by family members and guardians. These decisions were made by persons in the most knowledgeable position to offer their judgements as recognized by the U.S. Supreme Court in *Heller v. Doe* which stated,

> *"...close relatives and guardians, both of whom likely have intimate knowledge of a mentally retarded person's abilitites and experiences, have valuable insights which should be considered"* in placement and care decisions.

Please respect the decisions of family members and guardians. Do not allow them to be trumped by arbitrary benchmarks and harmful regulations.

Sincerely,

Caroline Lahrmann
Disability Advocacy Alliance
Spokesperson

Attachments:

Exhibit A: "ICF Cost Comparison by Bed Size Range - Calendar Year 2013," provided by DODD

Exhibit B: "ICF Cost Comparison by Bed Size Range - Calendar Year 2013," analysis provided by Gary Brown, Director, Brady Ware & Company

ICF Cost Comparison by Bed Size Range
Calendar Year 2013

Demographic Data

Bed Range	Provider Count	Total Beds in Category	Inpatient Days
50+ beds	20	1,536	552,507
16-49 beds	55	1,517	543,577
9-15 beds	56	617	222,256
8 or fewer beds	262	1,837	646,603

Total Cost Comparison

	Other Protected	Direct Care	Indirect
50+ beds	$16,212,164	$109,282,994	$37,752,348
16-49 beds	$15,383,529	$95,731,611	$38,781,589
9-15 beds	$5,722,448	$42,775,362	$14,859,907
8 or fewer beds	$16,361,911	$120,530,855	$39,354,308

Per Diem Cost Comparison

	Other Protected	Direct Care	Direct CPCMU
50+ beds	$29.34	$197.79	$114.30
16-49 beds	$28.30	$176.11	$101.77
9-15 beds	$25.75	$192.46	$111.21
8 or fewer beds	$25.30	$186.41	$107.71

* Data based on 2013 cleared Calendar Year End cost reports

Average Annual Case Mix Score
1.8067
1.7306
1.7088
1.6732

Capital	Total Cost
$10,187,090	$173,434,596
$9,080,262	$158,976,991
$3,114,282	$66,471,999
$10,789,441	**$187,036,515**

Indirect	Capital	Total Per Diem Costs
$68.33	**$18.44**	**$313.90**
$71.35	$16.70	$292.46
$66.86	$14.01	$299.08
$60.86	$16.69	$289.26

ICF Cost Comparison by Bed Size Range
Calendar Year 2013
Analysis completed by Gary Brown, Director, Brady Ware & Company

Demographic Data

Bed Range	Provider Count	Total Beds in Category	Medicaid Inpatient Days	Total Inpatient Days	Average Annual Case Mix Score
50+ beds	20	1,536	552,507	552,842	*1.8176*
16-49 beds	55	1,517	543,577	543,577	1.7331
9-15 beds	56	617	222,256	221,896	1.7073
7-8 beds	175	1,381	484,462	484,567	1.6811
6 or fewer beds	86	456	162,141	162,140	1.6668
Totals	392	5507	1,964,943	1,965,022	1.7356
		Residents	*5,383*	*5,384*	
		Occupancy	*97.76%*	*97.76%*	

Total Cost Comparison

	Other Protected	Direct Care	Indirect	Capital	Total Cost
50+ beds	$16,212,164	$109,282,994	$37,752,348	$10,187,090	$173,434,596
16-49 beds	$15,383,529	$95,731,611	$38,781,589	$9,080,262	$158,976,991
9-15 beds	$5,722,448	$42,775,362	$14,859,907	$3,114,282	$66,471,999
7-8 beds	$12,331,903	$88,879,496	$28,841,539	$8,083,692	$138,136,630
6 or fewer beds	$4,030,008	$31,651,359	$10,512,769	$2,705,749	$48,899,885
Totals/Averages	$53,680,052	$368,320,822	$130,748,152	$33,171,075	$585,920,101

Average Cost	FY 15 CAP	Cost over CAP	
$298.12	*$282.77*	*$30,162,294*	5.43%

Average Per Diem Cost Comparison

	Other Protected	Direct Care	Direct CPCMU	Indirect	Capital	Total Per Diem Costs	*Average Total CPCMU*
50+ beds	*$29.33*	$197.67	$108.71	$68.29	$18.43	$313.71	$172.60
16-49 beds	$28.30	$176.11	$101.63	*$71.35*	$16.70	$292.46	$168.75
9-15 beds	$25.79	$192.77	$112.87	$66.97	$14.03	$299.56	$175.46
7-8 beds	$25.45	$183.42	$109.64	$59.52	$16.68	$285.07	$169.57
6 or fewer beds	$24.86	$195.21	*$118.66*	*$64.84*	$16.69	$301.59	*$180.94*
Averages	$27.32	$187.44	$107.99	$66.54	$16.88	*$298.12*	*$171.76*

Average Cost Ceiling Comparison (Under)/Over

	Direct Ceiling	Indirect ceiling	Direct CPCMU	Indirect
50+ beds	*$113.59*	*$68.98*	($4.88)	($0.69)
16-49 beds	*$113.59*	*$68.98*	($11.96)	$2.37
9-15 beds	*$113.59*	*$68.98*	($0.72)	($2.01)
7-8 beds	*$117.66*	*$59.60*	($8.02)	($0.08)
6 or fewer beds	*$117.66*	*$59.60*	*$1.00*	*$5.24*

* Data based on 2013 ***"cleared"*** Calendar Year End cost reports

Notable Statistics:
*** DODD's analysis (392 Facilities) does not include all CY 2013 cost reports submitted, FY 2015 rate setting was for 420 Facilities**
*** Based on these 392 Cost reports, Provider cost *exceeded the FY 2015 rate setting cap by $30.2m* before inflation & earned incentives**
*** 50+ bed facilities have the highest acuity residents, 4-6 beds have the lowest.**
*** Although the 50+ bed facilities have the highest average Protected, Direct, Capital and Total Cost per day, the highest acuity adjusted Direct Care and Total Cost is the 4-6 bed facilities**
**** Average Direct & Indirect Care Cost in 4-6 bed Facilities is over the ceilings, making these size facilities financially unsustainable***
*** 41 or 48% of 4-6 beds are over Direct Care ceiling, 49 or 58% of 4-6 beds are over Indirect care ceiling**